TEXAS REGISTER

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Thomas Estrada

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*.

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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-0299-GA

Requestor:

The Honorable Kerry M. Spears

Milam County and District Attorney

The Blake Building

204 North Central

Cameron, Texas 76520

Re: Whether section 471.007, Texas Transportation Code, which prohibits a train from blocking a street or railroad crossing for more than ten minutes, is preempted by federal law (Request No. 0299-GA)

Briefs requested by January 16, 2005

RQ-0300-GA

Requestor:

Mr. Terry Julian

Executive Director

Texas Commission on Jail Standards

Post Office Box 12985

Austin, Texas 78711

Re: Authority of a county to deduct from a jail inmate's commissary account funds sufficient to repair or replace property allegedly destroyed by the inmate (Request No. 0300-GA)

Briefs requested by January 16, 2005

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

TRD-200407469
Nancy S. Fuller
Assistant Attorney General
Office of the Attorney General
Filed: December 22, 2004

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TEXAS ETHICS COMMISSION

The Texas Ethics Commission is authorized by the Government Code, §571.091, to issue advisory opinions in regard to the following statutes: the Government Code, Chapter 302; the Government Code, Chapter 305; the Government Code, Chapter 572; the Election Code, Title 15; the Penal Code, Chapter 36; and the Penal Code, Chapter 39. Requests for copies of the full text of opinions or questions on particular submissions should be addressed to the Office of the Texas Ethics Commission, P.O. Box 12070, Austin, Texas 78711-2070, (512) 463-5800.

Advisory Opinion Request

AOR-520. The Texas Ethics Commission has been asked to consider the meaning of the phrase "not reimbursable with public money" in section 251.001(9) of the Election Code. The specific question is whether a school board member's expenditures for tickets to school events are "reimbursable with public funds" if the board member purchases tickets rather than using the free pass provided to school board members.

The Texas Ethics Commission is authorized by section 571.091 of the Government Code to issue advisory opinions in regard to the following statutes: (1) Chapter 572, Government Code; (2) Chapter 302, Government Code; (3) Chapter 303, Government Code; (4) Chapter 305, Government Code; (5) Chapter 2004, Government Code; (6) Title 15, Election Code; (7) Chapter 36, Penal Code; and (8) Chapter 39, Penal Code.

Questions on particular submissions should be addressed to the Texas Ethics Commission, P.O. Box 12070, Capitol Station, Austin, Texas 78711-2070, (512) 463-5800.

TRD-200407361
Sarah Woelk
General Counsel
Texas Ethics Commission
Filed: December 16, 2004

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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 7. BANKING AND SECURITIES

PART 1. FINANCE COMMISSION OF TEXAS

CHAPTER 1. CONSUMER CREDIT REGULATION

SUBCHAPTER Q. CHAPTER 342, PLAIN LANGUAGE CONTRACT PROVISIONS

7 TAC §§1.1206, 1.1216, 1.1217, 1.1225 - 1.1227, 1.1235 - 1.1237, 1.1245 - 1.1247

The Finance Commission of Texas (the commission) proposes amendments to Chapter 1, Subchapter Q, §§1.1206, 1.1216, 1.1217, 1.1225, 1.1226, 1.1227, 1.1235 - 1.1237, and 1.1245 - 1.1247, concerning plain language model clauses, contract provisions, and permissible changes. The purpose of the proposed amendments is to make technical changes that clarify the rules and to offer additional model clauses that are being frequently used in contracts. The first amendment adds the option for a lender to obtain a witness signature on a loan contract. The second amendment offers clarifying language to ensure readers comply with §26.02 of the Business and Commerce Code for contracts over $50,000. The amendments also add flexibility for lenders and consumers. The rule proposes to delete the model figure for the itemization of amount financed. The use of this figure is primarily governed by Regulation Z. The rule advises that if the lender has complied with Regulation Z, the lender will also comply with the rule. Significant variation exists in the industry for use of the itemization of amount financed figure. The rule creates flexibility for lenders and borrowers. If a lender uses the model contract provisions, the lender will not be required to submit a non-standard contract for review.

Leslie L. Pettijohn, Consumer Credit Commissioner, has determined that for the first five-year period the amendments are in effect, there will be no fiscal implications for state or local government as a result of administering the amended sections.

Commissioner Pettijohn also has determined that for each year of the first five years the amendments are in effect, the public benefit anticipated as a result of the proposed amendments will be to clarify use of the model forms and ensure that the model forms conform with state and federal law. Consumers and lenders will benefit from plain language model forms that will promote consistency and ease of use. There is no anticipated cost to persons who are required to comply with the amendments as proposed. There will be no adverse economic effect on small or micro businesses. There will be no effect on individuals required to comply with the amendments as proposed.

Comments on the proposed amendments may be submitted in writing to Leslie L. Pettijohn, Consumer Credit Commissioner, Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207 or by e-mail to leslie.pettijohn@occc.state.tx.us.

The amendments are proposed under Texas Finance Code §11.304, which authorizes the commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code §342.551 authorizes the commission to adopt rules for the enforcement of the consumer loan chapter.

The statutory provision (as currently in effect) affected by the proposed amendments is Texas Finance Code §341.403.

§1.1206. Model Clauses.

(a) - (j) (No change.)

(k) Signature Block. At the lender's option a witness signature block may be added.

(l) [~~(k)~~] Clause Describing Collateral. In the TILA disclosure box, the model clause describing the collateral reads: "You will have a security interest in the following described collateral _____." At the creditor's option, if the promissory note is unsecured, the lender may use the following clause: "This note is unsecured."

(m) [~~(l)~~] Security Agreement Clause. The model clause setting out the security agreement in case of default reads: "If I am giving collateral for this loan, I will see the separate security agreement for more information and agreements."

(n) [~~(m)~~] Mailing of Notice to Borrower. The model agreement regarding notice to the borrower reads: "You can mail any notice to me at my last address in your records."

(o) [~~(n)~~] Statement of Truthful Information. The following clause is sufficient as the borrower's agreement that the information provided to the lender is true: "I promise that all information I gave you is true."

(p) [~~(o)~~] No Waiver of Lender's Rights. The model agreement regarding the lender's rights reads: "If you don't enforce your rights every time, you can still enforce them later."

(q) [~~(p)~~] Modifications in Writing. The model agreement requiring any change to be in writing reads: "Any change to this agreement has to be in writing. Both you and I have to sign it."

(r) [~~(q)~~] Application of Law. The model clause regarding the law to be applied to the contract reads: "Federal law and Texas law apply to this contract."

(s) [~~(r)~~] Joint Liability. The model joint liability agreement reads: "I will keep all of my promises in this document. If there is more than one Borrower, each Borrower agrees to keep all of the promises in this document, even if the other Borrowers do not."

(t) [~~(s)~~] Usury Savings Clause. The model usury savings clause reads: "I don't have to pay interest or other amounts that are more than the law allows."

(u) [~~(t)~~] Complaints and Inquiries Notice. "This lender is licensed and examined by the State of Texas - Office of Consumer Credit Commissioner. Call the Consumer Credit Hotline or write for credit information or assistance with credit problems. Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207, (512) 936-7600, (800) 538-1579."

(v) [~~(u)~~] Security Agreement. The model clause setting out the security agreement reads: "We are entering into this security agreement at the same time that we are entering into a loan. In exchange for the loan referenced above, I agree to the follow terms and conditions: To secure this loan, I give you a security interest in the collateral. The collateral includes the property listed below, anything that becomes attached to it, and all proceeds of the collateral. This security interest also secures all other debt I owe you now. I understand that all collateral that I have given to secure loans may also be used to secure this and any other loans you may make to me. I own the collateral. I won't sell or transfer it without your written permission. I won't allow anyone else to have an interest in the collateral except you. I will keep the collateral at my address shown above. I will promptly tell you in writing if I change my address. I won't permanently remove the collateral from Texas unless you give me written permission. I will timely pay all taxes and license fees on the collateral. I will keep it in good repair. I won't use the collateral illegally. Any change to this security agreement has to be in writing. Both you and I have to sign it. Any default under my agreements with you will be a default of this security agreement. Federal and Texas law apply to this security agreement. If I don't keep any of my promises, you can take the collateral. You will only take the collateral lawfully and without a breach of the peace. If you take my collateral, you will tell me how much I have to pay to get it back. If I don't pay you to get the collateral back, you can sell it or take other action allowed by law. You will send me notice at least 10 days before you sell it. My right to get the collateral back ends when you sell it. You can use the money you get from selling it to pay amounts the law allows, and to reduce the amount I owe. If any money is left, you will pay it to me. If the money from the sale is not enough to pay all I owe, I must pay the rest of what I owe you plus interest."

§1.1216. Model Clauses.

(a) - (t) (No change.)

(u) Final Agreement and Modifications in Writing. For loan agreements exceeding $50,000.00, this notice must be boldfaced, capitalized, underlined, or otherwise set out from the surrounding written material to be conspicuous. The model agreement requiring any change to be in writing reads: "This written loan agreement is the final agreement between you and me and may not be changed by prior, current, or future agreements or statements between you and me. There are no oral agreements between us relating to this loan agreement. Any change to this agreement has to be in writing. Both you and I have to sign it."

(v) - (aa) (No change.)

§1.1217. Permissible Changes.

(a) A licensed lender may consider making the following types of changes to the model clauses:

(1) - (6) (No change.)

(7) A sample model contract using the scheduled installment earnings method is presented in the following example.
Figure: 7 TAC §1.1217(a)(7)

(8) A sample model contract using the true daily earnings method is presented in the following example.
Figure: 7 TAC §1.1217(a)(8)

(9) (No change.)

(b) (No change.)

§1.1225. Contract Provisions.

(a) (No change.)

(b) The security document for a Chapter 342, Subchapter G second lien home equity loan contract may contain the following provisions:

(1) - (36) (No change.)

(37) A provision regarding notice of confidentiality rights.

§1.1226. Model Clauses.

(a) (No change.)

(b) For a Chapter 342, Subchapter G second lien home equity loan contract:

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

(3) An Itemization of Amount Financed box. The itemization of amount financed box is not required if the licensee provides the borrower with a good faith estimate or a settlement statement as permitted by the Truth-in-Lending Act. An itemization of amount financed box which complies with Regulation Z is considered to be in compliance with this paragraph and will not require a non-standard submission.

[~~(A) For use when the administrative fee is financed reads:~~]
[~~Figure: 7 TAC §1.1226(b)(3)(A)~~]

[~~(B) For use when the administrative fee is paid in cash reads:~~]
[~~Figure: 7 TAC §1.1226(b)(3)(B)~~]

(4) Promise to Pay. One permissible change to the model language for the scheduled installment earnings method would be to allow partial prepayments of the principal during the term of the loan. This variation on the Texas scheduled installment earnings method would allow periodic reductions of the principal balance by partial prepayments. This variation would allow reductions of the principal balance that were not originally scheduled. The bracketed or parenthetical insert may be inserted at the lender's option. The model clause for the borrower's promise to pay reads: "This loan is an Extension of Credit defined by Section 50(a)(6), Article XVI of the Texas Constitution."

(A) For contracts using the Scheduled Installment Earnings Method: "I promise to pay the Total of Payments to the order of you. (The "principal" or "cash advance" is $_____. This amount plus interest must be paid by _____ (maturity date).) I will make payments to you at the address above or as you direct. I will make the payments on the dates and in the amounts shown in the Payment Schedule."

(B) For contracts using the True Daily Earnings Method: "I promise to pay the cash advance plus the accrued interest to the order of you. (The "principal" or "cash advance" is $_____. This amount plus interest must be paid by _____ (maturity date).) I will make payments to you at the address above or as you direct. I will make the payments on the dates and in the amounts shown in the Payment Schedule."

(5) - (25) (No change.)

(c) For the security document for a Chapter 342, Subchapter G second lien home equity loan contract:

(1) The model definition section reads:

(A) - (E) (No change.)

(F) "Note" means the promissory Note signed by me and dated _____. The Note states that the amount I owe you is _____ dollars (U.S. $_____) plus interest. I have promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than _____ (maturity date).

(G) - (R) (No change.)

(2) - (36) (No change.)

(37) Notice of Confidentiality Rights Clause. On or after January 1, 2004, the security document must incorporate a new "Notice of Confidentiality Rights" disclosure. The new disclosure or notice must:

(A) appear on the first page of the security document;

(B) be in at least 12-point boldfaced type or 12-point uppercase lettering; and

(C) be substantially similar to the required notice or disclosure under Section 11.008(b) of the Texas Property Code. The model notice of confidentiality rights clause reads: "NOTICE OF CONFIDENTIALITY RIGHTS: I MAY REMOVE OR STRIKE MY SOCIAL SECURITY NUMBER OR MY DRIVER'S LICENSE NUMBER FROM THIS DOCUMENT BEFORE IT IS FILED IN THE PUBLIC RECORDS."

§1.1227. Permissible Changes.

(a) A licensed lender may consider making the following types of changes to the model clauses:

(1) - (6) (No change.)

(7) A sample model note is presented in the following example.

Figure: 7 TAC §1.1227(a)(7)

(8) A sample model security document is presented in the following example.

Figure: 7 TAC §1.1227(a)(8)

(b) (No change.)

§1.1235. Contract Provisions.

(a) (No change.)

(b) The security document for a Chapter 342, Subchapter G second lien purchase money loan contract may contain the following provisions:

(1) - (34) (No change.)

(35) A provision regarding notice of confidentiality rights.

§1.1236. Model Clauses.

(a) (No change.)

(b) For a Chapter 342, Subchapter G second lien purchase money loan contract:

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

(3) An Itemization of Amount Financed box. The itemization of amount financed box is not required if the licensee provides the borrower with a good faith estimate or a settlement statement as permitted by the Truth-in-Lending Act. An itemization of amount financed box which complies with Regulation Z is considered to be in compliance with this paragraph and will not require a non-standard submission.

~~[(A) For use when the administrative fee is financed reads:]~~

~~[Figure: 7 TAC §1.1236(b)(3)(A)]~~

~~[(B) For use when the administrative fee is paid in cash reads:]~~

~~[Figure: 7 TAC §1.1236(b)(3)(B)]~~

(4) Promise to Pay. One permissible change to the model language for the scheduled installment earnings method would be to allow partial prepayments of the principal during the term of the loan. This variation on the scheduled installment earnings method would allow periodic reductions of the principal balance by partial prepayments. This variation would allow reductions of the principal balance that were not originally scheduled. The bracketed or parenthetical insert may be inserted at the lender's option. The model clause for the borrower's promise to pay reads:

(A) For contracts using the Scheduled Installment Earnings Method: "I promise to pay the Total of Payments to the order of you. (The "principal" or "cash advance" is $_____. This amount plus interest must be paid by _____ (maturity date).) I will make payments to you at the address above or as you direct. I will make the payments on the dates and in the amounts shown in the Payment Schedule."

(B) For contracts using the True Daily Earnings Method: "I promise to pay the cash advance plus the accrued interest to the order of you. (The "principal" or "cash advance" is $_____. This amount plus interest must be paid by _____ (maturity date).) I will make payments to you at the address above or as you direct. I will make the payments on the dates and in the amounts shown in the Payment Schedule."

(5) - (25) (No change.)

(c) For the security document for a Chapter 342, Subchapter G second lien purchase money loan contract:

(1) The model definition section reads:

(A) - (E) (No change.)

(F) "Note" means the Purchase Money Note signed by me and dated _____. The Note states that the amount I owe you is _____ Dollars (U.S. $_____) plus interest. I have promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than _____ (maturity date).

(G) - (Q) (No change.)

(2) - (34) (No change.)

(35) Notice of Confidentiality Rights Clause. On or after January 1, 2004, the security document must incorporate a new "Notice of Confidentiality Rights" disclosure. The new disclosure or notice must:

(A) appear on the first page of the security document;

(B) be in at least 12-point boldfaced type or 12-point uppercase lettering; and

(C) be substantially similar to the required notice or disclosure under Section 11.008(b) of the Texas Property Code. The model notice of confidentiality rights clause reads: "NOTICE OF CONFIDENTIALITY RIGHTS: I MAY REMOVE OR STRIKE MY SOCIAL SECURITY NUMBER OR MY DRIVER'S LICENSE NUMBER FROM THIS DOCUMENT BEFORE IT IS FILED IN THE PUBLIC RECORDS."

§1.1237. Permissible Changes.

(a) A licensee may consider making the following types of changes to the model clauses:

(1) - (6) (No change.)

(7) A sample model note is presented in the following example.
Figure: 7 TAC §1.1237(a)(7)

(8) A sample model security document is presented in the following example.
Figure: 7 TAC §1.1237(a)(8)

(b) (No change.)

§1.1245. Contract Provisions.

A Chapter 342, Subchapter G second lien home improvement loan transaction may include, but is not limited to, the following contract provisions to the extent not prohibited by law or regulation. If the licensee desires to exercise its rights under one of the following provisions, it must include that provision in the contract. A licensee who does not desire to apply a provision is not required to include it in the contract. For example, a licensee who does not assess a fee for dishonored checks may omit the dishonored check fee clause. A licensee may also exclude non-relevant portions of a model clause. For example, a licensee who does not routinely finance certain insurance coverages may omit those non-applicable portions of the model clause. A Chapter 342, Subchapter G home improvement loan transaction may contain the following provisions:

(1) For a contract for use in a transaction that does not allow withdrawals or multiple advances:

(A) - (N) (No change.)

(O) A provision regarding notice of confidentiality rights.

(2) - (4) (No change.)

(5) For a deed of trust for use in a transaction that allows for withdrawals or multiple advances:

(A) - (HH) (No change.)

(II) A provision regarding notice of confidentiality rights.

§1.1246. Model Clauses.

(a) (No change.)

(b) For a Chapter 342, Subchapter G second lien home improvement loan contract for use in a transaction that does not allow for withdrawals or multiple advances:

(1) - (14) (No change.)

(15) Notice of Confidentiality Rights Clause. On or after January 1, 2004, the security document must incorporate a new "Notice of Confidentiality Rights" disclosure. The new disclosure or notice must:

(A) appear on the first page of the security document;

(B) be in at least 12-point boldfaced type or 12-point uppercase lettering; and

(C) be substantially similar to the required notice or disclosure under Section 11.008(b) of the Texas Property Code. The model notice of confidentiality rights clause reads: "NOTICE OF CONFIDENTIALITY RIGHTS: I MAY REMOVE OR STRIKE MY SOCIAL SECURITY NUMBER OR MY DRIVER'S LICENSE NUMBER FROM THIS DOCUMENT BEFORE IT IS FILED IN THE PUBLIC RECORDS."

(c) For a Chapter 342, Subchapter G second lien home improvement loan promissory note for use in a transaction that does not allow for withdrawals or multiple advances:

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

(3) An Itemization of Amount Financed box. The itemization of amount financed box is not required if the licensee provides the borrower with a good faith estimate or a settlement statement as permitted by the Truth-in-Lending Act. An itemization of amount financed box which complies with Regulation Z is considered to be in compliance with this paragraph and will not require a non-standard submission.

[~~(A) For use when the administrative fee is financed reads:~~]
[~~Figure: 7 TAC §1.1246(c)(3)(A)~~]

[~~(B) For use when the administrative fee is paid in cash reads:~~]
[~~Figure: 7 TAC §1.1246(c)(3)(B)~~]

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

(6) Promise to Pay. One permissible change to the model language for the scheduled installment earnings method would be to allow partial prepayments of the principal during the term of the loan. This variation on the scheduled installment earnings method would allow periodic reductions of the principal balance by partial prepayments. This variation would allow reductions of the principal balance that were not originally scheduled. The bracketed or parenthetical insert may be inserted at the lender's option. The model clause for the borrower's promise to pay reads:

(A) For contracts using the Scheduled Installment Earnings Method: "I promise to pay the Total of Payments to the [~~your~~] order of you. (The "principal" or "cash advance" is $_____. This amount plus interest must be paid by _____ (maturity date).) I will make payments to you at the address above or as you direct. I will make the payments on the dates and in the amounts shown in the Payment Schedule."

(B) For contracts using the True Daily Earnings Method: "I promise to pay the cash advance plus the accrued interest to the [~~your~~] order of you. (The "principal" or "cash advance" is $_____. This amount plus interest must be paid by _____ (maturity date).) I will make payments to you at the address above or as you direct. I will make the payments on the dates and in the amounts shown in the Payment Schedule."

(7) - (29) (No change.)

(d) (No change.)

(e) For a Chapter 342, Subchapter G second lien home improvement loan promissory note for use in a transaction that allows for withdrawals or multiple advances:

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

(3) An Itemization of Amount Financed box. The itemization of amount financed box is not required if the licensee provides the borrower with a good faith estimate or a settlement statement as permitted by the Truth-in-Lending Act. An itemization of amount financed box which complies with Regulation Z is considered to be in compliance with this paragraph and will not require a non-standard submission.

~~[(A) For use when the administrative fee is financed reads:]~~
~~[Figure: 7 TAC §1.1246(e)(3)(A)]~~

~~[(B) For use when the administrative fee is paid in cash reads:]~~
~~[Figure: 7 TAC §1.1246(e)(3)(B)]~~

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

(6) Promise to Pay. One permissible change to the model language for the scheduled installment earnings method would be to allow partial prepayments of the principal during the term of the loan. This variation on the scheduled installment earnings method would allow periodic reductions of the principal balance by partial prepayments. This variation would allow reductions of the principal balance that were not originally scheduled. The bracketed or parenthetical insert may be inserted at the lender's option. The model clause for the borrower's promise to pay reads:

(A) For contracts using the Scheduled Installment Earnings Method: "I promise to pay the Total of Payments to the [~~your~~] order of you. (The "principal" or "cash advance" is $_____. This amount plus interest must be paid by _____ (maturity date).) I will make payments to you at the address above or as you direct. I will make the payments on the dates and in the amounts shown in the Payment Schedule."

(B) For contracts using the True Daily Earnings Method: "I promise to pay the cash advance plus the accrued interest to the [~~your~~] order of you. (The "principal" or "cash advance" is $_____. This amount plus interest must be paid by _____ (maturity date).) I will make payments to you at the address above or as you direct. I will make the payments on the dates and in the amounts shown in the Payment Schedule."

(7) - (30) (No change.)

(f) For a Chapter 342, Subchapter G second lien home improvement loan deed of trust for use in a transaction that allows for withdrawals or multiple advances:

(1) - (34) (No change.)

(35) Notice of Confidentiality Rights Clause. On or after January 1, 2004, the security document must incorporate a new "Notice of Confidentiality Rights" disclosure. The new disclosure or notice must:

(A) appear on the first page of the security document;

(B) be in at least 12-point boldfaced type or 12-point uppercase lettering; and

(C) be substantially similar to the required notice or disclosure under Section 11.008(b) of the Texas Property Code. The model notice of confidentiality rights clause reads: "NOTICE OF CONFIDENTIALITY RIGHTS: I MAY REMOVE OR STRIKE MY SOCIAL SECURITY NUMBER OR MY DRIVER'S LICENSE NUMBER FROM THIS DOCUMENT BEFORE IT IS FILED IN THE PUBLIC RECORDS."

§1.1247. Permissible Changes.

(a) A licensee may consider making the following types of changes to the model clauses:

(1) - (11) (No change.)

(12) A sample model contract that does not allow for withdrawals or multiple advances reads:
Figure: 7 TAC §1.1247(a)(12)

(13) A sample model promissory note that does not allow for withdrawals or multiple advances reads:
Figure: 7 TAC §1.1247(a)(13)

(14) (No change.)

(15) A sample model promissory note that allows for withdrawals or multiple advances reads:
Figure: 7 TAC §1.1247(a)(15)

(16) A sample model deed of trust that allows for withdrawals or multiple advances reads:
Figure: 7 TAC §1.1247(a)(16)

(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 December 17, 2004.

TRD-200407377
Leslie L. Pettijohn
Commissioner
Finance Commission of Texas
Earliest possible date of adoption: January 30, 2005
For further information, please call: (512) 936-7640

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SUBCHAPTER R. MOTOR VEHICLE INSTALLMENT SALES CONTRACT PROVISIONS

7 TAC §1.1308

The Finance Commission of Texas (the commission) proposes an amendment to Chapter 1, Subchapter R, §1.1308, concerning model clauses. The purpose of the proposed amendment is to make technical changes that clarify certain provisions or correct technical errors within the rules. The amendment corrects the pronoun "your" to "my" in §1.1308(8)(A) and §1.1308(8)(B). The amendment also implements a technical correction to change the itemization of amount financed in §1.1308(8)(B).

Leslie L. Pettijohn, Consumer Credit Commissioner, 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 administering the amended section.

Commissioner Pettijohn also has determined that for each year of the first five years the amendment is in effect, the public benefit anticipated as a result of the proposed amendment will be providing clarity in the model forms. There is no anticipated cost to persons who are required to comply with the amendment as proposed. There will be no adverse economic effect on small or micro businesses. There will be no effect on individuals required to comply with the amendment as proposed.

Comments on the proposed amendment may be submitted in writing to Leslie L. Pettijohn, Consumer Credit Commissioner, Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207 or by e-mail to leslie.pettijohn@occc.state.tx.us.

The amendment is proposed under Texas Finance Code §11.304, which authorizes the commission to adopt rules to

enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code §348.513 authorizes the commission to adopt rules for the enforcement of the motor vehicle installment sales chapter.

The statutory provision (as currently in effect) affected by the proposed amendment is Texas Finance Code, Chapter 348.

§1.1308. Model Clauses.

The following model clause provides the plain language equivalent of provisions found in contracts subject to Chapter 348.

(1) - (7) (No change.)

(8) Itemization of Amount Financed. The creditor drafting the contract is given considerable flexibility regarding the Itemization of Amount Financed disclosure so long as the Itemization of Amount Financed disclosure complies with the Truth in Lending Act. As an example, a creditor may disclose the manufacturer's rebate either as: a component of the downpayment; or a deduction from the cash price of the motor vehicle. The model contract provision for the Itemization of the Amount Financed discloses the manufacturer's rebate as a component of the downpayment. If the creditor elected to disclose the manufacturer's rebate as a deduction from the cash price of the motor vehicle, the cash price component of the Itemization of Amount Financed would be amended to reflect the dollar amount of the manufacturer's rebate being deducted from the cash price of the motor vehicle.

(A) The model clause regarding Itemization of Amount Financed-Sales Tax Advance reads:
Figure: 7 TAC §1.1308(8)(A)

(B) The model clause regarding Itemization of Amount Financed-Sales Tax Deferred reads:
Figure: 7 TAC §1.1308(8)(B)

(9) - (42) (No change.)

(43) Negotiability and Assignment. The disclosure of the negotiability of the contract should be placed in the close proximity to the buyer's signature and may read:

(A) The rates on this contract are negotiable. The seller may be retaining a portion of the finance charge; or,

(B) The rates of this contract are negotiable. The seller may assign or otherwise sell this contract and receive a discount or other payment for the difference between the rate, charges, or balance.

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 December 17, 2004.

TRD-200407378
Leslie L. Pettijohn
Commissioner
Finance Commission of Texas
Earliest possible date of adoption: January 30, 2005
For further information, please call: (512) 936-7640

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PART 4. TEXAS SAVINGS AND LOAN DEPARTMENT

CHAPTER 80. MORTGAGE BROKER AND LOAN OFFICER LICENSING
SUBCHAPTER A. LICENSING

7 TAC §80.1, §80.2

The Finance Commission of Texas ("Finance Commission") proposes to amend 7 TAC §80.1, Scope, and §80.2, Definitions, to more clearly define the terms "mortgage broker," "loan officer", and "mortgage loan."

The Mortgage Broker Licensing Act (the "Act") became effective September 1, 1999. It requires that mortgage brokers and the loan officers who work for them meet certain requirements, that they obtain licenses, that they adhere to certain standards of conduct, and that they provide required disclosures to mortgage loan applicants. The Act directs the Finance Commission to promulgate regulations to implement the Act (the "Regulations").

The proposed amendments to 7 TAC §80.1 amends the rule defining the activities which require licensing under the Act. The Department recommends the changes to more closely reflect the definitions contained in the Act itself. In making the recommendation to the Finance Commission, the Department has reviewed the kinds of origination activity which has generated consumer complaints, and therefore fall within the area of activities which should be limited to persons licensed under the Act. Those activities are set forth in proposed new §80.1(4). In connection with the normal services of a real estate agent, general information relating to loans available in the marketplace may be provided to consumers. Proposed §80.1(5) is intended to clarify that the providing of general information by a real estate agent does not activate the licensing requirement, provided no additional compensation is received by the real estate agent.

The proposed amendment to §80.1(5)(B)(iii) is intended to clarify the exemption of a person who makes a mortgage loan from his own funds but does not regularly engage in the business of making mortgage loans. Under the amendment, a person will be deemed to be regularly engaging in the business of making mortgage loans if the person either holds himself out as being engaged in the business of making mortgage loans or if the person makes more than one loan in a calendar quarter.

The proposed amendment to 7 TAC §80.2 is intended to more clearly define "commercial loans." If the real property is intended to be used as a one to four family residence, it is a "mortgage loan" for purposes of the Act even if it is acquired for investment purposes. This is consistent with the provisions of the Act.

Other minor changes of a grammatical nature or syntax are made to §80.1.

The Act establishes a Mortgage Broker Advisory Committee to advise the Commissioner and the Finance Commission on the promulgation of forms and regulations and the implementation of the Act. The Advisory Committee met on October 6, 2004, and discussed the proposed amendments.

Danny Payne, Savings and Loan Commissioner, has determined that for the first five-year period that the amended sections, as proposed, will be in effect, there will be no fiscal implications for state and local government as a result of enforcing or administering these sections and is not expected to increase or decrease the net revenue of the Department from the industry.

Mr. Payne estimates that for the first five years that the proposed amended sections are in effect, the public will benefit by having

more detailed notice of how to file a complaint, including more detailed information as to contact with the Department. This will further the ability of the Department to detect and enforce violations of the Act, and provide improved consumer protection. No difference will exist between the cost of compliance for small business and the cost of compliance for the largest business affected by the amendments.

Comments on the proposed amendments may be submitted in writing to Danny Payne, Commissioner, Texas Savings and Loan Department, 2601 North Lamar, Suite 201, Austin, Texas 78705-4294, or e-mailed to tsld@tsld.state.tx.us, no later than 30 days from the date that these proposed rules are published in the *Texas Register*.

The amendments are proposed under *Finance Code*, Section 11.306, which authorizes the Finance Commission to adopt mortgage broker rules as provided by Chapter 156 of the Act, and under *Finance Code*, Section 156.102(a) and (b), which authorizes the Commissioner of the Texas Savings and Loan Department , subject to review and compliance with the directives of the Finance Commission, to adopt and enforce rules necessary for the intent of or to ensure compliance with the Act.

The section of the Act affected by the proposed amendment is *Finance Code*, Section 156.102(a) relating to authority for the Finance Commission to adopt rules implement the intended purposes of the Act or to enforce the Act. The proposed amendments relate to *Finance Code* §156.002(5),(9), and (10); and *Finance Code* §156.201.

§80.1. Scope.

This Chapter governs the licensing and conduct of Mortgage Brokers, and the Loan Officers working for them, under the Act.

(1) As used herein the term "Mortgage Broker" means an individual who receives an application from a prospective borrower to attempt to obtain a Mortgage Loan. An individual is a "Mortgage Broker" even if the individual is not exclusively engaged in the activities of a Mortgage Broker. [~~The fact that an individual is not exclusively engaged in activities as a Mortgage Broker does not mean that they are not a Mortgage Broker.~~]

(2) As used herein, the term "Loan Officer" means an individual required to be sponsored by a licensed Mortgage Broker for the purposes of performing the acts of a Mortgage Broker.

(3) The terms Mortgage Broker and Loan Officer do not include:

(A) An individual who performs only clerical functions in connection with the obtaining, compiling, or delivery of an application for a Mortgage Loan; or

(B) An individual functioning solely as a Mortgage Loan processor performing those duties listed in *Finance Code* §156.002(6). [~~In determining whether an individual is required to be licensed as a Mortgage Broker or a Loan Officer based on the activities they perform, if an individual receives an application from a prospective borrower and:~~]

[~~*(i)* makes the decision where that Loan Applicant's application for a Mortgage Loan will be sent AND~~]

[~~*(ii)* collects and retains any portion of fees for any services in connection with the application for or obtaining of a Mortgage Loan (including, but not limited to, appraisal fees, credit report fees, points, and loan commitment fees) then such individual shall be presumed to be a Mortgage Broker or Loan Officer and required to be licensed under §156.201 of the Act.~~]

(4) An individual is required to be licensed under the Act if :

(A) The individual, acting alone or in concert with others, receives a mortgage loan application and performs any one of the following activities:

(i) Advises a prospective borrower about the different type of loan products available, or advises a prospective borrower how closing costs and monthly payments could vary under each product; or

(ii) Consults or discusses with a prospective borrower about the maximum amount of the mortgage a prospective borrower can afford; or

(iii) Provides disclosures to a prospective borrower or discusses or explains such disclosures. Disclosures include but are not limited to the mortgage broker disclosure form; truth in lending disclosures , the good faith estimate of settlement costs, affiliated business arrangements; and disclosures relating to the dual role as mortgage broker and loan officer and real estate broker or sales agent. An individual who prepares a required disclosure under the direction and supervision of a licensed loan officer or licensed mortgage broker, but who does not discuss the disclosure with a prospective borrower shall not be deemed to have provided a disclosure for purposes of this subsection; or

(iv) Assists a prospective borrower in understanding and clearing credit problems; or

(v) Determines the lender(s) or investor(s) to whom the loan will be submitted; or

(vi) Issues or signs a prequalification letter or preapproval letter; or

(B) the individual represents or holds himself out as a "loan officer," "mortgage consultant," or "mortgage broker", or otherwise represents that the person is engaging in or conducting the business of originating mortgage loans.

(5) An individual who is a licensed real estate agent or real estate broker, and who only provides general information relating to paragraph (4)(i) and (ii) of this subsection is not required to be licensed provided that such individual receives no compensation for providing such services.

(6) [~~(4)~~] Exemptions.

(A) The following business entities are exempt from the Act and this Chapter, and the Employees, as defined in paragraph (11) of §80.2 of this Chapter (relating to Definitions), of such entities are also exempt from the Act and this Chapter to the extent they are working for the benefit of their employer:

(i) a bank, savings bank, or savings association and any subsidiary or affiliate of any of the foregoing;

(ii) a state or federal credit union;

(iii) an insurance company licensed or authorized to do business in the State of Texas;

(iv) a Mortgage Banker; or

(v) an organization that qualifies for an exemption from state franchise and sales taxes by virtue of its status under §501(c)(3) of the *Internal Revenue Code*, as amended.

(vi) An Employee is presumed to be working for the benefit of his or her employer with respect to a Mortgage Loan if when the Mortgage Loan is made it is closed at the direction of the employer

or the employer directly shares in the economic gain or loss of the Mortgage Loan transaction.

(B) The following individuals are exempt from the Act and this Chapter:

(i) an individual who makes a Mortgage Loan from the individual's own funds to a spouse, former spouse, or person or persons in the lineal line of consanguinity of the person making such Mortgage Loan;

(ii) an owner of real property who makes a Mortgage Loan to a purchaser of the real property for all or a part of the purchase price of that same real property; and

(iii) an individual who makes a Mortgage Loan from that individual's own funds who is not and is not required, by virtue of his or her business, to be an authorized lender under Chapter 342, *Finance Code*, and does not regularly engage in the business of making or brokering Mortgage Loans. For purposes of this subsection, a [~~A~~] person is deemed to be regularly engaging in the business of making or brokering Mortgage Loans if that person:

(I) advertises or holds himself out to be engaged in the business of making or brokering mortgage loans; or

(II) originates or brokers more than one mortgage loan in any one calendar quarter.

~~*[(I)* has more than 50% of his or her net assets invested in Mortgage Loans (other than loans of the types set forth in subsections (B) and (C), above) in which he or she participated in either the origination or brokering; or]~~

~~*[(II)* is found by the Commissioner, after notice and an opportunity for a hearing, to be engaging in the business of making or brokering Mortgage Loans.]~~

§80.2. Definitions.

As used in this Chapter, the following terms have the meanings indicated:

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

(5) "Mortgage Loan" means any indebtedness secured by a first [~~priority~~] lien against, or security interest in, one-to-four family residential real property when the property is intended to be occupied for residential purposes whether or not the property is acquired for investment purposes or acquired for owner occupancy. It includes new loans and renewals, extensions, modifications, and rearrangements of such loans. The term [~~Mortgage Loan~~] does not include a [~~any~~] loan which is secured by a structure that is suitable for occupancy as a one to four family residence, but is used for a commercial purpose such as a professional office, beauty salon, or other non residential use, and is not used as a residence. [~~which, although secured by one-to-four family residential property, is clearly commercial in nature.~~]

(6) - (13) (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 December 20, 2004.

TRD-200407382

John Fleming
General Counsel
Texas Savings and Loan Department
Earliest possible date of adoption: January 30, 2005
For further information, please call: (512) 475-1353

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CHAPTER 81. MORTGAGE BANKER REGISTRATION

7 TAC §81.1, §81.2

The Finance Commission of Texas ("Finance Commission") proposes new Chapter 81, 7 TAC §81.1, Definitions, and 7 TAC §81.2 Loan Status Forms. The purpose of the proposed new rules is to promulgate standard forms to be used by a mortgage banker who represents to an applicant that the applicant has been preapproved or prequalified for a mortgage loan.

The Mortgage Banker Registration Act, *Finance Code* Chapter 157, (the "Act") requires registration of mortgage bankers and creates a system of regulation for them. The Act directs the Finance Commission to promulgate regulations to implement the Act (the "Regulations") and specifically authorizes the Finance Commission to adopt rules to adopt standard forms for use in representing that an applicant has been preapproved or prequalified for a mortgage loan. The Commissioner of the Texas Savings and Loan Department ("Department") is charged with administration of the Act.

The Finance Commission initially published the proposed rule in the November 5, 2004 issue of the *Texas Register* (29 TexReg 10188). The Commission received five comments. Three comments from individuals who identified themselves as real estate agents or brokers. These individuals support the rule. They expressed their belief that mortgage bankers and mortgage brokers should adhere to the same rules.

In addition to the individuals, Mr. Tom Morgan commented on behalf of the Texas Association of Realtors ("TAR") on behalf of the rule. While TAR generally supports the proposal, TAR commented: "TAR is concerned that allowing a Mortgage Banker to check "no" in response to these questions *(referring to questions relating to reviewing credit report and credit score and verification of certain financial information)*, dissipates the value of the form to the consumer."(language in italics not in original). TAR suggested that the utility of the form to a seller of property who relied on the conditional approval is also diminished.

Comments were also received from Deborah Goodell Polan on behalf of the Texas Financial Services Association (TFSA). TFSA indicated that the proposed rule appeared to be incongruous with activity permitted under the Fair Credit Reporting Act (FCRA), and that the rule would prohibit creditors from offering pre-screened firm offers of credit in Texas. Under FCRA, a creditor is permitted to make a firm offer of credit to a prospective borrower prior to the consumer submitting an application for credit. The FCRA establishes restrictions on this activity. Because certain loan terms such as the amount of the loan, interest rate, and payment terms are not known at the time the firm offer of credit is extended. TFSA is concerned that "since Form A requires disclosure of information not yet available to the creditor in this scenario, it will be impossible to comply with the proposed regulation, leading to the effective elimination of firm offers of credit by mortgage bankers." TFSA proposes that 81.2(a) be limited to "applicants" rather than

"prospective applicants", or that an express exception be made for firm offers of credit made in conformity with FCRA and its implementing regulations.

In addition to these comments, the Department has received an oral comment that the provisions of §81.2(a)(1) and (b)(1) should be modified to make the use of the descriptive heading "Conditional Qualification Letter" and "Conditional Approval Letter" mandatory and not optional.

As re-proposed 7 TAC §81.1 adopts the definitions of "mortgage banker" and "mortgage loan" as provided in the Act.

Proposed 7 TAC §81.2 sets forth the standard forms and permitted modifications for mortgage bankers to use in representing to a mortgage loan applicant that the applicant has been preapproved for a mortgage loan or has prequalified for a mortgage loan. As re-proposed, the descriptive headings in (a)(1) and (b)(1) are mandatory and not optional.

The Finance Commission anticipates that rule §80.22, Loan Status Forms which is applicable to brokers will be modified concurrently so that mortgage brokers and mortgage bankers will be using substantially identical forms.

Therefore, before adopting a final rule, the Finance Commission is interested in soliciting comments on the following issues: (1) should the descriptive headings be mandatory or optional; (2) should Form B permit a mortgage broker to answer "No" to the credit and verification of information questions as suggested, or should the Form B more closely resemble the companion form used by mortgage bankers currently under §80.22; and (3) how should the final rule address the issue of "firm offers of credit" made in conformity with the FCRA?

Danny Payne, Savings and Loan Commissioner, has determined that for the first five-year period that the new sections, as proposed, will be in effect, there will be no fiscal implications for state and local government as a result of enforcing or administering these sections and is not expected to increase or decrease the net revenue of the Department from the industry.

Mr. Payne estimates that for the first five years that the proposed new sections are in effect, the public will benefit by the requirement that loan applicants and sellers of real property will be provided meaningful information about the status of a loan application. No difference will exist between the cost of compliance for small business and the cost of compliance for the largest business affected by the new sections.

Comments on the proposed new sections may be submitted in writing to Danny Payne, Commissioner, Texas Savings and Loan Department, 2601 North Lamar, Suite 201, Austin, Texas 78705-4294, or e-mailed to tsld@tsld.state.tx.us , no later than 30 days from the date that these proposed rules are published in the *Texas Register*.

The new sections are proposed under *Finance Code*, Section 11.306, which authorizes the Finance Commission to adopt mortgage broker rules as provided by Chapter 157 of the Act, and under *Finance Code*§§157.011(a) and 157.011(b) which authorizes the Commissioner of the Texas Savings and Loan Department, subject to review and compliance with the directives of the Finance Commission, to adopt and enforce rules necessary for the intent of or to ensure compliance with the Act.

The section of the Act affected by the proposed new section is *Finance Code*, §157.011(b) relating to authority for the Finance Commission to adopt rules to establish standard forms and require the use of those forms by mortgage bankers who represent that an applicant for a loan is preapproved or has prequalified.

§81.1. Definitions.

(a) "Mortgage banker" shall have the same meaning as that provided in *Finance Code* §157.002(2).

(b) "Mortgage loan" shall have the same meaning as that provided in *Finance Code* §157.002(3)

§81.2. Loan Status Forms.

(a) Whenever a mortgage banker provides a prospective loan applicant with written confirmation of the prospective loan applicant's conditional qualification for a loan that has not been approved, the mortgage banker shall use the form attached as Form A below. Such form may be modified as follows:

(1) The descriptive heading "Conditional Qualification Letter" may not be omitted;

(2) Additional aspects of the Loan may be described as long as they are not misleading;

(3) Additional items that the mortgage banker has reviewed may be described;

(4) Additional terms, conditions, and requirements may be added; and

(5) An alternative form may be used if it provides at least the same information as is set forth in the approved form.
Figure: 7 TAC §81.2(a)(5)

(b) Whenever a mortgage banker or loan officer provides a loan applicant with confirmation that an application for a mortgage loan has been approved as to credit but not as to collateral, the mortgage banker may use the form attached as Form B below. Such form maybe modified as follows:

(1) The descriptive heading "Conditional Approval Letter" may not be omitted;

(2) Additional aspects of the Loan may be described as long as they are not misleading;

(3) Fees charged may be disclosed but such disclosure shall not serve as a substitute for the Good Faith Estimate required by the Real Estate Settlement Procedures Act.

(4) Additional items that the mortgage banker has reviewed may be described;

(5) Additional terms, conditions, and requirements may be added;

(6) An alternative form may be used if it provides at least the same information as is set forth in the approved form.
Figure: 7 TAC §81.2(b)(6)

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

Filed with the Office of the Secretary of State on December 20, 2004.

TRD-200407385

John Fleming
General Counsel
Texas Savings and Loan Department
Earliest possible date of adoption: January 30, 2005
For further information, please call: (512) 475-1353

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TITLE 16. ECONOMIC REGULATION

PART 9. TEXAS LOTTERY COMMISSION

CHAPTER 403. GENERAL ADMINISTRATION

16 TAC §403.110

The Texas Lottery Commission proposes new §403.110 relating to a petition for adoption of rules. The proposed new section would provide procedures to petition for adoption of a new rule or an amendment to a rule.

Lee Deviney, Financial Administration Director, has determined for each year of the first five years the section as proposed is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule. There is no anticipated impact on small businesses, micro businesses or local or state employment as a result of implementing the section.

Gary Grief, Deputy Executive Director, has determined that for each of the first five years the section as proposed is in effect, the public benefit anticipated as a result of enforcing the section will be the codification of the Commission's procedure for interested persons to petition to adopt rules, as required by Government Code, §2001.021(b).

Written comments on the proposed new section may be submitted to Sandra Joseph, Assistant General Counsel, Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630. Comments must be received within 30 days of publication in the Texas Register to be considered.

The new section is proposed under Government Code, §466.015 which authorizes the Commission to adopt all rules necessary to administer the State Lottery Act and to adopt rules governing the establishment and operation of the lottery, and under Government Code, §467.102 which authorizes the Commission to adopt rules for the enforcement and administration of the laws under the Commission's jurisdiction. The new section is also proposed under Government Code, §2001.021(b) which requires a state agency to by rule prescribe the form for a petition and the procedure for the submission, consideration, and disposition to request the adoption of a rule.

The new section implements Government Code, Chapter 2001.021.

§403.110. Petition for Adoption of Rule Changes.

(a) Any interested person or agency may petition the Commission requesting adoption of a rule. Petitions shall be in writing, should be filed with the general counsel, and shall comply with the following requirements.

(1) Each petition must state the name and address of the petitioner.

(2) Each petition shall include:

(A) a brief explanation of the proposed rule;

(B) the text of the proposed rule prepared in a manner to indicate the words to be added or deleted from the current text, if any;

(C) a statement of the statutory or other authority under which the rule is proposed to be promulgated; and

(D) a justification for adoption of the rule.

(b) The general counsel or the general counsel's designee shall review all petitions for compliance with this section. The petitioner shall have the right to file a corrected petition which complies with the requirements of this section.

(c) Upon receipt of a petition which complies with the requirements of this section, the general counsel or the general counsel's designee will consult with the persons in the Commission who are responsible for the area with which the rule is concerned to evaluate the merits of the proposal. Not later than the 60th day after the date of receipt of a petition, the general counsel or the general counsel's designee shall present the petition to the commission with a recommendation on whether a rulemaking proceeding should be initiated.

(d) The commission shall deny the petition or initiate rulemaking proceedings in accordance with the Administrative Procedure Act (APA) and these rules. The commission may modify any proposed rule to ensure that it conforms to the format of commission rules, adequately addresses the perceived problem or other subject matter, and conforms to the filing requirements of the Texas Register.

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 December 14, 2004.

TRD-200407305
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Earliest possible date of adoption: January 30, 2005
For further information, please call: (512) 344-5113

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TITLE 22. EXAMINING BOARDS

PART 9. TEXAS STATE BOARD OF MEDICAL EXAMINERS

CHAPTER 170. AUTHORITY OF PHYSICIAN TO PRESCRIBE FOR THE TREATMENT OF PAIN

The Texas State Board of Medical Examiners proposes the repeal and replacement of §§170.1 - 170.3, concerning the authority of physician to prescribe for the treatment of pain.

The complete revision of Chapter 170 provides recognition of the need for the patients of Texas to have optimal pain management. It is intended to set forth the principles of appropriate pain treatment to protect the public and to provide physicians with a

higher level of comfort in the use of dangerous drugs and controlled substances in the treatment of pain. Among those principles, the revision of the chapter recognizes that inappropriate pain treatment shall include over treatment, under treatment, no treatment, and the treatment of patients for no legitimate medical purpose.

Michele Shackelford, General Counsel, Texas State Board of Medical Examiners, has determined that for the first five-year period the repeal and new sections are in effect there will be no fiscal implications to state or local government as a result of enforcing the sections as proposed. There will be no effect to individuals required to comply with the sections as proposed.

Ms. Shackelford also has determined that for each year of the first five years the repeal and new sections as proposed are in effect the public benefit anticipated as a result of enforcing the sections will be updated rules concerning treatment of pain management. There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Colleen Klein, P.O. Box 2018, Austin, Texas 78768-2018. A public hearing will be held at a later date.

22 TAC §§170.1 - 170.3

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

The repeal is proposed under the authority of the Occupation Code Annotated, §§153.001 164.051(a)(6), 164.053(a)(3), 164.053(a)(5), 164.053(a)(6), and 164.053(c), which provide that the Texas State Board of Medical Examiners may adopt rules and bylaws as necessary to perform its duties, regulate the practice of medicine in this state, enforce the Medical Practice Act, and take disciplinary action against a person if the person fails to practice medicine in an acceptable professional manner consistent with public health and welfare, writes prescriptions for known abusers of certain drugs, nontherapeutic prescription or administration of drugs, prescribes, administers or dispenses certain drugs in a manner inconsistent with public health and welfare, and treatment of intractable pain.

No other statutes, articles or codes are affected by this proposal.

§170.1 Purpose.

§170.2. Definitions.

§170.3. Guidelines.

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 December 20, 2004.

TRD-200407424
Donald W. Patrick, MD, JD
Executive Director
Texas State Board of Medical Examiners
Earliest possible date of adoption: January 30, 2005
For further information, please call: (512) 305-7016

♦ ♦ ♦

22 TAC §§170.1 - 170.3

The new rules are proposed under the authority of the Occupation Code Annotated, §§153.001 164.051(a)(6), 164.053(a)(3), 164.053(a)(5), 164.053(a)(6), and 164.053(c), which provide that the Texas State Board of Medical Examiners may adopt rules and bylaws as necessary to perform its duties, regulate the practice of medicine in this state, enforce the Medical Practice Act, and take disciplinary action against a person if the person fails to practice medicine in an acceptable professional manner consistent with public health and welfare, writes prescriptions for known abusers of certain drugs, nontherapeutic prescription or administration of drugs, prescribes, administers or dispenses certain drugs in a manner inconsistent with public health and welfare, and treatment of intractable pain.

No other statutes, articles or codes are affected by this proposal.

§170.1. Purpose.

The Texas State Board of Medical Examiners recognizes the need for the patients of Texas to have optimal pain management. This rule is intended to set forth the principles of appropriate pain treatment to protect the public and to provide physicians with a higher level of comfort in the use of dangerous drugs and controlled substances in the treatment of pain. The principles underlying this rule include:

(1) Inappropriate pain treatment shall include over treatment, under treatment, no treatment, and the treatment of patients for no legitimate medical purpose.

(2) Some dangerous drugs and controlled substances listed in Chapters 481 and 483 of the Texas Health and Safety Code are indispensable for the treatment of pain, including intractable pain, and are useful for relieving and controlling many other related symptoms that patients may suffer.

(3) The use of opioid analgesics and other dangerous drugs for other than legitimate medical purposes pose a threat to the individual and society. The inappropriate prescribing of controlled substances and dangerous drugs, including opioid analgesics, may lead to drug diversion and abuse by individuals who seek them for other than legitimate medical use. Accordingly, the board expects that physicians incorporate safeguards into their practices to minimize the potential for the abuse and diversion of controlled substances.

(4) Physicians should not fear disciplinary action from the board for prescribing, dispensing or administering controlled substances, including opioid analgesics, for a legitimate medical purpose and in the course of professional practice. The board will consider prescribing, ordering, dispensing or administering controlled substances for pain to be for a legitimate medical purpose if based on sound clinical judgment. All such prescribing must be based on clear documentation of unrelieved pain.

(5) The board will judge the validity of the physician's treatment of the patient based on available documentation, rather than solely on the quantity and duration of medication administration. The goal is to control the patient's pain while effectively addressing other aspects of the patient's functioning, including physical, psychological, social, and work-related factors.

(6) Allegation of inappropriate pain management will be evaluated on an individual basis. The board will not take disciplinary action against a physician for not adhering strictly to this policy when contemporaneous medical records document reasonable cause for deviation. The physician's conduct will be evaluated to a great extent by the documentation of pain treatment, recognizing that some types of pain cannot be completely relieved, and by taking into account whether the drug used is appropriate for the diagnosis, as well as improvement in function when such is possible.

§170.2. Definitions.

The following words and terms shall have the following meanings in the context of providing medications for pain and related symptoms.

(1) Abuser of narcotic drugs, controlled substances and dangerous drugs--A person who takes a drug or drugs for other than legitimate medical purposes.

(2) Acute pain--The normal, predicted, physiological response to a noxious chemical, thermal or mechanical stimulus typically associated with invasive procedures, trauma and disease. It is time limited.

(3) Addiction--A primary, chronic, neurobiological disease, with genetic, psychosocial, and environmental factors influencing its development and manifestations. It is characterized by behaviors that include the following: impaired control over drug use, including taking prescriptions in a quantity and frequency not prescribed; craving; compulsive use; and continued use despite harm to oneself or other people. Physical dependence and tolerance are normal physiological consequences of extended opioid therapy for pain and are not the same as addiction.

(4) Chronic pain--A state in which the pain persists beyond the usual course of an acute disease or healing of an injury, or that may or may not be associated with an chronic pathologic process that causes continuous or intermittent pain over months or years.

(5) Controlled or "scheduled" substances--Medications defined and regulated by DEA and the Texas Controlled Substances Act, Chapter 481 of the Health and Safety Code establishing drug categories I-V based on risk of abuse and addiction. (Category I has no legitimate medical use and Category V has the lowest abuse/addiction risk.)

(6) Dangerous drugs--Medications defined and regulated under the Texas Dangerous Drug Act, Chapter 483 of the Health and Safety Code. A dangerous drug is a device or drug that is unsafe for self-medication (i.e. requires a prescription) and that is not included in the Schedule I through V drugs of Chapter 481 (Controlled Substances). A dangerous drug is one that bears the legend "Caution: federal law prohibits dispensing without a prescription" or "Prescription Only."

(7) Intractable pain--A pain state in which the cause of the pain cannot be removed or otherwise treated and which, in the generally accepted course of medical practice, no relief or cure of the cause of the pain is possible or none has been found after reasonable efforts.

(8) Legitimate medical purpose--Legitimate medical purpose is demonstrated by appropriate treatment of a patient's pain using the guidelines set forth in §170.3 of this title.

(9) Non-therapeutic--Inappropriate pain treatment, including over treatment, under treatment, no treatment, and the treatment of patients for no legitimate medical purpose.

(10) Pain--An unpleasant sensory and emotional experience associated with actual or potential tissue damage or described in terms of such damage.

(11) Physical dependence--A state of adaptation that is manifested by signs and symptoms that can be produced by abrupt cessation, rapid dose reduction, decreasing blood level of the drug, and/or administration of an antagonist. Physical dependence, by itself, does not equate with addiction as defined under paragraph (3) of this section.

(12) Prescribing pharmaceuticals or practicing consistent with the public health and welfare--Prescribing pharmaceuticals and practicing medicine for a legitimate medical purpose in the usual course of professional practice.

(13) Pseudoaddiction--The iatrogenic syndrome resulting from the misinterpretation of relief-seeking behaviors as though they are drug-seeking behaviors that are commonly seen with addiction. The relief-seeking behaviors resolve upon institution of effective analgesic therapy.

(14) Substance abuse--The use of any substance(s) for nontherapeutic purposes or use of medication for purposes other than those for which it is prescribed.

(15) Tolerance (tachyphylaxis)--Rapid appearance of progressive decrease in response following repetitive administration of a pharmacologically or physiologically active substance. Tolerance may or may not be evident during opioid treatment and does not equate with addiction as defined under §170.2(3).

§170.3. Guidelines.

(a) The Texas State Board of Medical Examiners will use the following guidelines when evaluating a physician's treatment of pain, including the use of controlled substances and or dangerous drugs violates the Medical Practice Act, §§164.051(a)(6), 164.053(a)(5), and 164.053(a)(6).

(1) Evaluation of the patient. A medical history, taken either orally or in writing from the patient and physical examination, must be obtained and documented in the medical record. The medical record should document the nature and intensity of the pain, current and past treatments for pain, underlying or coexisting diseases and conditions, the effect of the pain on physical and psychological function, any history and potential for substance abuse. The medical record also should document the presence of one or more recognized medical indications for the use of a dangerous drug or controlled substance.

(2) Treatment plan. The written treatment plan should state the objectives that will be used to determine treatment success, such as pain relief and improved physical and psychosocial function, and should indicate if any further diagnostic evaluations or other treatments are planned. After treatment begins, the physician should adjust drug therapy to the individual medical needs of each patient. Such a written treatment plan shall consider the need for further testing, diagnostic evaluations, consultations, referrals, or use of other treatment modalities depending upon the extent to which the pain is associated with physical and psychosocial impairment.

(3) Informed consent. The physician should discuss the risks and benefits of the use of controlled substances with the patient or with the patient's surrogate or guardian if the patient is without medical decision-making capacity. Discussion of risks and benefits should include:

(A) the diagnosis;

(B) treatment plan including the controlled substance/dangerous drug and/or group of controlled substances/dangerous drugs to be used;

(C) anticipated therapeutic results, including the realistic expectations for sustained pain relief and improved functioning, and that it may not be possible to relieve all the patient's pain;

(D) alternatives or complementary therapies to drug therapy including physical therapy or psychological techniques;

(E) potential side effects and how to manage them, potential for dependence, addiction, escalation, tolerance, and withdrawal precautions; and

(F) potential for impairment of judgment and/or motor skills.

(4) Periodic review.

(A) The physician should perform and document periodic review of the patient at reasonable intervals in view of the individual circumstances of the patient in regard to progress toward reaching treatment objectives which takes into consideration the course of medications prescribed, ordered, administered, or dispensed as well as any new information about the etiology of the pain.

(B) Continuation or modification of controlled substances and/or dangerous drugs for pain management therapy depends on the physician's evaluation of progress toward treatment objectives which must be documented in the patient's record. Satisfactory response to treatment may be indicated by the patient's decreased pain, increased level of function, or improved quality of life. Objective evidence of improved or diminished function should be monitored and information from family members or other caregivers should be considered in determining the patient's response to treatment. If the patient's progress is unsatisfactory, the physician should assess the appropriateness of continued use of the current treatment plan and consider the use of other therapeutic modalities.

(5) Agreement for treatment. The patient should receive prescriptions from one physician and one pharmacy whenever possible. If the patient is at high risk for medication abuse or has a history of substance abuse, the physician should consider the use of a written agreement between the physician and the patient outlining patient responsibilities, including:

(A) urine/serum medication levels screening when requested;

(B) number and frequency of all prescription refills;

(C) one physician prescribing controlled substances and/or dangerous drugs in the treatment of pain;

(D) use of one pharmacy for prescriptions, and

(E) reasons for which drug therapy may be discontinued (e.g. violation of agreement).

(6) Consultation. The physician should be willing to refer the patient as necessary for additional evaluation and treatment in order to achieve treatment objectives. Special attention should be given to those patients with pain who are at risk for medication misuse, abuse, or diversion. The management of pain in patients with a history or substance abuse or with a comorbid psychiatric disorder may require extra care, monitoring, documentation and consultation with or referral to an expert in the management of such patients.

(7) Medical records. Complete and accurate records of the care provided as set forth in subparagraphs (A) - (J) of this paragraph should be kept. Records should remain current and be maintained in an accessible manner and readily available for review. Specifically the records should include:

(A) the medical history and the physical examination;

(B) diagnostic, therapeutic and laboratory results;

(C) evaluations and consultations;

(D) treatment objectives;

(E) discussion of risks and benefits;

(F) informed consent;

(G) treatments;

(H) medications (including date, type, dosage and quantity prescribed);

(I) instructions and agreements; and

(J) periodic reviews.

(b) A decision by a physician not to strictly adhere to the provisions of subsection (a) of this section will not solely be grounds for the board to take disciplinary action in regard to the physician. Each case of prescribing for pain will be evaluated on an individual basis. The physician's conduct will be evaluated to a great extent by the treatment outcome, taking into account whether the drugs used are medically and/or pharmacologically recognized to be appropriate for the diagnosis, the patient's individual needs including any improvement in functioning, and recognizing that some types of pain cannot be completely relieved.

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 December 20, 2004.

TRD-200407425
Donald W. Patrick, MD, JD
Executive Director
Texas State Board of Medical Examiners
Earliest possible date of adoption: January 30, 2005
For further information, please call: (512) 305-7016

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CHAPTER 183. ACUPUNCTURE

22 TAC §183.20

The Texas State Board of Medical Examiners proposes an amendment to §183.20, concerning reporting of CME for acupuncturists on-line.

The amendment facilitates the reporting of CME for acupuncturists on-line.

Michele Shackelford, General Counsel, Texas State Board of Medical Examiners, has determined that for the first five-year period the rule is in effect there will be no fiscal implications to state or local government as a result of enforcing the rule as proposed. There will be no effect to individuals required to comply with the section as proposed.

Ms. Shackelford also has determined that for each year of the first five years the rule as proposed is in effect the public benefit anticipated as a result of enforcing the section will be reporting of CME for acupuncturists on-line. There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Colleen Klein, P.O. Box 2018, Austin, Texas 78768-2018. A public hearing will be held at a later date.

The amendment is proposed under the authority of the Occupation Code Annotated, §153.001 and §205.251, which provide that the Texas State Board of Medical Examiners may adopt rules and bylaws as necessary to perform its duties, regulate the practice of medicine in this state, enforce the Medical Practice Act, and provide for the annual renewal of a license to practice acupuncture.

No other statutes, articles or codes are affected by this proposal.

§183.20. Continuing Acupuncture Education.

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

(c) Reporting Continuing Acupuncture Education. An acupuncturist must report on the licensee's annual registration form whether the licensee has completed the required [~~the number of hours and type of continuing~~] acupuncture education [~~completed~~] during the previous year.

(d) - (v) (No change.)

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

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Donald W. Patrick, MD, JD
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PART 29. TEXAS BOARD OF PROFESSIONAL LAND SURVEYING

CHAPTER 661. GENERAL RULES OF PROCEDURES AND PRACTICES

SUBCHAPTER D. APPLICATIONS, EXAMINATIONS, AND LICENSING

22 TAC §661.41

The Texas Board of Professional Land Surveying (TBPLS) proposes an amendment to §661.41(a), concerning the need for a sworn affidavit during the application process. As currently written, §661.41(a) states that a sworn affidavit concerning information contained in the application must be submitted to the board.

Deletion of this portion of the rule will clarify that the board will no longer require a sworn affidavit as part of the application.

Sandy Smith, Executive Director, has determined that for the first five year period the amendment is in effect there will be no fiscal impact to state or local government as a result of enforcing or administering this amendment.

Ms. Smith has also determined that for each year of the first five years the amendment is in effect the public will benefit from the amendment as the rule will be easier to understand and will not imply that the board has authority where it does not.

There will be no effect on small or micro businesses. There are no anticipated costs to those who are required to comply with the amendment as proposed.

Comments on the proposed amendment may be submitted in writing to Sandy Smith, Executive Director, Texas Board of Professional Land Surveying, 7701 North Lamar, Suite 400, Austin, Texas 78752. Comments may also be faxed to Ms. Smith at the Board at (512) 452-7711 or may be sent electronically to sandy.smith@mail.capnet.state.tx.us. All requests for a public hearing on the proposed amendment submitted under the Administrative Procedure Act must be received by the Executive Director not more than 15 calendar days after notice of the proposal has been published in the *Texas Register*.

The amendment is proposed pursuant to §1071.151, Title 6, Occupations Code, Subtitle C, which authorizes the Board to adopt and enforce reasonable and necessary rules to perform its duties.

The proposed amendment implements the Texas Administrative Code, Title 22, Part 29, Chapter 661, General Rules of Procedures and Practices.

§661.41. Applications.

(a) An applicant qualified by law who wishes to take an examination for certification or for registration to practice professional land surveying and/or state land surveying in Texas shall be furnished duplicate application forms, one to be returned to the office of the board, the other to be retained by the applicant. Applications received by the board shall be examined by the executive director for conformity with the rules and regulations governing applications as established by the board. Applications accompanied by proper fees and in the form prescribed by the board shall be entered in the records of the board. Applications not accompanied by proper fees or not conforming with the rules and regulations shall be returned to the applicant. Each applicant shall be required to furnish all information requested on the application form. The application form shall contain general information regarding the applicant, a recent passport type photograph, other registration and memberships, references and qualifications, formal education information with certified transcripts of college work, personal surveying experience, and instructions for filing the form[~~, and a sworn affidavit concerning information contained in the application, and a record of the board~~].

(b) - (j) (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 December 16, 2004.

TRD-200407357
Sandy Smith
Executive Director
Texas Board of Professional Land Surveying
Earliest possible date of adoption: January 30, 2005
For further information, please call: (512) 452-9427

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SUBCHAPTER E. CONTESTED CASES

22 TAC §661.95

(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 Professional Land Surveying or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Board of Professional Land Surveying (TBPLS) proposes to repeal §661.95, concerning the failure to attend hearings and the judgments that will occur if the respondent fails to appear. The language in §661.95 has been incorporated into §661.62, therefore it needs to be repealed.

The repeal of §661.95 will take away language that is currently included in another rule.

Sandy Smith, Executive Director, has determined that for the first five year period the repeal is in effect there will be no fiscal impact to state or local government as a result of enforcing or administering this repeal.

Ms. Smith has also determined that for each year of the first five years the repeal is in effect the public will benefit from the repeal as the rule will be easier to understand and will not imply that the board has authority where it does not.

There will be no effect on small or micro businesses. There are no anticipated costs to those who are required to comply with the repeal as proposed.

Comments on the proposed repeal may be submitted in writing to Sandy Smith, Executive Director, Texas Board of Professional Land Surveying, 7701 North Lamar, Suite 400, Austin, Texas 78752. Comments may also be faxed to Ms. Smith at the Board at (512) 452-7711 or may be sent electronically to sandy.smith@mail.capnet.state.tx.us. All requests for a public hearing on the proposed repeal submitted under the Administrative Procedure Act must be received by the Executive Director not more than 15 calendar days after notice of the proposal has been published in the *Texas Register*.

The repeal is proposed pursuant to §1071.151, Title 6, Occupations Code, Subtitle C, which authorizes the Board to adopt and enforce reasonable and necessary rules to perform its duties.

The proposed repeal implements the Texas Administrative Code, Title 22, Part 29, Chapter 661, General Rules of Procedures and Practices.

§661.95. Failure To Attend Hearing: Default Judgment.

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

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Sandy Smith
Executive Director
Texas Board of Professional Land Surveying
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For further information, please call: (512) 452-9427

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CHAPTER 663. STANDARDS OF RESPONSIBILITY AND RULES OF CONDUCT
SUBCHAPTER A. ETHICAL STANDARDS

22 TAC §663.8

The Texas Board of Professional Land Surveying (TBPLS) proposes an amendment to §663.8(2), concerning adherence to Statutes and Codes.

The amendment to this rule explains in greater detail what the requirements are in regard to subdividing land into tracts and what actions should be taken by the surveyor.

Sandy Smith, Executive Director, has determined that for the first five year period the amendment is in effect there will be no fiscal impact to state or local government as a result of enforcing or administering this amendment.

Ms. Smith has also determined that for each year of the first five years the amendment is in effect the public will benefit from the amendment as the rule will be easier to understand and will not imply that the board has authority where it does not.

There will be no effect on small or micro businesses. There are no anticipated costs to those who are required to comply with the amendment as proposed.

Comments on the proposed amendment may be submitted in writing to Sandy Smith, Executive Director, Texas Board of Professional Land Surveying, 7701 North Lamar, Suite 400, Austin, Texas 78752. Comments may also be faxed to Ms. Smith at the Board at (512) 452-7711 or may be sent electronically to sandy.smith@mail.capnet.state.tx.us. All requests for a public hearing on the proposed amendment submitted under the Administrative Procedure Act must be received by the Executive Director not more than 15 calendar days after notice of the proposal has been published in the *Texas Register*.

The amendment is proposed pursuant to §1071.151, Title 6, Occupations Code, Subtitle C, which authorizes the Board to adopt and enforce reasonable and necessary rules to perform its duties.

The proposed amendment implements the Texas Administrative Code, Title 22, Part 29, Chapter 661, General Rules of Procedures and Practices.

§663.8. Adherence to Statutes and Codes.

Strict adherence to practice requirements of related sections of the statutes, the state code, and all local codes and ordinances should be maintained in all services rendered. The registrant:

(1) (No change.)

(2) shall abide by, and conform to, the provisions of the state code and any [~~all~~] local codes and ordinances not consistent with this Act. Any surveyor subdividing land into tracts subject to statutory requirements providing for an approval process by a governing body for such subdivision shall notify the individual whose intent it is to create the subdivision of the existence of the statutory requirements that pertain to and affect the development of the proposed subdivision prior to commencing the survey. It is recommended that this notification be in writing and a copy of which is maintained within the surveyor's permanent records.[~~;~~]

(3) - (5) (No change.)

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

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Sandy Smith
Executive Director
Texas Board of Professional Land Surveying
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For further information, please call: (512) 452-9427

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SUBCHAPTER B. PROFESSIONAL AND TECHNICAL STANDARDS

22 TAC §663.20

The Texas Board of Professional Land Surveying (TBPLS) proposes an amendment to §663.20(a)(2), concerning the requirement for a sworn affidavit regarding criminal convictions. As currently written, §663.20(a)(2) states that a sworn affidavit is required to attest to whether he or she has ever been convicted of a felony or a misdemeanor.

Deletion of this portion of the rule will clarify that the board will no longer require a sworn affidavit regarding criminal convictions.

Sandy Smith, Executive Director, has determined that for the first five year period the amendment is in effect there will be no fiscal impact to state or local government as a result of enforcing or administering this amendment.

Ms. Smith has also determined that for each year of the first five years the amendment is in effect the public will benefit from the amendment as the rule will be easier to understand and will not imply that the board has authority where it does not.

There will be no effect on small or micro businesses. There are no anticipated costs to those who are required to comply with the amendment as proposed.

Comments on the proposed amendment may be submitted in writing to Sandy Smith, Executive Director, Texas Board of Professional Land Surveying, 7701 North Lamar, Suite 400, Austin, Texas 78752. Comments may also be faxed to Ms. Smith at the Board at (512) 452-7711 or may be sent electronically to sandy.smith@mail.capnet.state.tx.us. All requests for a public hearing on the proposed amendment submitted under the Administrative Procedure Act must be received by the Executive Director not more than 15 calendar days after notice of the proposal has been published in the *Texas Register*.

The amendment is proposed pursuant to §1071.151, Title 6, Occupations Code, Subtitle C, which authorizes the Board to adopt and enforce reasonable and necessary rules to perform its duties.

The proposed amendment implements the Texas Administrative Code, Title 22, Part 29, Chapter 661, General Rules of Procedures and Practices.

§663.20. Criminal Convictions.

(a) Pursuant to Title 2, Occupations Code, Chapter 53, the following apply for registered professional land surveyors and applicants.

(1) (No change.)

(2) The applicant will be required to state<u>on a form provided by the board</u>[~~, in a sworn affidavit~~], whether he or she has ever been convicted of a felony or a misdemeanor.

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

(b) - (i) (No change.)

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

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Sandy Smith
Executive Director
Texas Board of Professional Land Surveying
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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 113. STANDARDS OF PERFORMANCE FOR HAZARDOUS AIR POLLUTANTS AND FOR DESIGNATED FACILITIES AND POLLUTANTS

SUBCHAPTER C. NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS FOR SOURCE CATEGORIES (FCAA, §112, 40 CFR PART 63)

30 TAC §§113.100, 113.105, 113.106, 113.110, 113.120, 113.130, 113.140, 113.170, 113.180, 113.190, 113.200, 113.220, 113.230, 113.240, 113.250, 113.260, 113.280, 113.290, 113.300, 113.320, 113.330, 113.340, 113.350, 113.360, 113.380, 113.390, 113.400, 113.410, 113.420, 113.430, 113.440, 113.460, 113.470, 113.480, 113.490, 113.530, 113.600, 113.610, 113.620, 113.640, 113.650, 113.660, 113.670, 113.690, 113.700, 113.710, 113.720, 113.730, 113.750, 113.770, 113.790, 113.810, 113.880, 113.890, 113.920, 113.940, 113.960, 113.980, 113.990, 113.1000, 113.1010, 113.1060, 113.1080, 113.1090, 113.1100, 113.1110, 113.1120, 113.1140, 113.1150, 113.1160, 113.1170, 113.1180, 113.1190, 113.1200, 113.1210, 113.1220, 113.1230, 113.1250, 113.1270, 113.1280, 113.1290

The Texas Commission on Environmental Quality (commission) proposes amendments to §§113.100, 113.110, 113.120, 113.130, 113.140, 113.170, 113.180, 113.190, 113.200, 113.220, 113.230, 113.240, 113.250, 113.260, 113.280, 113.290, 113.300, 113.320, 113.330, 113.340, 113.350, 113.360, 113.380, 113.390, 113.400, 113.410, 113.420, 113.430, 113.440, 113.460, 113.470, 113.480, 113.490, 113.530, 113.600, 113.610, 113.620, 113.640, 113.650, 113.660, 113.670, 113.690, 113.700, 113.710, 113.720, 113.730, 113.750, 113.770, 113.790, and 113.810. The commission also proposes new §§113.105, 113.106, 113.880, 113.890, 113.920, 113.940, 113.960, 113.980, 113.990, 113.1000, 113.1010, 113.1060, 113.1080, 113.1090, 113.1100, 113.1110, 113.1120, 113.1140, 113.1150, 113.1160, 113.1170, 113.1180, 113.1190, 113.1200, 113.1210, 113.1220, 113.1230, 113.1250, 113.1270, 113.1280, and 113.1290.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The proposed amendments to Chapter 113 would incorporate amendments that the United States Environmental Protection Agency (EPA) has made to the National Emission Standards for

Hazardous Air Pollutants (NESHAP) for Source Categories, under 40 Code of Federal Regulations (CFR) Part 63. These are technology-based standards commonly referred to as the maximum achievable control technology (MACT) standards. In addition, the proposed new sections would incorporate by reference 29 MACT standards and two general MACT requirements that have not been previously incorporated into Chapter 113. The EPA is developing these national standards to regulate emissions of hazardous air pollutants under the Federal Clean Air Act (FCAA), §112, as codified in 42 United States Code (USC), §7412.

Under federal law, affected industries are required to implement the MACT standards regardless of whether the commission or the EPA is the agency responsible for implementation. As MACT standards are promulgated or amended by the EPA, they are reviewed for compatibility with current commission regulations and policies. The commission then incorporates them into Chapter 113 through formal rulemaking procedures. After each MACT standard or amendment is adopted, the commission will seek formal delegation from the EPA under 40 CFR Part 63, Subpart E, which implements 42 USC, §7412(1). Upon delegation, the commission will be responsible for administering and enforcing the MACT requirements.

The commission proposes to incorporate amendments that the EPA has made to the 40 CFR Part 63 General Provisions and 49 of the federal MACT standards previously incorporated into the commission rules by updating the federal promulgation dates and Federal Register (FR) citations stated in the commission rules. The standards, along with their corresponding Chapter 113 sections and original incorporation date, are listed in the following table.

Figure 1: 30 TAC Chapter 113--Preamble

The commission also proposes to incorporate by reference, without change, 29 recent federal MACT standards not currently included in Chapter 113. In addition, the commission proposes to incorporate by reference, without change, general provisions related to FCAA, §112(j), as implemented by the EPA under 40 CFR §§63.50 - 63.56 (concerning Applicability, Definitions, Approval Process for New and Existing Emission Units, Application Content for Case-by-Case MACT Determinations, Preconstruction Review Procedures for New Emission Units, MACT Determinations for Emission Units Subject to Case-by-Case Determination of Equivalent Emission Limitations, and Requirements for Case-by-Case Determination of Equivalent Emission Limitations after Promulgation of a Subsequent MACT Standard). The commission also proposes to incorporate by reference, without change, 40 CFR Part 63 Subpart C, concerning the List of Hazardous Air Pollutants, Petitions Process, Lesser Quantity Designations, Source Category List. These additions are summarized in the following table.

Figure 2: 30 TAC Chapter 113--Preamble

SECTION BY SECTION DISCUSSION

Subchapter C: National Emission Standards for Hazardous Air Pollutants for Source Categories (FCAA, §112, 40 CFR 63)

Throughout the new and amended sections, where needed, the commission proposes to add "Part" to the titles of each section to conform to Texas Register guidelines. Additionally, throughout the proposed amendments, the commission is adding the word "Part" after the phrase "Code of Federal Regulations." Similarly, where the acronym "CFR" is used in existing sections, it is expanded to the Code of Federal Regulations. These amendments are proposed so that the rule language will conform to commission and Texas Register formatting and style standards.

Section 113.100--General Provisions (40 CFR 63, Subpart A)

The commission proposes to amend §113.100 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart A made by the EPA since April 12, 1999. During this time frame, EPA amended 40 CFR Part 63 Subpart A on June 10, 1999 (64 FR 31375), October 17, 2000 (65 FR 62215), March 12, 2001 (66 FR 14324), June 8, 2001 (66 FR 30822), July 3, 2001 (66 FR 35087), October 2, 2001 (66 FR 50124), January 29, 2002 (67 FR 4184), February 14, 2002 (67 FR 6986), February 27, 2002 (67 FR 9162), April 5, 2002 (67 FR 16595), June 10, 2002 (67 FR 39812), July 23, 2002 (67 FR 48262), December 4, 2002 (67 FR 72341), February 18, 2003 (68 FR 7713), April 21, 2003 (68 FR 19402), May 6, 2003 (68 FR 23898), May 20, 2003 (68 FR 27663), May 23, 2003 (68 FR 28619), May 27, 2003 (68 FR 28784), May 28, 2003 (68 FR 31615 and 31760), May 29, 2003 (68 FR 32189), May 30, 2003 (68 FR 32600), June 17, 2003 (68 FR 35792), November 13, 2003 (68 FR 64446), December 19, 2003 (68 FR 70965), January 2, 2004 (69 FR 157), February 3, 2004 (69 FR 5063), April 19, 2004 (69 FR 20990), April 22, 2004 (69 FR 21752), April 26, 2004 (69 FR 22623), and June 15, 2004 (69 FR 33506).

The June 10, 1999 amendments revised 40 CFR §63.14 by incorporating by reference several test methods associated with 40 CFR Part 63, Subparts AA and BB (MACTs for Phosphoric Acid Manufacturing and Phosphate Fertilizers Production, respectively).

The October 17, 2000 amendments included numerous editorial and technical changes to testing and monitoring provisions, as well as changes in the format of test methods and performance specifications. These amendments corrected typographical errors, corrected technical errors, updated test methods to more current versions, and removed or revised obsolete narrative material. The affected sections included 40 CFR §63.7, Performance Testing Requirements, §63.11, Control Device Requirements, and §63.14, Incorporations by Reference, as well as various individual test methods in 40 CFR Part 63, Appendix A.

The March 12, 2001 amendments granted Puget Sound Clean Air authority to implement and enforce its perchloroethylene dry cleaning regulation in place of the federal dry cleaning MACT, for area sources in Puget Sound Clean Air's jurisdiction. This action revised 40 CFR §63.14 by incorporating the Puget Sound regulations under 40 CFR §63.14(d)(2).

The June 8, 2001 amendments granted the Delaware Department of Natural Resources and Environmental Control authority to implement and enforce its accidental release prevention regulation in place of similar federal requirements. This action revised 40 CFR §63.14 by incorporating the Delaware regulations under 40 CFR §63.14(d)(3).

The July 3, 2001 amendments granted the New Jersey Department of Environmental Protection the authority to implement and enforce portions of the State of New Jersey's Toxic Catastrophe Prevention Act Program in place of the Federal Chemical Accident Prevention regulations, promulgated by the EPA under FCAA, §112(r), for all stationary sources with covered processes (''subject sources'') under New Jersey's jurisdiction. This

action revised 40 CFR §63.14 by incorporating the New Jersey Toxic Catastrophe Prevention Act Program under 40 CFR §63.14(d)(2).

The October 2, 2001 amendments approved certain Delaware Department of Natural Resources and Environmental Control regulations as equivalent to FCAA, §112(d) requirements as set forth in 40 CFR Part 63, Subparts A, M, N, and Q, respectively, for affected sources in the State of Delaware. This action revised 40 CFR §63.14 and §63.99, Delegated Federal Authorities, to reflect the incorporation and federal enforceability of Delaware Department of Natural Resources and Environmental Control's regulations under 40 CFR §63.14(d)(3).

The January 29, 2002 amendments revised 40 CFR §63.13, Addresses of State Air Pollution Control Agencies and EPA Regional Offices, by correcting the address listed for EPA Region III.

The February 14, 2002 amendments revised 40 CFR §63.14 by incorporating by reference American Society of Mechanical Engineers (ASME) standard numbers QHO 1 1994 and QHO 1a 1996 Addenda. This ASME standard is titled ''Standard for the Qualification and Certification of Hazardous Waste Incinerator Operators,'' and was added as 40 CFR §63.14(i) in conjunction with revisions to 40 CFR Part 63, Subpart EEE (MACT for Hazardous Waste Combustors).

The February 27, 2002 amendments revised 40 CFR §63.14 by adding and reserving §63.14(b)(19) and (20), and incorporating by reference American Society for Testing and Materials (ASTM) method D2099-00 under 40 CFR §63.14(b)(21). This test method was incorporated in conjunction with the addition of 40 CFR Part 63, Subpart TTTT (MACT for Leather Finishing Operations).

The April 5, 2002 amendments to 40 CFR Part 63, Subpart A contained numerous clarifications and changes as a result of settlement negotiations with six petitioners, and various public comments. Amendments to 40 CFR §63.5, Construction and Reconstruction, streamlined preconstruction review requirements, including a provision to allow state or local agencies to use preconstruction review procedures used for other purposes to satisfy the federal preconstruction review requirements in 40 CFR Part 63, Subpart A. The amendments to 40 CFR §63.6, Compliance with Standards and Maintenance Requirements, added a notification requirement applicable to revisions of startup, shutdown, and malfunction plans, and added more comprehensive reporting requirements associated with malfunction events. The amendments also added language to clarify that startup, shutdown, and malfunction plans are not by themselves part of a facility's operating permit, such that startup, shutdown, and malfunction plans can be revised without revising the operating permit. The amendments to 40 CFR §63.6 also revised compliance extension provisions, allowing affected sources greater flexibility to request compliance extensions. The amendments to 40 CFR §63.8, Monitoring Requirements, clarified the owner or operator's obligations with respect to the accessibility of readouts from monitoring systems required for compliance, to ensure that this information is readily accessible to inspectors. The amendments also revised and created numerous definitions under 40 CFR §63.2, Definitions, including revisions to the definition of "affected source" and a definition of "new affected source."

The June 10, 2002 amendments revised 40 CFR §63.14 by incorporating test methods to support 40 CFR Part 63, Subpart SSSS (MACT for Surface Coating of Metal Coil).

The July 23, 2002 amendments revised 40 CFR §63.14 by revising and adding test methods to support 40 CFR Part 63, Subpart NNNN (MACT for Surface Coating of Large Appliances).

The December 4, 2002 amendments revised 40 CFR §63.14 by incorporating a test method to support 40 CFR Part 63, Subpart JJJJ (MACT for Paper and Other Web Coating).

The February 18, 2003 amendments revised 40 CFR §63.14 by revising and updating test methods related to 40 CFR Part 63, Subpart MM (MACT for Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite, and Stand-Alone Semichemical Pulp Mills).

The April 21, 2003 amendments revised 40 CFR §63.14 by incorporating a test method (ASTM D6420-99) to support 40 CFR Part 63, Subpart WWWW (MACT for Reinforced Plastic Composites Production).

The May 6, 2003 amendments revised 40 CFR §63.8 by making an administrative correction to §63.8(f).

The May 20, 2003 amendments revised 40 CFR §63.14 by incorporating a test method associated with 40 CFR Part 63, Subpart FFFFF (MACT for Integrated Iron and Steel Manufacturing).

The May 23, 2003 amendments revised 40 CFR §63.14 by incorporating test methods to support 40 CFR Part 63, Subpart RRRR (MACT for Surface Coating of Metal Furniture).

The May 27, 2003 amendments revised 40 CFR §63.14 by incorporating test methods to support 40 CFR Part 63, Subpart PPPPP (MACT for Engine Test Cells/Stands).

The May 28, 2003 amendments (68 FR 31615) granted the New Hampshire Department of Environmental Services the authority to implement New Hampshire Department of Environmental Services' ''Management and Control of Asbestos Disposal Sites Not Operated After July 9, 1981'' rule in lieu of some sections of the federal asbestos MACT rule. This action revised 40 CFR §63.14 by incorporating the New Hampshire rules under §63.14(d)(5).

The May 28, 2003 amendments (68 FR 31760) revised 40 CFR §63.14 by incorporating test methods associated with 40 CFR Part 63, Subpart QQQQ (MACT for Surface Coating of Wood Building Products).

The May 29, 2003 amendments revised 40 CFR §63.14 by incorporating a test method to support 40 CFR Part 63, Subpart OOOO (MACT for Printing, Coating, and Dyeing of Fabrics and Other Textiles).

The May 30, 2003 amendments revised 40 CFR §63.6 requirements associated with minimization of emissions and startup, shutdown, and malfunction plans, and clarified that startup, shutdown, and malfunction plans must be submitted to the EPA or the permitting authority upon request. The May 30, 2003 amendments also provided for public access to startup, shutdown, and malfunction plans, to be implemented through the permitting authority or by direct on-site inspection of the plan. The amendments also streamlined reporting requirements associated with startup, shutdown, and malfunction events, and added rule language to ensure that deficient startup, shutdown, and malfunction plans are revised to address the specified deficiencies. The amendments also revised the 40 CFR §63.2 definition of "malfunction" to only include events that may cause emission limitations to be exceeded, and expanded the definition of "monitoring" to include data or information collected for purposes of verifying compliance with work practice standards.

The June 17, 2003 amendments revised 40 CFR §63.13 by correcting the address listed for EPA Region VII.

The November 13, 2003 amendments revised 40 CFR §63.14 by incorporating test methods to support 40 CFR Part 63, Subpart KKKK (MACT for Surface Coating of Metal Cans).

The December 19, 2003 amendments revised 40 CFR §63.14 by incorporating test methods to support 40 CFR Part 63, Subpart R (MACT for Gasoline Distribution Facilities).

The January 2, 2004 amendments revised 40 CFR §63.14 by incorporating test methods to support 40 CFR Part 63, Subpart MMMM (MACT for Surface Coating of Miscellaneous Metal Parts and Products).

The February 3, 2004 amendments revised 40 CFR §63.14 by incorporating test methods to support 40 CFR Part 63, Subpart EEEE (MACT for Organic Liquids Distribution (Non-Gasoline)).

The April 19, 2004 amendments revised 40 CFR §63.14 by incorporating test methods to support 40 CFR Part 63, Subpart PPPP (MACT for Surface Coating of Plastic Parts and Products).

The April 22, 2004 amendments implemented a federal Performance Track program, which allows eligible sources to qualify for a reduction in the frequency of reporting.

The April 26, 2004 amendments revised 40 CFR §63.14 by incorporating test methods to support 40 CFR Part 63, Subpart IIII (MACT for Surface Coating of Automobiles and Light-Duty Trucks).

The June 15, 2004 amendments revised 40 CFR §63.14 by incorporating test methods to support 40 CFR Part 63, Subpart ZZZZ (MACT for Stationary Reciprocating Internal Combustion Engines).

Section 113.105--Requirements for Control Technology Determinations for Major Sources in Accordance with Clean Air Act Section 112(j) (40 CFR 63, Subpart B, §§63.50 - 63.56)

The commission proposes new §113.105, which will incorporate by reference, without change, the final promulgated rules and all amendments to 40 CFR §§63.50 - 63.56 adopted by the EPA since May 20, 1994. Proposed §113.105 implements the requirements of FCAA, §112(j), by ensuring control of hazardous air pollutant emissions if the EPA should miss a scheduled MACT promulgation date. FCAA, §112(j) is commonly referred to as the "MACT hammer." If the EPA fails to promulgate an emission standard by the applicable FCAA, §112(j) deadline, major sources in that source category must submit to their respective state (or local) agencies a permit application to obtain source-specific case-by-case MACT. Conditions of the case-by-case MACT determination must be incorporated into the Title V operating permit.

Section 113.106--List of Hazardous Air Pollutants, Petitions Process, Lesser Quantity Designations, Source Category List (40 CFR 63, Subpart C)

The commission proposes new §113.106, which will incorporate by reference, without change, the final promulgated rules in 40 CFR Part 63, Subpart C adopted by the EPA on June 18, 1996 (61 FR 30823), as amended on August 2, 2000 (65 FR 47348) and November 29, 2004 (69 FR 69325). Incorporation of 40 CFR Part 63, Subpart C into Chapter 113 is necessary because Subpart C is the mechanism by which the list of hazardous air pollutants is updated. The June 18, 1996, amendments deleted caprolactam from the list of hazardous air pollutants and reserved sections 40 CFR §§63.61 - 63.69 for future use. The August 2, 2000, amendments altered the definition of glycol ether compounds referenced in the list of hazardous air pollutants. The November 29, 2004, amendments deleted ethylene glycol monobutyl ether from the list of hazardous air pollutants.

Section 113.110--Synthetic Organic Chemical Manufacturing Industry (40 CFR 63, Subpart F)

The commission proposes to amend §113.110 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart F made by the EPA since January 22, 2001. During this time frame, the EPA amended 40 CFR Part 63, Subpart F on June 23, 2003 (68 FR 37344). The June 23, 2003 amendments clarified which provisions of this MACT can be delegated to state, local, and tribal authorities, and identified provisions for which the EPA retains exclusive authority.

Section 113.120--Synthetic Organic Chemical Manufacturing Industry for Process Vents, Storage Vessels, Transfer Operations, and Wastewater (40 CFR 63, Subpart G)

The commission proposes to amend §113.120 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart G made by the EPA since January 22, 2001. During this time frame, the EPA amended 40 CFR Part 63, Subpart G on June 23, 2003 (68 FR 37344). The June 23, 2003 amendments clarified which provisions of this MACT can be delegated to state, local, and tribal authorities, and identified provisions for which the EPA retains exclusive authority.

Section 113.130--Organic Hazardous Air Pollutants for Equipment Leaks (40 CFR 63, Subpart H)

The commission proposes to amend §113.130 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart H made by the EPA since January 22, 2001. During this time frame, the EPA amended 40 CFR Part 63, Subpart H on June 23, 2003 (68 FR 37345). The June 23, 2003 amendments clarified which provisions of this MACT can be delegated to state, local, and tribal authorities, and identified provisions for which the EPA retains exclusive authority. The June 23, 2003 amendments also slightly rephrased some sections to more clearly separate delegable requirements from non-delegable requirements.

Section 113.140--Certain Processes Subject to the Negotiated Regulation for Equipment Leaks (40 CFR 63, Subpart I)

The commission proposes to amend §113.140 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart I made by the EPA since January 17, 1997. During this time frame, the EPA amended 40 CFR Part 63, Subpart I on June 23, 2003 (68 FR 37345). The June 23, 2003 amendments clarified which provisions of this MACT can be delegated to state, local, and tribal authorities, and identified provisions for which the EPA retains exclusive authority.

Section 113.170--Coke Oven Batteries (40 CFR 63, Subpart L)

The commission proposes to amend §113.170 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart L made by the EPA since October 17, 2000. During this time frame, the EPA amended 40 CFR Part 63, Subpart L on June 23, 2003 (68 FR 37345). The June 23, 2003 amendments clarified which provisions of this MACT can be delegated

to state, local, and tribal authorities, and identified provisions for which the EPA retains exclusive authority. The June 23, 2003 amendments also rephrased some sections to more clearly separate delegable requirements from non-delegable requirements, and to provide language more consistent with the revised delegation of authority provisions.

Section 113.180--Perchloroethylene Dry Cleaning Facilities (40 CFR 63, Subpart M)

The commission proposes to amend §113.180 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart M made by the EPA since December 14, 1999. During this time frame, the EPA amended 40 CFR Part 63, Subpart M on June 23, 2003 (68 FR 37347). The June 23, 2003 amendments clarified which provisions of this MACT can be delegated to state, local, and tribal authorities, and identified provisions for which the EPA retains exclusive authority.

Section 113.190--Chromium Emissions from Hard and Decorative Chromium Electroplating and Chromium Anodizing Tanks (40 CFR 63, Subpart N)

The commission proposes to amend §113.190 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart N made by the EPA since December 14, 1999. During this time frame, the EPA amended 40 CFR Part 63, Subpart N on June 23, 2003 (68 FR 37347) and on July 19, 2004 (69 FR 42894). The June 23, 2003 amendments clarified which provisions of this MACT can be delegated to state, local, and tribal authorities, and identified provisions for which the EPA retains exclusive authority. The June 23, 2003 amendments also rephrased some sections to more clearly separate delegable requirements from non-delegable requirements, and to provide language more consistent with the revised delegation of authority provisions. The July 19, 2004 amendments addressed five technical areas: 1) the use of fume suppressants for controlling chromium emissions from hard chromium electroplating tanks; 2) a revised surface tension limit for decorative chromium electroplating tanks when measuring surface tension with a tensiometer; 3) an alternate emission limit for hard chromium electroplating tanks equipped with enclosing hoods; 4) revised definitions for chromium electroplating and chromium anodizing tanks; and 5) the pressure drop monitoring requirement for composite mesh pad control systems. The July 19, 2004 amendments affected the emission limits, definitions, compliance provisions, and performance testing requirements of this MACT standard.

Section 113.200--Ethylene Oxide Emissions Standards for Sterilization Facilities (40 CFR 63, Subpart O)

The commission proposes to amend §113.200 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart O made by the EPA since November 2, 2001. During this time frame, the EPA amended 40 CFR Part 63, Subpart O on June 23, 2003 (68 FR 37348). The June 23, 2003 amendments clarified which provisions of this MACT can be delegated to state, local, and tribal authorities, and identified provisions for which the EPA retains exclusive authority.

Section 113.220--Industrial Process Cooling Towers (40 CFR 63, Subpart Q)

The commission proposes to amend §113.220 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart Q made by the EPA since July 23, 1998. During this time frame, the EPA amended 40 CFR Part 63, Subpart Q on June 23, 2003 (68 FR 37348). The June 23, 2003 amendments clarified which provisions of this MACT can be delegated to state, local, and tribal authorities, and identified provisions for which the EPA retains exclusive authority.

Section 113.230--Gasoline Distribution Facilities (40 CFR 63, Subpart R)

The commission proposes to amend §113.230 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart R made by the EPA since January 16, 1998. During this time frame, the EPA amended 40 CFR Part 63, Subpart R on June 23, 2003 (68 FR 37348) and December 19, 2003 (68 FR 70965). The June 23, 2003 amendments clarified which provisions of this MACT can be delegated to state, local, and tribal authorities, and identified provisions for which the EPA retains exclusive authority. The December 19, 2003 amendments clarified testing, monitoring, and recordkeeping requirements, and added additional flexibility to testing and recordkeeping requirements.

Section 113.240--Pulp and Paper Industry (40 CFR 63, Subpart S)

The commission proposes to amend §113.240 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart S made by the EPA since May 14, 2001. During this time frame, the EPA amended 40 CFR Part 63, Subpart S on June 27, 2001 (66 FR 34124), October 16, 2001 (66 FR 52538), and June 23, 2003 (68 FR 37348). The June 27, 2001 amendments implemented site-specific emission control requirements for a pulp mill facility in Georgia. The October 16, 2001 amendments contained technical corrections to the June 27, 2001 amendments. The June 23, 2003 amendments clarified which provisions of this MACT can be delegated to state, local, and tribal authorities, and identified provisions for which the EPA retains exclusive authority. The June 23, 2003 amendments also rephrased some sections to more clearly separate delegable requirements from non-delegable requirements, and to provide language more consistent with the revised delegation of authority provisions.

Section 113.250--Halogenated Solvent Cleaning (40 CFR 63, Subpart T)

The commission proposes to amend §113.250 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart T made by the EPA since September 8, 2000. During this time frame, the EPA amended 40 CFR Part 63, Subpart T on June 23, 2003 (68 FR 37349). The June 23, 2003 amendments clarified which provisions of this MACT can be delegated to state, local, and tribal authorities, and identified provisions for which the EPA retains exclusive authority. The June 23, 2003 amendments also rephrased some sections to more clearly separate delegable requirements from non-delegable requirements, and to provide language more consistent with the revised delegation of authority provisions.

Section 113.260--Group I Polymers and Resins (40 CFR 63, Subpart U)

The commission proposes to amend §113.260 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart U made by the EPA since July 16, 2001. During this time frame, the EPA amended 40 CFR Part 63, Subpart U on June 23, 2003 (68 FR 37349). The June 23, 2003 amendments clarified which provisions of this MACT can be delegated to state, local, and tribal authorities, and identified provisions for which the EPA retains exclusive authority.

Section 113.280--Epoxy Resins Production and Non-Nylon Polyamides Production (40 CFR 63, Subpart W)

The commission proposes to amend §113.280 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart W made by the EPA since May 8, 2000. During this time frame, 40 CFR Part 63, Subpart W was amended on June 23, 2003 (68 FR 37350). The June 23, 2003 amendments clarified which provisions of this MACT can be delegated to state, local, and tribal authorities, and identified provisions for which the EPA retains exclusive authority.

Section 113.290--Secondary Lead Smelting (40 CFR 63, Subpart X)

The commission proposes to amend §113.290 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart X made by the EPA since December 14, 1999. During this time frame, the EPA amended 40 CFR Part 63, Subpart X on June 23, 2003 (68 FR 37350). The June 23, 2003 amendments clarified which provisions of this MACT can be delegated to state, local, and tribal authorities, and identified provisions for which the EPA retains exclusive authority. The June 23, 2003 amendments also rephrased some sections to provide language more consistent with the revised delegation of authority provisions.

Section 113.300--Marine Vessel Loading (40 CFR 63, Subpart Y)

The commission proposes to amend §113.300 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart Y made by the EPA since September 19, 1995. During this time frame, the EPA amended 40 CFR Part 63, Subpart Y on June 23, 2003 (68 FR 37350). The June 23, 2003 amendments clarified which provisions of this MACT can be delegated to state, local, and tribal authorities, and identified provisions for which the EPA retains exclusive authority. The June 23, 2003 amendments also rephrased some sections to more clearly separate delegable requirements from non-delegable requirements, and to provide language more consistent with the revised delegation of authority provisions.

Section 113.320--Phosphoric Acid Manufacturing Plants (40 CFR 63, Subpart AA)

The commission proposes to amend §113.320 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart AA made by the EPA since June 13, 2002. During this time frame, 40 CFR Part 63, Subpart AA was amended on June 23, 2003 (68 FR 37351). The June 23, 2003 amendments clarified which provisions of this MACT can be delegated to state, local, and tribal authorities, and identified provisions for which the EPA retains exclusive authority.

Section 113.330--Phosphate Fertilizers Production Plants (40 CFR 63, Subpart BB)

The commission proposes to amend §113.330 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart BB made by the EPA since June 13, 2002. During this time frame, 40 CFR Part 63, Subpart BB was amended on June 23, 2003 (68 FR 37351). The June 23, 2003 amendments clarified which provisions of this MACT can be delegated to state, local, and tribal authorities, and identified provisions for which the EPA retains exclusive authority.

Section 113.340--Petroleum Refineries (40 CFR 63, Subpart CC)

The commission proposes to amend §113.340 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart CC made by the EPA since May 25, 2001. During this time frame, the EPA amended 40 CFR Part 63, Subpart CC on June 23, 2003 (68 FR 37351). The June 23, 2003 amendments clarified which provisions of this MACT can be delegated to state, local, and tribal authorities, and identified provisions for which the EPA retains exclusive authority.

Section 113.350--Off-Site Waste and Recovery Operations (40 CFR 63, Subpart DD)

The commission proposes to amend §113.350 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart DD made by the EPA since January 8, 2001. During this time frame, 40 CFR Part 63, Subpart DD was amended on June 23, 2003 (68 FR 37351). The June 23, 2003 amendments clarified which provisions of this MACT can be delegated to state, local, and tribal authorities, and identified provisions for which the EPA retains exclusive authority. The June 23, 2003 amendments also rephrased some sections to more clearly separate delegable requirements from non-delegable requirements, and to provide language more consistent with the revised delegation of authority provisions.

Section 113.360--Magnetic Tape Manufacturing Operations (40 CFR 63, Subpart EE)

The commission proposes to amend §113.360 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart EE made by the EPA since April 9, 1999. During this time frame, the EPA amended 40 CFR Part 63, Subpart EE on June 23, 2003 (68 FR 37352). The June 23, 2003 amendments clarified which provisions of this MACT can be delegated to state, local, and tribal authorities, and identified provisions for which the EPA retains exclusive authority.

Section 113.380--Aerospace Manufacturing and Rework Facilities (40 CFR 63, Subpart GG)

The commission proposes to amend §113.380 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart GG made by the EPA since December 8, 2000. During this time frame, the EPA amended 40 CFR Part 63, Subpart GG on June 23, 2003 (68 FR 37352). The June 23, 2003 amendments clarified which provisions of this MACT can be delegated to state, local, and tribal authorities, and identified provisions for which the EPA retains exclusive authority.

Section 113.390--Oil and Natural Gas Production Facilities (40 CFR 63, Subpart HH)

The commission proposes to amend §113.390 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart HH made by the EPA since June 29, 2001. During this time frame, 40 CFR Part 63, Subpart HH was amended on June 23, 2003 (68 FR 37353). The June 23, 2003 amendments clarified which provisions of this MACT can be delegated to state, local, and tribal authorities, and identified provisions for which the EPA retains exclusive authority. The June 23, 2003 amendments also rephrased some sections to more clearly separate delegable requirements from non-delegable requirements, and to provide language more consistent with the revised delegation of authority provisions.

Section 113.400--Shipbuilding and Ship Repair (Surface Coating) (40 CFR 63, Subpart II)

The commission proposes to amend §113.400 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart II made by the EPA since October 17, 2000. During this time frame, 40 CFR Part 63, Subpart II was amended on June 23, 2003 (68 FR 37353). The June 23, 2003 amendments clarified which provisions of this MACT can be delegated to state, local, and tribal authorities, and identified provisions for which the EPA retains exclusive authority.

Section 113.410--Wood Furniture Manufacturing Operations (40 CFR 63, Subpart JJ)

The commission proposes to amend §113.410 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart JJ made by the EPA since December 28, 1998. During this time frame, 40 CFR Part 63, Subpart JJ was amended on June 23, 2003 (68 FR 37353). The June 23, 2003 amendments clarified which provisions of this MACT can be delegated to state, local, and tribal authorities, and identified provisions for which the EPA retains exclusive authority. The June 23, 2003 amendments also rephrased some sections to more clearly separate delegable requirements from non-delegable requirements, and to provide language more consistent with the revised delegation of authority provisions.

Section 113.420--Printing and Publishing (40 CFR 63, Subpart KK)

The commission proposes to amend §113.420 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart KK made by the EPA since May 30, 1996. During this time frame, 40 CFR Part 63, Subpart KK was amended on June 23, 2003 (68 FR 37354). The June 23, 2003 amendments clarified which provisions of this MACT can be delegated to state, local, and tribal authorities, and identified provisions for which the EPA retains exclusive authority.

Section 113.430--Primary Aluminum Reduction Plants (40 CFR 63, Subpart LL)

The commission proposes to amend §113.430 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart LL made by the EPA since October 7, 1997. During this time frame, 40 CFR Part 63, Subpart LL was amended on June 23, 2003 (68 FR 37354). The June 23, 2003 amendments clarified which provisions of this MACT can be delegated to state, local, and tribal authorities, and identified provisions for which the EPA retains exclusive authority.

Section 113.440--Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite, and Stand-Alone Semichemical Pulp Mills (40 CFR 63, Subpart MM)

The commission proposes to amend §113.440 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart MM made by the EPA since August 6, 2001. During this time frame, 40 CFR Part 63, Subpart MM was amended on February 18, 2003 (68 FR 7713), July 18, 2003 (68 FR 42605), August 5, 2003 (68 FR 46108), December 5, 2003 (68 FR 67954), and May 6, 2004 (69 FR 25323). The February 18, 2003 amendments clarified and consolidated monitoring and testing requirements and added a site-specific alternative standard for a facility in the State of Washington. The July 18, 2003 amendments deleted certain provisions previously adopted on February 18, 2003, which were the subject of adverse comments, and corrected a typographical error and a cross-referencing error. The August 5, 2003 amendments extended the compliance date for a site-specific emission control project in Virginia. The December 5, 2003 amendments implemented technical corrections to restore monitoring and recordkeeping provisions inadvertently deleted by the July 18, 2003 amendments, and added clarifying language which was inadvertently omitted from an emission standard in the January 12, 2001 final rule. The May 6, 2004 amendments corrected cross-references in order to be consistent with changes made in the February 18, 2003 amendments.

Section 113.460--Tanks-Level 1 (40 CFR 63, Subpart OO)

The commission proposes to amend §113.460 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart OO made by the EPA since July 20, 1999. During this time frame, 40 CFR Part 63, Subpart OO was amended on June 23, 2003 (68 FR 37354). The June 23, 2003 amendments clarified which provisions of this MACT can be delegated to state, local, and tribal authorities, and identified provisions for which the EPA retains exclusive authority.

Section 113.470--Containers (40 CFR 63, Subpart PP)

The commission proposes to amend §113.470 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart PP made by the EPA since January 8, 2001. During this time frame, 40 CFR Part 63, Subpart PP was amended on June 23, 2003 (68 FR 37355). The June 23, 2003 amendments clarified which provisions of this MACT can be delegated to state, local, and tribal authorities, and identified provisions for which the EPA retains exclusive authority.

Section 113.480--Surface Impoundments (40 CFR 63, Subpart QQ)

The commission proposes to amend §113.480 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart QQ made by the EPA since July 20, 1999. During this time frame, 40 CFR Part 63, Subpart QQ was amended on June 23, 2003 (68 FR 37355). The June 23, 2003 amendments clarified which provisions of this MACT can be delegated to state, local, and tribal authorities, and identified provisions for which the EPA retains exclusive authority.

Section 113.490--Individual Drain Systems (40 CFR 63, Subpart RR)

The commission proposes to amend §113.490 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart RR made by the EPA since January 8, 2001. During this time frame, 40 CFR Part 63, Subpart RR was amended on June 23, 2003 (68 FR 37355). The June 23, 2003 amendments clarified which provisions of this MACT can be delegated to state, local, and tribal authorities, and identified provisions for which the EPA retains exclusive authority.

Section 113.530--Oil-Water Separators and Organic-Water Separators (40 CFR 63, Subpart VV)

The commission proposes to amend §113.530 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart VV made by the EPA since January 8, 2001. During this time frame, 40 CFR Part 63, Subpart VV was amended on June 23, 2003 (68 FR 37355). The June 23, 2003 amendments clarified which provisions of this MACT can be delegated to state, local, and tribal authorities, and identified provisions for which the EPA retains exclusive authority.

Section 113.600--Steel Pickling-HCl Process Facilities and Hydrochloric Acid Regeneration Plants (40 CFR 63, Subpart CCC)

The commission proposes to amend §113.600 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart CCC made by the EPA since June 22, 1999. During this time frame, 40 CFR Part 63, Subpart CCC was amended on June 23, 2003 (68 FR 37356). The June 23, 2003 amendments clarified which provisions of this MACT can be delegated to state, local, and tribal authorities, and identified provisions for which the EPA retains exclusive authority.

Section 113.610--Mineral Wool Production (40 CFR 63, Subpart DDD)

The commission proposes to amend §113.610 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart DDD made by the EPA since June 1, 1999. During this time frame, 40 CFR Part 63, Subpart DDD was amended on June 23, 2003 (68 FR 37356). The June 23, 2003 amendments clarified which provisions of this MACT can be delegated to state, local, and tribal authorities, and identified provisions for which the EPA retains exclusive authority.

Section 113.620--Hazardous Waste Combustors (40 CFR 63, Subpart EEE)

The commission proposes to amend §113.620 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart EEE made by the EPA since December 19, 2002. During this time frame, the EPA amended 40 CFR Part 63, Subpart EEE on June 23, 2003 (68 FR 37356). The June 23, 2003 amendments clarified which provisions of this MACT can be delegated to state, local, and tribal authorities, and identified provisions for which the EPA retains exclusive authority. The proposed rule also corrects two typographical errors in §113.620.

Section 113.640--Pharmaceuticals Production (40 CFR 63, Subpart GGG)

The commission proposes to amend §113.640 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart GGG made by the EPA since April 2, 2002. During this time frame, the EPA amended 40 CFR Part 63, Subpart GGG on June 23, 2003 (68 FR 37356). The June 23, 2003 amendments clarified which provisions of this MACT can be delegated to state, local, and tribal authorities, and identified provisions for which the EPA retains exclusive authority.

Section 113.650--Natural Gas Transmission and Storage Facilities (40 CFR 63, Subpart HHH)

The commission proposes to amend §113.650 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart HHH made by the EPA since February 22, 2002. During this time frame, the EPA amended 40 CFR Part 63, Subpart HHH on June 23, 2003 (68 FR 37357). The June 23, 2003 amendments clarified which provisions of this MACT can be delegated to state, local, and tribal authorities, and identified provisions for which the EPA retains exclusive authority. The June 23, 2003 amendments also restructured some sections to more clearly separate delegable requirements from non-delegable requirements, and to provide language more consistent with the revised delegation of authority provisions.

Section 113.660--Flexible Polyurethane Foam Production (40 CFR 63, Subpart III)

The commission proposes to amend §113.660 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart III made by the EPA since October 7, 1998. During this time frame, the EPA amended 40 CFR Part 63, Subpart III on June 23, 2003 (68 FR 37357). The June 23, 2003 amendments clarified which provisions of this MACT can be delegated to state, local, and tribal authorities, and identified provisions for which the EPA retains exclusive authority.

Section 113.670--Group IV Polymers and Resins (40 CFR 63, Subpart JJJ)

The commission proposes to amend §113.670 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart JJJ made by the EPA since August 6, 2001. During this time frame, the EPA amended 40 CFR Part 63, Subpart JJJ on June 23, 2003 (68 FR 37357), with corrections published on June 2, 2004 (69 FR 31008). The June 23, 2003 amendments clarified which provisions of this MACT can be delegated to state, local, and tribal authorities, and identified provisions for which the EPA retains exclusive authority. The June 2, 2004 correction modified 40 CFR §63.1331, Equipment Leak Provisions.

Section 113.690--Portland Cement Manufacturing Industry (40 CFR 63, Subpart LLL)

The commission proposes to amend §113.690 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart LLL made by the EPA since December 6, 2002. During this time frame, the EPA amended 40 CFR Part 63, Subpart LLL on June 23, 2003 (68 FR 37359). The June 23, 2003 amendments clarified which provisions of this MACT can be delegated to state, local, and tribal authorities, and identified provisions for which the EPA retains exclusive authority.

Section 113.700--Pesticide Active Ingredient Production (40 CFR 63, Subpart MMM)

The commission proposes to amend §113.700 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart MMM made by the EPA since September 20, 2002. During this time frame, the EPA amended 40 CFR Part 63, Subpart MMM on June 23, 2003 (68 FR 37358). The June 23, 2003 amendments clarified which provisions of this MACT can be delegated to state, local, and tribal authorities, and identified provisions for which the EPA retains exclusive authority. The June 23, 2003 amendments also restructured some sections to more clearly separate delegable requirements from non-delegable requirements, and to provide language more consistent with the revised delegation of authority provisions.

Section 113.710--Wool Fiberglass Manufacturing (40 CFR 63, Subpart NNN)

The commission proposes to amend §113.710 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart NNN made by the EPA since June 14, 1999. During this time frame, the EPA amended 40 CFR Part 63, Subpart NNN on June 23, 2003 (68 FR 37358). The June 23, 2003 amendments clarified which provisions of this MACT can be delegated to state, local, and tribal authorities, and identified provisions for which the EPA retains exclusive authority.

Section 113.720--Manufacture of Amino/Phenolic Resins (40 CFR 63, Subpart OOO)

The commission proposes to amend §113.720 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart OOO made by the EPA since February 22, 2000. During this time frame, the EPA amended 40 CFR Part 63, Subpart OOO on June 23, 2003 (68 FR 37359). The June 23, 2003

amendments clarified which provisions of this MACT can be delegated to state, local, and tribal authorities, and identified provisions for which the EPA retains exclusive authority.

Section 113.730--Polyether Polyols Production (40 CFR 63, Subpart PPP)

The commission proposes to amend §113.730 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart PPP made by the EPA since May 8, 2000. During this time frame, the EPA amended 40 CFR Part 63, Subpart PPP on June 23, 2003 (68 FR 37359), with corrections published on July 1, 2004 (69 FR 39862). The June 23, 2003 amendments clarified which provisions of this MACT can be delegated to state, local, and tribal authorities, and identified provisions for which the EPA retains exclusive authority. The July 1, 2004 corrections modified several table headings and corrected Equation 11 in 40 CFR §63.1427.

Section 113.750--Secondary Aluminum Production (40 CFR 63, Subpart RRR)

The commission proposes to amend §113.750 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart RRR adopted by the EPA since December 30, 2002. During this time frame, the EPA amended 40 CFR Part 63, Subpart RRR on June 23, 2003 (68 FR 37359). The June 23, 2003 amendments clarified which provisions of this MACT can be delegated to state, local, and tribal authorities, and identified provisions for which the EPA retains exclusive authority.

Section 113.770--Primary Lead Smelting (40 CFR 63, Subpart TTT)

The commission proposes to amend §113.770 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart TTT adopted by the EPA since June 4, 1999. During this time frame, the EPA amended 40 CFR Part 63, Subpart TTT on June 23, 2003 (68 FR 37360). The June 23, 2003 amendments clarified which provisions of this MACT can be delegated to state, local, and tribal authorities, and identified provisions for which the EPA retains exclusive authority.

Section 113.790--Publicly Owned Treatment Works (40 CFR 63, Subpart VVV)

The commission proposes to amend §113.790 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart VVV made by the EPA since October 21, 2002. During this time frame, the EPA amended 40 CFR Part 63, Subpart VVV on June 23, 2003 (68 FR 37360). The June 23, 2003 amendments clarified which provisions of this MACT can be delegated to state, local, and tribal authorities, and identified provisions for which the EPA retains exclusive authority.

Section 113.810--Ferroalloys Production: Ferromanganese and Silicomanganese (40 CFR 63, Subpart XXX)

The commission proposes to amend §113.810 by incorporating by reference, without change, all amendments to 40 CFR Part 63, Subpart XXX made by the EPA since March 22, 2001. During this time frame, the EPA amended 40 CFR Part 63, Subpart XXX on June 23, 2003 (68 FR 37360). The June 23, 2003 amendments clarified which provisions of this MACT can be delegated to state, local, and tribal authorities, and identified provisions for which the EPA retains exclusive authority.

Section 113.880--Organic Liquids Distribution (Non-Gasoline) (40 CFR 63, Subpart EEEE)

The commission proposes new §113.880, which will incorporate by reference, without change, the final promulgated rules in 40 CFR Part 63, Subpart EEEE adopted by the EPA on February 3, 2004 (69 FR 5063). This MACT standard applies to new and existing non-gasoline organic liquid distribution operations that are located at, or are part of, a major source of hazardous air pollutant emissions. Hazardous air pollutants emitted from these operations include: benzene, ethylbenzene, toluene, vinyl chloride, and a large number of other organic hazardous air pollutants.

Section 113.890--Miscellaneous Organic Chemical Manufacturing (40 CFR 63, Subpart FFFF)

The commission proposes new §113.890, which will incorporate by reference, without change, the final promulgated rules in 40 CFR Part 63, Subpart FFFF adopted by the EPA on November 10, 2003 (68 FR 63888). This MACT standard applies to new and existing miscellaneous organic chemical manufacturing process units, wastewater treatment and conveyance systems, transfer operations, and associated ancillary equipment. This standard applies to process units that are located at, or are part of, a major source of hazardous air pollutant emissions. Hazardous air pollutant emissions from these operations include: toluene, methanol, xylenes, hydrogen chloride, and methylene chloride.

Section 113.920--Surface Coating of Automobiles and Light-Duty Trucks (40 CFR 63, Subpart IIII)

The commission proposes new §113.920, which will incorporate by reference, without change, the final promulgated rules in 40 CFR Part 63, Subpart IIII adopted by the EPA on April 26, 2004 (69 FR 22623). This MACT standard applies to new and existing auto and light-duty truck surface coating operations that are a major source, are located at a major source, or are part of a major source of hazardous air pollutant emissions. The primary hazardous air pollutants emitted by these facilities include: toluene, xylenes, glycol ethers, methyl ethyl ketone, methyl isobutyl ketone, ethylbenzene, and methanol.

Section 113.940--Surface Coating of Metal Cans (40 CFR 63, Subpart KKKK)

The commission proposes new §113.940, which will incorporate by reference, without change, the final promulgated rules in 40 CFR Part 63, Subpart KKKK adopted by the EPA on November 13, 2003 (68 FR 64446). This MACT standard applies to new and existing metal can surface coating operations that are a major source, are located at a major source, or are part of a major source of hazardous air pollutants. The hazardous air pollutants emitted by these facilities include: certain glycol ethers, xylenes, hexane, methyl isobutyl ketone (MIBK), and methyl ethyl ketone (MEK).

Section 113.960--Surface Coating of Miscellaneous Metal Parts and Products (40 CFR 63, Subpart MMMM)

The commission proposes new §113.960, which will incorporate by reference, without change, the final promulgated rules in 40 CFR Part 63, Subpart MMMM adopted by the EPA on January 2, 2004 (69 FR 157), as amended through April 26, 2004 (69 FR 22660). This MACT standard applies to new and existing miscellaneous metal parts and products surface coating operations located at major sources of hazardous air pollutants. Hazardous air pollutants emitted from these facilities include: xylenes, toluene, methyl ethyl ketone, phenol, cresols/cresylic acid, glycol ethers, styrene, methyl isobutyl ketone, and ethyl

benzene. The April 26, 2004 amendments clarified the interaction of 40 CFR Part 63, Subpart MMMM with Subpart IIII, concerning Surface Coating of Automobiles and Light-Duty Trucks.

Section 113.980--Printing, Coating, and Dyeing of Fabrics and Other Textiles (40 CFR 63, Subpart OOOO)

The commission proposes new §113.980, which will incorporate by reference, without change, the final promulgated rules in 40 CFR Part 63, Subpart OOOO adopted by the EPA on May 29, 2003 (68 FR 32189). This MACT standard applies to new and existing operations involving printing, coating, slashing, dyeing, or finishing of fabric and other textiles. This standard applies to operations that are a major source, are located at a major source, or are part of a major source of hazardous air pollutants. Hazardous air pollutant emissions from these operations include, but are not limited to: toluene, methyl ethyl ketone, methanol, xylenes, methyl isobutyl ketone, methylene chloride, trichloroethylene, n-hexane, glycol ethers, and formaldehyde.

Section 113.990--Surface Coating of Plastic Parts and Products (40 CFR 63, Subpart PPPP)

The commission proposes new §113.990, which will incorporate by reference, without change, the final promulgated rules in 40 CFR Part 63, Subpart PPPP adopted by the EPA on April 19, 2004 (69 FR 20990), as amended through April 26, 2004 (69 FR 22660). This MACT standard applies to new and existing plastic parts and products surface coating operations that are a major source, are located at a major source, or are part of a major source of hazardous air pollutants. Hazardous air pollutant emissions from these operations include: methyl ethyl ketone, methyl isobutyl ketone, toluene, certain glycol ethers, and xylenes. The April 26, 2004 amendments clarified the interaction of 40 CFR Part 63, Subpart PPPP with Subpart IIII, concerning Surface Coating of Automobiles and Light-Duty Trucks.

Section 113.1000--Surface Coating of Wood Building Products (40 CFR 63, Subpart QQQQ)

The commission proposes new §113.1000, which will incorporate by reference, without change, the final promulgated rules in 40 CFR Part 63, Subpart QQQQ adopted by the EPA on May 28, 2003 (68 FR 31760). This MACT standard applies to new and existing operations involving surface coating of wood building products. This standard applies to operations that are a major source, are located at a major source, or are part of a major source of hazardous air pollutants. Hazardous air pollutant emissions from these operations include, but are not limited to: xylenes, toluene, ethyl benzene, methyl ethyl ketone, methyl isobutyl ketone, methanol, styrene, and formaldehyde.

Section 113.1010--Surface Coating of Metal Furniture (40 CFR 63, Subpart RRRR)

The commission proposes new §113.1010, which will incorporate by reference, without change, the final promulgated rules in 40 CFR Part 63, Subpart RRRR adopted by the EPA on May 23, 2003 (68 FR 28619). This MACT standard applies to new and existing operations involving surface coating of metal furniture. This standard applies to operations that are a major source, are located at a major source, or are part of a major source of hazardous air pollutants. Hazardous air pollutant emissions from these operations include, but are not limited to: xylenes, toluene, certain glycol ethers, ethylbenzene, and methyl ethyl ketone.

Section 113.1060--Reinforced Plastic Composites Production (40 CFR 63, Subpart WWWW)

The commission proposes new §113.1060, which will incorporate by reference, without change, the final promulgated rules in 40 CFR Part 63, Subpart WWWW adopted by the EPA on April 21, 2003 (68 FR 19402). This MACT standard applies to new and existing reinforced plastic composites production facilities that are located at a major source of hazardous air pollutant emissions. Hazardous air pollutant emissions from these operations include, but are not limited to: styrene, methyl methacrylate, and methylene chloride.

Section 113.1080--Stationary Combustion Turbines (40 CFR 63, Subpart YYYY)

The commission proposes new §113.1080, which will incorporate by reference, without change, the final promulgated rules in 40 CFR Part 63, Subpart YYYY adopted by the EPA on March 5, 2004 (69 FR 10537), as amended through August 18, 2004 (69 FR 51188). This MACT standard applies to new and existing stationary combustion turbines located at a major source of hazardous air pollutant emissions. Hazardous air pollutant emissions from stationary combustion turbines include: formaldehyde, toluene, benzene, and acetaldehyde. The August 18, 2004 amendments stayed the effectiveness of emission limitations and operating limitations for lean premix gas-fired turbines and diffusion flame gas-fired turbines.

Section 113.1090--Stationary Reciprocating Internal Combustion Engines (40 CFR 63, Subpart ZZZZ)

The commission proposes new §113.1090, which will incorporate by reference, without change, the final promulgated rules in 40 CFR Part 63, Subpart ZZZZ adopted by the EPA on June 15, 2004 (69 FR 33506). This MACT standard applies to new and existing stationary reciprocating internal combustion engines located at a major source of hazardous air pollutant emissions. Hazardous air pollutant emissions from stationary reciprocating internal combustion engines include: formaldehyde, acrolein, toluene, methanol, and acetaldehyde.

Section 113.1100--Lime Manufacturing Plants (40 CFR 63, Subpart AAAAA)

The commission proposes new §113.1100, which will incorporate by reference, without change, the final promulgated rules in 40 CFR Part 63, Subpart AAAAA adopted by the EPA on January 5, 2004 (69 FR 416). This MACT standard applies to new and existing lime manufacturing units, including lime kilns, lime coolers, and various types of processed stone handling operations. The standard applies to lime manufacturing plants that are major sources, co-located at major sources, or are part of a major source. However, this MACT standard does not apply to lime manufacturing plants that are located at pulp and paper mills or beet sugar factories. Hazardous air pollutant emissions from lime manufacturing plants include, but are not limited to: hydrogen chloride, antimony, arsenic, beryllium, cadmium, chromium, lead, manganese, mercury, nickel, and selenium.

Section 113.1110--Semiconductor Manufacturing (40 CFR 63, Subpart BBBBB)

The commission proposes new §113.1110, which will incorporate by reference, without change, the final promulgated rules in 40 CFR Part 63, Subpart BBBBB adopted by the EPA on May 22, 2003 (68 FR 27925). This MACT standard applies to new and existing semiconductor manufacturing operations that are a major source of hazardous air pollutants, are located at a major source of hazardous air pollutants, or are part of a major source of hazardous air pollutant emissions. Hazardous air

pollutant emissions from these operations include, but are not limited to: hydrochloric acid, hydrogen fluoride, methanol, glycol ethers, and xylenes.

Section 113.1120--Coke Ovens: Pushing, Quenching, and Battery Stacks (40 CFR 63, Subpart CCCCC)

The commission proposes new §113.1120, which will incorporate by reference, without change, the final promulgated rules in 40 CFR Part 63, Subpart CCCCC adopted by the EPA on April 14, 2003 (68 FR 18025), with corrections published on April 22, 2003 (68 FR 19885). This MACT standard applies to each new or existing coke oven battery at a plant that is a major source of hazardous air pollutant emissions. Hazardous air pollutant emissions from these operations include, but are not limited to: polycyclic organic matter, benzene, and toluene. The corrections published on April 22, 2003 altered an incorrect compliance date in 40 CFR §63.7283(b), When Do I Have to Comply with this Subpart.

Section 113.1140--Iron and Steel Foundries (40 CFR 63, Subpart EEEEE)

The commission proposes new §113.1140, which will incorporate by reference, without change, the final promulgated rules in 40 CFR Part 63, Subpart EEEEE adopted by the EPA on April 22, 2004 (69 FR 21923). This MACT standard applies to new and existing iron and steel foundries, which are (or are located at) a major source of hazardous air pollutants. Hazardous air pollutant emissions from these operations include: metallic compounds such as lead, manganese, cadmium, chromium, and nickel; and numerous organic compounds such as acetophenone, benzene, cumene, dibenzofurans, dioxins, formaldehyde, methanol, naphthalene, phenol, pyrene, toluene, triethylamine, and xylenes.

Section 113.1150--Integrated Iron and Steel Manufacturing Facilities (40 CFR 63, Subpart FFFFF)

The commission proposes new §113.1150, which will incorporate by reference, without change, the final promulgated rules in 40 CFR Part 63, Subpart FFFFF adopted by the EPA on May 20, 2003 (68 FR 27663). This MACT standard applies to each new or existing sinter plant, blast furnace, and basic oxygen process furnace shop that are (or are located at) a major source of hazardous air pollutant emissions. Hazardous air pollutant emissions from these operations include, but are not limited to: manganese, lead, polycyclic organic matter, benzene, and carbon disulfide.

Section 113.1160--Site Remediation (40 CFR 63, Subpart GGGGG)

The commission proposes new §113.1160, which will incorporate by reference, without change, the final promulgated rules in 40 CFR Part 63, Subpart GGGGG adopted by the EPA on October 8, 2003 (68 FR 58190). This MACT standard applies to site remediation projects (such as cleanup of contaminated soil, groundwater, or surface water) that meet all of the following criteria: 1) clean-up remediation materials defined in 40 CFR §63.7957, What Definitions Apply to this Subpart; 2) are co-located at a facility with one or more other stationary sources that emit hazardous air pollutants and meet an affected source definition for a source category that is regulated by another subpart under 40 CFR Part 63; and 3) the facility is a major source of hazardous air pollutant emissions. 40 CFR Part 63, Subpart GGGGG contains exemptions for remediation projects located at gasoline service stations, farms, residential sites, and certain remediation projects conducted under the authority of other environmental regulations, such as the Resource Conservation and Recovery Act (RCRA) or the Comprehensive Environmental Response and Compensation Liability Act (CERCLA). Hazardous air pollutant emissions regulated under this MACT standard include a wide variety of compounds listed in Table 1 of 40 CFR Part 63, Subpart GGGGG.

Section 113.1170--Miscellaneous Coating Manufacturing (40 CFR 63, Subpart HHHHH)

The commission proposes new §113.1170, which will incorporate by reference, without change, the final promulgated rules in 40 CFR Part 63, Subpart HHHHH adopted by the EPA on December 11, 2003 (68 FR 69185) as amended through December 29, 2003 (68 FR 75033). This MACT standard applies to new and existing miscellaneous coating manufacturing operations that are located at or are part of a major source of hazardous air pollutants. Hazardous air pollutant emissions from these operations include: toluene, xylenes, glycol ethers, methyl ethyl ketone, and methyl isobutyl ketone. The December 29, 2003 amendments corrected a compliance date stated in 40 CFR §63.7995, (When do I have to comply with this subpart?), which should have read "December 11, 2006."

Section 113.1180--Mercury Emissions from Mercury Cell Chlor-Alkali Plants (40 CFR 63, Subpart IIIII)

The commission proposes new §113.1180, which will incorporate by reference, without change, the final promulgated rules in 40 CFR Part 63, Subpart IIIII adopted by the EPA on December 19, 2003 (68 FR 70928). This MACT standard applies to new and existing mercury cell chlor-alkali plants. The hazardous air pollutant regulated by this standard is mercury.

Section 113.1190--Brick and Structural Clay Products Manufacturing (40 CFR 63, Subpart JJJJJ)

The commission proposes new §113.1190, which will incorporate by reference, without change, the final promulgated rules in 40 CFR Part 63, Subpart JJJJJ adopted by the EPA on May 16, 2003 (68 FR 26722), with corrections published on May 28, 2003 (68 FR 31744). This MACT standard applies to new and existing sources at brick and structural clay products manufacturing plants. This MACT standard applies to brick and structural clay manufacturing facilities that are a major source of hazardous air pollutant emissions, are located at a major source of hazardous air pollutant emissions, or are part of a major source of hazardous air pollutant emissions. Hazardous air pollutant emissions from these operations include, but are not limited to: hydrogen fluoride; hydrogen chloride; and metallic compounds such as antimony, arsenic, beryllium, cadmium, chromium, cobalt, mercury, manganese, nickel, lead, and selenium. The May 28, 2003 corrections altered an erroneous compliance date.

Section 113.1200--Clay Ceramics Manufacturing (40 CFR 63, Subpart KKKKK)

The commission proposes new §113.1200, which will incorporate by reference, without change, the final promulgated rules in 40 CFR Part 63, Subpart KKKKK adopted by the EPA on May 16, 2003 (68 FR 26738), with corrections published on May 28, 2003 (68 FR 31744). This MACT standard applies to new and existing sources at clay ceramics manufacturing facilities. This MACT standard applies to clay ceramics manufacturing facilities that are a major source of hazardous air pollutant emissions, are located at a major source of hazardous air pollutant emissions,

or are part of a major source of hazardous air pollutant emissions. Hazardous air pollutant emissions from these operations include, but are not limited to: hydrogen fluoride; hydrogen chloride; and metallic compounds such as antimony, arsenic, beryllium, cadmium, chromium, cobalt, mercury, manganese, nickel, lead, and selenium. The May 28, 2003 corrections altered an erroneous compliance date.

Section 113.1210--Asphalt Processing and Asphalt Roofing Manufacturing (40 CFR 63, Subpart LLLLL)

The commission proposes new §113.1210, which will incorporate by reference, without change, the final promulgated rules in 40 CFR Part 63, Subpart LLLLL initially adopted by the EPA on April 29, 2003 (68 FR 22991) and republished with corrections on May 7, 2003 (68 FR 24577). This MACT standard applies to new and existing asphalt processing and asphalt roofing manufacturing facilities that are a major source of hazardous air pollutant emissions, are located at a major source of HAP emissions, or are part of a major source of hazardous air pollutant emissions. Hazardous air pollutant emissions from these operations include, but are not limited to: formaldehyde, hexane, hydrogen chloride, phenol, polycyclic organic matter, and toluene.

Section 113.1220--Flexible Polyurethane Foam Fabrication Operations (40 CFR 63, Subpart MMMMM)

The commission proposes new §113.1220, which will incorporate by reference, without change, the final promulgated rules in 40 CFR Part 63, Subpart MMMMM adopted by the EPA on April 14, 2003 (68 FR 18070). This MACT standard applies to new and existing flexible polyurethane foam fabrication facilities that are located at or are part of a major source of hazardous air pollutant emissions. Hazardous air pollutant emissions from these operations include, but are not limited to: hydrochloric acid, 2,4-toluene diisocyanate, hydrogen cyanide, and methylene chloride.

Section 113.1230--Hydrochloric Acid Production (40 CFR 63, Subpart NNNNN)

The commission proposes new §113.1230, which will incorporate by reference, without change, the final promulgated rules in 40 CFR Part 63, Subpart NNNNN adopted by the EPA on April 17, 2003 (68 FR 19090). This MACT standard applies to new and existing hydrochloric acid production units that normally produce liquid hydrochloric acid at a concentration of 30 weight percent or greater, and are located at a major source of hazardous air pollutant emissions, or are part of a major source of hazardous air pollutant emissions. The primary hazardous air pollutant that will be controlled with this MACT standard is hydrochloric acid.

Section 113.1250--Engine Test Cells/Stands (40 CFR 63, Subpart PPPPP)

The commission proposes new §113.1250, which will incorporate by reference, without change, the final promulgated rules in 40 CFR Part 63, Subpart PPPPP adopted by the EPA on May 27, 2003 (68 FR 28785) with corrections published on August 28, 2003 (68 FR 51830). This MACT standard applies to new and existing engine test cells/stands that are located at a major source of hazardous air pollutant emissions. Hazardous air pollutant emissions from these operations include, but are not limited to: toluene, benzene, mixed xylenes, and 1,3-butadiene. The August 28, 2003 corrections altered the title of the subpart.

Section 113.1270--Taconite Iron Ore Processing (40 CFR 63, Subpart RRRRR)

The commission proposes new §113.1270, which will incorporate by reference, without change, the final promulgated rules in 40 CFR Part 63, Subpart RRRRR adopted by the EPA on October 30, 2003 (68 FR 61888). This MACT standard applies to new and existing taconite ore processing facilities, including ore crushing and handling operations, ore dryers, indurating furnaces, and finished pellet handling operations. The standard applies to ore processing facilities that are major sources of hazardous air pollutant emissions (or are part of a major source of hazardous air pollutant emissions). Hazardous air pollutants emitted from taconite ore processing operations include: metal compounds such as manganese, arsenic, lead, nickel, chromium, and mercury; products of incomplete combustion, including formaldehyde; and the acid gases hydrogen chloride and hydrogen fluoride.

Section 113.1280--Refractory Products Manufacturing (40 CFR 63, Subpart SSSSS)

The commission proposes new §113.1280, which will incorporate by reference, without change, the final promulgated rules in 40 CFR Part 63, Subpart SSSSS adopted by the EPA on April 16, 2003 (68 FR 18747). This MACT standard applies to new and existing refractory products manufacturing facilities that are a major source of hazardous air pollutant emissions, are located at a major source of hazardous air pollutant emissions, or are part of a major source of hazardous air pollutant emissions. Hazardous air pollutant emissions from these operations include, but are not limited to: ethylene glycol, formaldehyde, hydrogen fluoride, hydrochloric acid, methanol, phenol, and polycyclic organic matter.

Section 113.1290--Primary Magnesium Refining (40 CFR 63, Subpart TTTTT)

The commission proposes new §113.1290, which will incorporate by reference, without change, the final promulgated rules in 40 CFR Part 63, Subpart TTTTT adopted by the EPA on October 10, 2003 (68 FR 58620). This MACT standard applies to new and existing primary magnesium refining facilities that are major sources of hazardous air pollutant emissions, or are part of a major source of hazardous air pollutant emissions. Hazardous air pollutant emissions from these operations include, but are not limited to: chlorine, hydrochloric acid, dioxins and furans, and trace amounts of several hazardous air pollutant metals.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMIT PROGRAM

Because Chapter 113 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 amendment process in Chapter 122, revise their operating permit to include the amended Chapter 113 requirements.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Grants Management Section, has determined that for the first five-year period the proposed rules are in effect, no fiscal implications are anticipated for the agency or other units of state and local government as a result of administration or enforcement of the proposed rules. Enforcement of the proposed rules will result in some additional workload for agency staff and it is anticipated that the agency will reallocate existing resources to meet this need.

The proposed rulemaking incorporates by reference, numerous EPA updates, additions, and new standards associated with federal MACT standards under 40 CFR Part 63 not currently included in Chapter 113. MACT standards under 40 CFR Part 63 control hazardous air pollutant emissions. EPA has not delegated to the commission the direct authority to implement the MACT standards addressed in the proposed rules. The commission uses the mechanism of Chapter 113 to enforce MACT standards. To ensure that the requirements in Chapter 113 are consistent with the most current federal MACT standards, the chapter must be amended to reflect the most current information. After each MACT standard or amendment is adopted, the commission will ask EPA to delegate the direct responsibility for administering and enforcing the MACT requirements to the commission.

Enforcement and implementation of the proposed standards are extensions of the normal duties of commission staff, and the commission does not anticipate any fiscal impact to result from the proposed rules. The commission does not anticipate any significant fiscal impact to be felt by the regulated community, which must comply with federal MACT standards regardless of whether the proposed rules are adopted. Industry may need to update Title V permits to reflect the proposed rules, but commission staff does not anticipate costs associated with this process to be significant in nature.

PUBLIC BENEFITS AND COSTS

Ms. Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be increased consistency between federal and state air quality regulations, thereby making it more efficient for the regulated community to comply with current laws and regulations.

Industries in the regulated community currently have to comply with EPA's MACT standards. No significant fiscal implications are anticipated to affect the regulated community because of the proposed rules.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of implementing and enforcing the proposed rules. Small and micro-businesses are already required to comply with the MACT standards whether or not the commission adopts or takes delegation of the MACT standards contained in the proposed rules.

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 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 specific intent of the proposed rules is to adopt MACT standards mandated by the FCAA and the amendments to that statute. The EPA is developing these national MACT standards to regulate emissions of hazardous air pollutants under 42 USC, §7412. Hazardous air pollutant sources affected by the MACT standards are required to comply with the federal standards whether or not the commission adopts or takes delegation of the standards from EPA. The proposed rules are not anticipated to add any significant additional costs to affected individuals or businesses beyond existing requirements to comply with the federal standards. The proposed rules are intended to protect the environment, but are not anticipated to have material adverse effects beyond what is already required to comply with federal MACT standards on 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.

In addition, the proposed rules 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. This rulemaking does not meet any of the requirements because the MACT standards in this proposal are federal technology-based standards which will be incorporated by reference, and therefore, will not exceed any standard set by federal law. This proposal is not an express requirement of state law, but was developed by EPA as MACT standards mandated by the FCAA and the amendments to that statute. The proposed rules do not exceed a requirement of a delegation agreement or a contract between state and federal government. The proposed rules were not developed solely under the general powers of the agency, but are proposed under the Texas Clean Air Act (TCAA), as codified in Texas Health and Safety Code, §382.011, which authorizes the commission to establish the level of quality to be maintained in the state's air; §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; §382.016, which authorizes the commission to prescribe reasonable requirements for measuring and monitoring the emissions of air contaminants; §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA; and §382.051, which authorizes the commission to adopt rules as necessary to comply with changes in federal law and regulations applicable to air permits.

TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact analysis for the proposed rulemaking action under Texas Government Code, §2007.043. The specific purpose of this rulemaking is to facilitate implementation and enforcement of MACT standards by the state. This rulemaking will not create any additional burden on private real property. Under federal law, the affected industries will be required to implement these MACT standards regardless of whether the commission or EPA is the agency responsible for implementation of the standards.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found that the proposal 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 prepared a preliminary consistency determination for the proposed rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22 and found the proposed rulemaking is consistent with the applicable CMP goals and policies. The CMP goal applicable to the proposed rules is to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas. The CMP policy applicable to the proposed rules is Emission of Air Pollutants. These rules are consistent because they only incorporate by reference the federal MACT standards that pertain to certain industries and processes. The MACT standards provide the highest level of control of air emissions that is achievable. The commission seeks public comment on the consistency of the proposed rules with applicable CMP goals and policies.

PUBLIC HEARING

A public hearing on this proposal will be held on January 31, 2005 at 10:00 a.m., in Building F, Room 2210 of the commission's central office, located at 12100 Park 35 Circle, Austin, Texas. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not occur during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearings should contact the agency at (512) 239-4900. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Patricia Durón, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. All comments should reference Rule Project Number 2002-036c-113-AI. Comments must be received by 5:00 p.m., January 31, 2005. For further information or questions concerning this proposal, contact Michael Wilhoit, Air Permits Division at (512) 239-1222 or Joseph Thomas, Policy and Regulations Division at (512) 239-4580.

STATUTORY AUTHORITY

The new and amended sections are proposed under Texas Water Code (TWC), §5.102, which provides the commission with the general powers to carry out its duties under the TWC; §5.103, which authorizes the commission to adopt any rules necessary to carry out the powers and the duties under the provisions of the TWC and other laws of this state; and §5.105, which authorizes the commission by rule to establish and approve all general policy of the commission. The amended and new sections are also proposed under Texas Health and Safety Code, TCAA, §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA; §382.002, 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, which authorizes the commission to establish the level of quality to be maintained in the state's air and to control the quality of the state's air; §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.016, which authorizes the commission to prescribe reasonable requirements for measuring and monitoring the emissions of air contaminants; and §382.051, which authorizes the commission to adopt rules as necessary to comply with changes in federal law or regulations applicable to permits issued under the TCAA.

The proposed new and amended sections implement Texas Health and Safety Code, §§382.002, 382.011, 382.012, 382.016, 382.017, and 382.051.

§113.100. General Provisions (40 Code of Federal Regulations Part 63 [CFR 63], Subpart A).

The General Provisions for the National Emission Standards for Hazardous Air Pollutants for Source Categories as specified in 40 Code of Federal Regulations (CFR) Part 63, Subpart A, are incorporated by reference as amended through June 15, 2004 (69 FR 33506) [April 12, 1999 at 64 FedReg 17555] with the following exceptions. [:]

(1) The language of 40 CFR §63.5(e)(2)(i) is amended to read as follows: The executive director will notify the owner or operator in writing of approval or intention to deny approval of construction or reconstruction within 180 calendar days after receipt of sufficient information to evaluate an application submitted under 40 CFR §63.5(d) [paragraph (d) of this section]. The 180-day [180 day] approval or denial period will begin after the owner or operator has been notified in writing that his/her application is complete. The executive director will notify the owner or operator in writing of the status of his/her application, that is, whether the application contains sufficient information to make a determination, within 90 calendar days after receipt of the original application and within 60 calendar days after receipt of any supplementary information that is submitted.

(2) The language of 40 CFR §63.6(i)(12)(i) is amended to read as follows: The executive director will notify the owner or operator in writing of approval or intention to deny approval of a request for an extension of compliance within 60 calendar days after receipt of sufficient information to evaluate a request submitted under 40 CFR §63.6(i)(4)(i) or (i)(5) [paragraph (i)(4)(i) or (i)(5) of this section]. The 60-day [60 day] approval or denial period will begin after the owner or operator has been notified in writing that his/her application is complete. The executive director will notify the owner or operator in writing of the status of his/her application, that is, whether the application contains sufficient information to make a determination, within 30 calendar days after receipt of the original application and within 30 calendar days after receipt of any supplementary information that is submitted.

(3) The language of 40 CFR §63.6(i)(13)(i) is amended to read as follows: The executive director will notify the owner or operator in writing of approval or intention to deny approval of a request for an extension of compliance within 60 calendar days after receipt of sufficient information to evaluate a request submitted under 40 CFR §63.6(i)(4)(ii) [paragraph (i)(4)(ii) of this section]. The 60-day [60 day] approval or denial period will begin after the owner or operator has been notified in writing that his/her application is complete. The executive director will notify the owner or operator in writing of the status of his/her application, that is, whether the application contains sufficient information to make a determination, within 30 calendar days after receipt of the original application and within 30 calendar days after receipt of any supplementary information that is submitted.

(4) The language of 40 CFR §63.6(i)(13)(ii) is amended to read as follows: When notifying the owner or operator that his/her application is not complete, the executive director will specify the information needed to complete the application and provide notice of opportunity for the applicant to present, in writing, within 30 calendar days after he/she is notified of the incomplete application, additional information, or arguments to the executive director to enable further action on the application.

(5) The language of 40 CFR §63.8(e)(5)(ii) is amended to read as follows: The owner or operator of an affected source using a Continuous Opacity Monitoring System (COMS) to determine opacity compliance during any performance test required under §63.7 and described in §63.6(d)(6) shall furnish the executive director two or, upon request, three copies of a written report of the results of the COMS performance evaluation under this paragraph. The copies shall be provided at least 30 calendar days before the performance test required under §63.7 is conducted.

(6) The language of 40 CFR §63.9(i)(3) is amended to read as follows: If, in the executive director's judgment, an owner or operator's request for an adjustment to a particular time period or postmark deadline is warranted, the executive director will approve the adjustment. The executive director will notify the owner or operator in writing of approval or disapproval of the request for an adjustment within 30 calendar days of receiving sufficient information to evaluate the request.

(7) The language of 40 CFR §63.10(e)(2)(ii) is amended to read as follows: The owner or operator of an affected source using a COMS to determine opacity compliance during any performance test required under §63.7 and described in §63.6(d)(6) shall furnish the executive director two or, upon request, three copies of a written report of the results of the COMS performance evaluation conducted under §63.8(e). The copies shall be furnished at least 30 calendar days before the performance test required under §63.7 is conducted.

§113.105. Requirements for Control Technology Determinations for Major Sources in Accordance with Clean Air Act, §112(j) (40 Code of Federal Regulations Part 63, Subpart B, §§63.50 - 63.56).

The Requirements for Control Technology Determinations for Major Sources in Accordance with Clean Air Act, §112(j), 40 Code of Federal Regulations Part 63, Subpart B, §§63.50 - 63.56, are incorporated by reference as amended through May 30, 2003 (68 FR 32601).

§113.106. List of Hazardous Air Pollutants, Petitions Process, Lesser Quantity Designations, Source Category List (40 Code of Federal Regulations Part 63, Subpart C).

The provisions of 40 Code of Federal Regulations Part 63, Subpart C, concerning the List of Hazardous Air Pollutants, Petitions Process, Lesser Quantity Designations, Source Category List, are incorporated by reference as amended through November 29, 2004 (69 FR 69325).

§113.110. Synthetic Organic Chemical Manufacturing Industry (40 Code of Federal Regulations Part 63 [~~CFR 63~~], Subpart F).

The Synthetic Organic Chemical Manufacturing Industry Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart F, is incorporated by reference as amended through June 23, 2003 (68 FR 37344) [~~January 22, 2001 (66 FR 6922)~~].

§113.120. Synthetic Organic Chemical Manufacturing Industry for Process Vents, Storage Vessels, Transfer Operations, and Wastewater (40 Code of Federal Regulations Part 63 [~~CFR 63~~], Subpart G).

The Synthetic Organic Chemical Manufacturing Industry for Process Vents, Storage Vessels, Transfer Operations, and Wastewater Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart G, is incorporated by reference as amended through June 23, 2003 (68 FR 37344) [~~January 22, 2001 (66 FR 6922)~~].

§113.130. Organic Hazardous Air Pollutants for Equipment Leaks (40 Code of Federal Regulations Part 63 [~~CFR 63~~], Subpart H).

The Organic Hazardous Air Pollutants for Equipment Leaks Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart H, is incorporated by reference as amended through June 23, 2003 (68 FR 37345) [~~January 22, 2001 (66 FR 6922)~~].

§113.140. Certain Processes Subject to the Negotiated Regulation for Equipment Leaks (40 Code of Federal Regulations Part 63 [~~CFR 63~~], Subpart I).

The Certain Processes Subject to the Negotiated Regulations for Equipment Leaks Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part [~~CFR~~] 63, Subpart I, is incorporated by reference as amended through June 23, 2003 (68 FR 37345) [~~January 17, 1997, is incorporated by reference~~].

§113.170. Coke Oven Batteries (40 Code of Federal Regulations Part 63 [~~CFR 63~~], Subpart L).

The Coke Oven Batteries Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart L, is incorporated by reference as amended through June 23, 2003 (68 FR 37345) [~~October 17, 2000 (65 FR 61744)~~].

§113.180. Perchloroethylene Dry Cleaning Facilities (40 Code of Federal Regulations Part 63 [~~CFR 63~~], Subpart M).

The Perchloroethylene Dry Cleaning Facilities Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart M, is incorporated by reference as amended through June 23, 2003 (68 FR 37347) [~~December 14, 1999, at 64 FedReg 69637~~].

§113.190. Chromium Emissions from Hard and Decorative Chromium Electroplating and Chromium Anodizing Tanks (40 Code of Federal Regulations Part 63 [~~CFR 63~~], Subpart N).

The Chromium Emissions from Hard and Decorative Chromium Electroplating and Chromium Anodizing Tanks Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart N, is incorporated by reference as amended through July 19, 2004 (69 FR 42894) [~~December 14, 1999, at 64 FedReg 69637~~].

§113.200. Ethylene Oxide Emissions Standards for Sterilization Facilities (40 Code of Federal Regulations Part 63 [~~CFR 63~~], Subpart O).

The Ethylene Oxide Emissions Standards for Sterilization Facilities Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart O, is incorporated by reference as amended through June 23, 2003 (68 FR 37348) [~~November 2, 2001 (66 FR 55577)~~].

§113.220. Industrial Process Cooling Towers (40 Code of Federal Regulations Part 63 [~~CFR 63~~], Subpart Q).

The Industrial Process Cooling Towers Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part [~~CFR~~] 63, Subpart Q, is incorporated by reference as amended through June 23, 2003 (68 FR 37348) [~~July 23, 1998, is incorporated by reference~~].

§113.230. Gasoline Distribution Facilities (40 Code of Federal Regulations Part 63 [~~CFR 63~~], Subpart R).

The Gasoline Distribution Facilities (Bulk Gasoline Terminals and Pipeline Breakout Stations) Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part [~~CFR~~] 63, Subpart R, is incorporated by reference as amended through

December 19, 2003 (68 FR 70965) [~~January 16, 1998, is incorporated by reference~~].

§113.240. Pulp and Paper Industry (40 Code of Federal Regulations Part 63 [~~CFR 63~~], Subpart S).

The Pulp and Paper Industry Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart S, is incorporated by reference as amended through June 23, 2003 (68 FR 37348) [~~May 14, 2001 (66 FR 24268)~~].

§113.250. Halogenated Solvent Cleaning (40 Code of Federal Regulations Part 63 [~~CFR 63~~], Subpart T).

The Halogenated Solvent Cleaning Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart T, is incorporated by reference as amended through June 23, 2003 (68 FR 37349) [~~September 8, 2000 (65 FR 54419)~~].

§113.260. Group I Polymers and Resins (40 Code of Federal Regulations Part 63 [~~CFR 63~~], Subpart U).

The Group I Polymers and Resins Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart U, is incorporated by reference as amended through June 23, 2003 (68 FR 37349) [~~July 16, 2001 (66 FR 36924)~~].

§113.280. Epoxy Resins Production and Non-Nylon Polyamides Production (40 Code of Federal Regulations Part 63 [~~CFR 63~~], Subpart W).

The Epoxy Resins Production and Non-Nylon Polyamides Production Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart W, is incorporated by reference as amended through June 23, 2003 (68 FR 37350) [~~May 8, 2000 (65 FR 26491)~~].

§113.290. Secondary Lead Smelting (40 Code of Federal Regulations Part 63 [~~CFR 63~~], Subpart X).

The Secondary Lead Smelting Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart X, is incorporated by reference as amended through June 23, 2003 (68 FR 37350) [~~December 14, 1999, at 64 FedReg 69637~~].

§113.300. Marine Vessel Loading (40 Code of Federal Regulations Part 63 [~~CFR 63~~], Subpart Y).

The Marine Vessel Loading Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part [~~CFR~~] 63, Subpart Y, is incorporated by reference as amended through June 23, 2003 (68 FR 37350) [~~September 19, 1995, is incorporated by reference~~].

§113.320. Phosphoric Acid Manufacturing Plants (40 Code of Federal Regulations Part 63 [~~CFR 63~~], Subpart AA).

The Phosphoric Acid Manufacturing Plants Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart AA, is incorporated by reference as amended through June 23, 2003 (68 FR 37351) [~~June 13, 2002 (67 FR 40814)~~].

§113.330. Phosphate Fertilizers Production Plants (40 Code of Federal Regulations Part 63 [~~CFR 63~~], Subpart BB).

The Phosphate Fertilizers Production Plants Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart BB, is incorporated by reference as amended through June 23, 2003 (68 FR 37351) [~~June 13, 2002 (67 FR 40814)~~].

§113.340. Petroleum Refineries (40 Code of Federal Regulations Part 63 [~~CFR 63~~], Subpart CC).

The Petroleum Refineries Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart CC, is incorporated by reference as amended through June 23, 2003 (68 FR 37351) [~~May 25, 2001 (66 FR 28840)~~].

§113.350. Off-Site Waste and Recovery Operations (40 Code of Federal Regulations Part 63 [~~CFR 63~~], Subpart DD).

The Off-Site Waste and Recovery Operations Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart DD, is incorporated by reference as amended through June 23, 2003 (68 FR 37351) [~~January 8, 2001 (66 FR 1263)~~].

§113.360. Magnetic Tape Manufacturing Operations (40 Code of Federal Regulations Part 63 [~~CFR 63~~], Subpart EE).

The Magnetic Tape Manufacturing Operations Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart EE, is incorporated by reference as amended through June 23, 2003 (68 FR 37352) [~~April 9, 1999, at 64 FedReg 17460~~].

§113.380. Aerospace Manufacturing and Rework Facilities (40 Code of Federal Regulations Part 63 [~~CFR 63~~], Subpart GG).

The Aerospace Manufacturing and Rework Facilities Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart GG, is incorporated by reference as amended through June 23, 2003 (68 FR 37352) [~~December 8, 2000 (65 FR 76941)~~].

§113.390. Oil and Natural Gas Production Facilities (40 Code of Federal Regulations Part 63 [~~CFR 63~~], Subpart HH).

The Oil and Natural Gas Production Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart HH, is incorporated by reference as amended through June 23, 2003 (68 FR 37353) [~~June 29, 2001 (66 FR 34548)~~].

§113.400. Shipbuilding and Ship Repair (Surface Coating) (40 Code of Federal Regulations Part 63 [~~CFR 63~~], Subpart II).

The Shipbuilding and Ship Repair (Surface Coating) Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart II, is incorporated by reference as amended through June 23, 2003 (68 FR 37353) [~~October 17, 2000 (65 FR 61744)~~].

§113.410. Wood Furniture Manufacturing Operations (40 Code of Federal Regulations Part 63 [~~CFR 63~~], Subpart JJ).

The Wood Furniture Manufacturing Operations Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part [~~CFR~~] 63, Subpart JJ, is incorporated by reference as amended through June 23, 2003 (68 FR 37353) [~~December 28, 1998, is incorporated by reference~~].

§113.420. Printing and Publishing (40 Code of Federal Regulations Part 63 [~~CFR 63~~], Subpart KK).

The Printing and Publishing Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part [~~CFR~~] 63, Subpart KK, is incorporated by reference as amended through June 23, 2003 (68 FR 37354) [~~May 30, 1996, is incorporated by reference~~].

§113.430. Primary Aluminum Reduction Plants (40 Code of Federal Regulations Part 63 [~~CFR 63~~], Subpart LL).

The Primary Aluminum Reduction Plants Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part [~~CFR~~] 63, Subpart LL, is incorporated by reference as amended through June 23, 2003 (68 FR 37354) [~~October 7, 1997, is incorporated by reference~~].

§113.440. Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite, and Stand-Alone Semichemical Pulp Mills (40 Code of Federal Regulations Part 63 [~~CFR 63~~], Subpart MM).

The Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite, and Stand-Alone Semichemical Pulp Mills Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart MM, is incorporated by reference as amended through May 6, 2004 (69 FR 25323) [~~August 6, 2001 (66 FR 41086)~~].

§113.460. Tanks -[-] Level 1 (40 Code of Federal Regulations Part 63 ~~CFR 63~~], Subpart OO).

The Tanks - Level 1 Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart OO, is incorporated by reference as amended through June 23, 2003 (68 FR 37354) [~~July 20, 1999, at 64 FedReg 38950~~].

§113.470. Containers (40 Code of Federal Regulations Part 63 [~~CFR 63~~], Subpart PP).

The Containers Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart PP, is incorporated by reference as amended through June 23, 2003 (68 FR 37355) [~~January 8, 2001 (66 FR 1263)~~].

§113.480. Surface Impoundments (40 Code of Federal Regulations Part 63 [~~CFR 63~~], Subpart QQ).

The Surface Impoundments Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart QQ, is incorporated by reference as amended through June 23, 2003 (68 FR 37355) [~~July 20, 1999, at 64 FedReg 38950~~].

§113.490. Individual Drain Systems (40 Code of Federal Regulations Part 63 [~~CFR 63~~], Subpart RR).

The Individual Drain System Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart RR, is incorporated by reference as amended through June 23, 2003 (68 FR 37355) [~~January 8, 2001 (66 FR 1263)~~].

§113.530. Oil-Water Separators and Organic-Water Separators (40 Code of Federal Regulations Part 63 [~~CFR 63~~], Subpart VV).

The Oil-Water Separators and Organic-Water Separators Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart VV, is incorporated by reference as amended through June 23, 2003 (68 FR 37355) [~~January 8, 2001 (66 FR 1263)~~].

§113.600. Steel Pickling - HCl Process Facilities and Hydrochloric Acid Regeneration Plants (40 Code of Federal Regulations Part 63 [~~CFR 63~~], Subpart CCC).

The Steel Pickling - HCl Process Facilities and Hydrochloric Acid Regeneration Plants Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart CCC, is incorporated by reference as amended through June 23, 2003 (68 FR 37356) [~~adopted June 22, 1999, at 64 FedReg 33202~~].

§113.610. Mineral Wool Production (40 Code of Federal Regulations Part 63 [~~CFR 63~~], Subpart DDD).

The Mineral Wool Production Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart DDD, is incorporated by reference as amended through June 23, 2003 (68 FR 37356) [~~adopted June 1, 1999, at 64 FedReg 29490~~].

§113.620. Hazardous Waste Combustors (40 Code of Federal Regulations Part 63 [~~CFR 63~~], Subpart EEE).

The Hazardous Waste Combustor Maximum Achievable [~~achievable~~] Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart EEE, is [~~in~~] incorporated by reference as amended through June 23, 2003 (68 FR 37356) [~~December 19, 2002 (67 FR 77687)~~].

§113.640. Pharmaceuticals Production (40 Code of Federal Regulations Part 63 [~~CFR 63~~], Subpart GGG).

The Pharmaceuticals Production Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart GGG, is incorporated by reference as amended through June 23, 2003 (68 FR 37356) [~~April 2, 2002 (67 FR 15486)~~].

§113.650. Natural Gas Transmission and Storage Facilities (40 Code of Federal Regulations Part 63 [~~CFR 63~~], Subpart HHH).

The Natural Gas Transmission and Storage Facilities Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart HHH, is incorporated by reference as amended through June 23, 2003 (68 FR 37357) [~~February 22, 2002 (67 FR 8202)~~].

§113.660. Flexible Polyurethane Foam Production (40 Code of Federal Regulations Part 63 [~~CFR 63~~], Subpart III).

The Flexible Polyurethane Foam Production Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part [~~CFR~~] 63, Subpart III, is incorporated by reference as amended through June 23, 2003 (68 FR 37357) [~~October 7, 1998, is incorporated by reference~~].

§113.670. Group IV Polymers and Resins (40 Code of Federal Regulations Part 63 [~~CFR 63~~], Subpart JJJ).

The Group IV Polymers and Resins Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart JJJ, is incorporated by reference as amended through June 2, 2004 (69 FR 31008) [~~August 6, 2001 (66 FR 40903)~~].

§113.690. Portland Cement Manufacturing Industry (40 Code of Federal Regulations Part 63 [~~CFR 63~~], Subpart LLL).

The Portland Cement Manufacturing Industry Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart LLL, is incorporated by reference as amended through June 23, 2003 (68 FR 37359) [~~December 6, 2002 (67 FR 72580)~~].

§113.700. Pesticide Active Ingredient Production (40 Code of Federal Regulations Part 63 [~~CFR 63~~], Subpart MMM).

The Pesticide Active Ingredient Production Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart MMM, is incorporated by reference as amended through June 23, 2003 (68 FR 37358) [~~September 20, 2002 (67 FR 59336)~~].

§113.710. Wool Fiberglass Manufacturing (40 Code of Federal Regulations Part 63 [~~CFR 63~~], Subpart NNN).

The Wool Fiberglass Manufacturing Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart NNN, is incorporated by reference as amended through June 23, 2003 (68 FR 37358) [~~June 14, 1999, at 64 FedReg 31695~~].

§113.720. Manufacture of Amino/Phenolic Resins (40 Code of Federal Regulations Part 63 [~~CFR 63~~], Subpart OOO).

The Manufacture of Amino/Phenolic Resins Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart OOO, is incorporated by reference as amended through June 23, 2003 (68 FR 37359) [~~February 22, 2000 (65 FR 8768)~~].

§113.730. Polyether Polyols Production (40 Code of Federal Regulations Part 63 [~~CFR 63~~], Subpart PPP).

The Polyether Polyols Production Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart PPP, is incorporated by reference as amended through June 23, 2003 (68 FR 37359) with corrections published on July 1, 2004 (69 FR 39862) [~~May 8, 2000 (65 FR 26491)~~].

§113.750. Secondary Aluminum Production (40 Code of Federal Regulations Part 63 [~~CFR 63~~], Subpart RRR).

The Secondary Aluminum Production Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart RRR, is incorporated by reference as amended through June 23, 2003 (68 FR 37359) [~~December 30, 2002 (67 FR 79808)~~].

§113.770. Primary Lead Smelting (40 Code of Federal Regulations Part 63 [~~CFR 63~~], Subpart TTT).

The Primary Lead Smelting Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart TTT, is incorporated by reference as amended through June 23, 2003 (68 FR 37360) [~~adopted June 4, 1999, at 64 FedReg 30194~~].

§113.790. Publicly Owned Treatment Works (40 Code of Federal Regulations Part 63 [~~CFR 63~~], Subpart VVV).

The Publicly Owned Treatment Works Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart VVV, is incorporated by reference as amended through June 23, 2003 (68 FR 37360) [~~October 21, 2002 (67 FR 64742)~~].

§113.810. Ferroalloys Production: Ferromanganese and Silicomanganese (40 Code of Federal Regulations Part 63 [~~CFR 63~~], Subpart XXX).

The Ferroalloys Production: Ferromanganese and Silicomanganese Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart XXX, is incorporated by reference as amended through June 23, 2003 (68 FR 37360) [~~March 22, 2001 (66 FR 16007)~~].

§113.880. Organic Liquids Distribution (Non-Gasoline) (40 Code of Federal Regulations Part 63, Subpart EEEE).

The Organic Liquids Distribution (Non-Gasoline) Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart EEEE, is incorporated by reference as adopted February 3, 2004 (69 FR 5063).

§113.890. Miscellaneous Organic Chemical Manufacturing (40 Code of Federal Regulations Part 63, Subpart FFFF).

The Miscellaneous Organic Chemical Manufacturing Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart FFFF, is incorporated by reference as adopted November 10, 2003 (68 FR 63888).

§113.920. Surface Coating of Automobiles and Light-Duty Trucks (40 Code of Federal Regulations Part 63, Subpart IIII).

The Surface Coating of Automobiles and Light-Duty Trucks Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart IIII, is incorporated by reference as adopted April 26, 2004 (69 FR 22623).

§113.940. Surface Coating of Metal Cans (40 Code of Federal Regulations Part 63, Subpart KKKK).

The Surface Coating of Metal Cans Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart KKKK, is incorporated by reference as adopted November 13, 2003 (68 FR 64446).

§113.960. Surface Coating of Miscellaneous Metal Parts and Products (40 Code of Federal Regulations Part 63, Subpart MMMM).

The Surface Coating of Miscellaneous Metal Parts and Products Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart MMMM, is incorporated by reference as amended through April 26, 2004 (69 FR 22660).

§113.980. Printing, Coating, and Dyeing of Fabrics and Other Textiles (40 Code of Federal Regulations Part 63, Subpart OOOO).

The Printing, Coating, and Dyeing of Fabrics and Other Textiles Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart OOOO, is incorporated by reference as adopted May 29, 2003 (68 FR 32189).

§113.990. Surface Coating of Plastic Parts and Products (40 Code of Federal Regulations Part 63, Subpart PPPP).

The Surface Coating of Plastic Parts and Products Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart PPPP, is incorporated by reference as amended through April 26, 2004 (69 FR 22660).

§113.1000. Surface Coating of Wood Building Products (40 Code of Federal Regulations Part 63, Subpart QQQQ).

The Surface Coating of Wood Building Products Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart QQQQ, is incorporated by reference as adopted May 28, 2003 (68 FR 31760).

§113.1010. Surface Coating of Metal Furniture (40 Code of Federal Regulations Part 63, Subpart RRRR).

The Surface Coating of Metal Furniture Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart RRRR, is incorporated by reference as adopted May 23, 2003 (68 FR 28619).

§113.1060. Reinforced Plastic Composites Production (40 Code of Federal Regulations Part 63, Subpart WWWW).

The Reinforced Plastic Composites Production Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart WWWW, is incorporated by reference as adopted April 21, 2003 (68 FR 19402).

§113.1080. Stationary Combustion Turbines (40 Code of Federal Regulations Part 63, Subpart YYYY).

The Stationary Combustion Turbines Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart YYYY, is incorporated by reference as amended through August 18, 2004 (69 FR 51188).

§113.1090. Stationary Reciprocating Internal Combustion Engines (40 Code of Federal Regulations Part 63, Subpart ZZZZ).

The Stationary Reciprocating Internal Combustion Engines Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart ZZZZ, is incorporated by reference as adopted June 15, 2004 (69 FR 33506).

§113.1100. Lime Manufacturing Plants (40 Code of Federal Regulations Part 63, Subpart AAAAA).

The Lime Manufacturing Plants Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart AAAAA, is incorporated by reference as adopted January 5, 2004 (69 FR 416).

§113.1110. Semiconductor Manufacturing (40 Code of Federal Regulations Part 63, Subpart BBBBB).

The Semiconductor Manufacturing Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart BBBBB, is incorporated by reference as adopted May 22, 2003 (68 FR 27925).

§113.1120. Coke Ovens: Pushing, Quenching, and Battery Stacks (40 Code of Federal Regulations Part 63, Subpart CCCCC).

The Coke Ovens Pushing, Quenching, and Battery Stacks Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart CCCCC, is incorporated by reference as amended through April 22, 2003 (68 FR 19885).

§113.1140. Iron and Steel Foundries (40 Code of Federal Regulations Part 63, Subpart EEEEE).

The Iron and Steel Foundries Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart EEEEE, is incorporated by reference as adopted April 22, 2004 (69 FR 21923).

§113.1150. Integrated Iron and Steel Manufacturing Facilities (40 Code of Federal Regulations Part 63, Subpart FFFFF).

The Integrated Iron and Steel Manufacturing Facilities Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart FFFFF, is incorporated by reference as adopted May 20, 2003 (68 FR 27663).

§113.1160. Site Remediation (40 Code of Federal Regulations Part 63, Subpart GGGGG).

The Site Remediation Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart GGGGG, is incorporated by reference as adopted October 8, 2003 (68 FR 58190).

§113.1170. Miscellaneous Coating Manufacturing (40 Code of Federal Regulations Part 63, Subpart HHHHH).

The Miscellaneous Coating Manufacturing Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart HHHHH, is incorporated by reference as adopted December 11, 2003 (68 FR 69185) with corrections published on December 29, 2003 (68 FR 75033).

§113.1180. Mercury Emissions from Mercury Cell Chlor-Alkali Plants (40 Code of Federal Regulations Part 63, Subpart IIIII).

The Mercury Emissions from Mercury Cell Chlor-Alkali Plants Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart IIIII, is incorporated by reference as adopted December 19, 2003 (68 FR 70928).

§113.1190. Brick and Structural Clay Products Manufacturing (40 Code of Federal Regulations Part 63, Subpart JJJJJ).

The Brick and Structural Clay Products Manufacturing Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart JJJJJ, is incorporated by reference as adopted May 16, 2003 (68 FR 26722) with corrections published on May 28, 2003 (68 FR 31744).

§113.1200. Clay Ceramics Manufacturing (40 Code of Federal Regulations Part 63, Subpart KKKKK).

The Clay Ceramics Manufacturing Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart KKKKK, is incorporated by reference as adopted May 16, 2003 (68 FR 26738) with corrections published on May 28, 2003 (68 FR 31744).

§113.1210. Asphalt Processing and Asphalt Roofing Manufacturing (40 Code of Federal Regulations Part 63, Subpart LLLLL).

The Asphalt Processing and Asphalt Roofing Manufacturing Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart LLLLL, is incorporated by reference as amended through May 7, 2003 (68 FR 24577).

§113.1220. Flexible Polyurethane Foam Fabrication Operations (40 Code of Federal Regulations Part 63, Subpart MMMMM).

The Flexible Polyurethane Foam Fabrication Operations Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart MMMMM, is incorporated by reference as adopted April 14, 2003 (68 FR 18070).

§113.1230. Hydrochloric Acid Production (40 Code of Federal Regulations Part 63, Subpart NNNNN).

The Hydrochloric Acid Production Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart NNNNN, is incorporated by reference as adopted April 17, 2003 (68 FR 19090).

§113.1250. Engine Test Cells/Stands (40 Code of Federal Regulations Part 63, Subpart PPPPP).

The Engine Test Cells/Stands Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart PPPPP, is incorporated by reference as adopted May 27, 2003 (68 FR 28785) with corrections published on August 28, 2003 (68 FR 51830).

§113.1270. Taconite Iron Ore Processing (40 Code of Federal Regulations Part 63, Subpart RRRRR).

The Taconite Iron Ore Processing Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart RRRRR, is incorporated by reference as adopted October 30, 2003 (68 FR 61888).

§113.1280. Refractory Products Manufacturing (40 Code of Federal Regulations Part 63, Subpart SSSSS).

The Refractory Products Manufacturing Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart SSSSS, is incorporated by reference as adopted April 16, 2003 (68 FR 18747).

§113.1290. Primary Magnesium Refining (40 CFR Code of Federal Regulations Part 63, Subpart TTTTT).

The Primary Magnesium Refining Maximum Achievable Control Technology standard as specified in 40 Code of Federal Regulations Part 63, Subpart TTTTT, is incorporated by reference as adopted October 10, 2003 (68 FR 58620).

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

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Stephanie Bergeron Perdue
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Texas Commission on Environmental Quality
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CHAPTER 114. CONTROL OF AIR POLLUTION FROM MOTOR VEHICLES

The Texas Commission on Environmental Quality (TCEQ or commission) proposes amendments to §§114.6, 114.312, 114.314 - 114.316, 114.318, and 114.319.

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

In April 2000, the commission adopted rules establishing requirements for low emission diesel (LED), and requiring that only LED be sold for on-road and off-road use in the Dallas/Fort Worth

(DFW) nonattainment counties as part of that area's ozone attainment demonstration SIP. These new diesel fuel standards were to go into effect May 1, 2002. In December 2000, the commission adopted amendments to the LED rules expanding their coverage to the entire state and made the diesel fuel content limits for sulfur more stringent than federal diesel fuel regulations for on-road vehicles. The commission submitted, as part of that SIP revision, a waiver in accordance with 42 United States Code (USC), §7545(C)(4)(c) for the on-road portion of the rules. The EPA granted the waiver on November 14, 2001 (66 FR 57197) as part of EPA's approval of the SIP revision. Subsequent to this adoption, the 77th Legislature, 2001, passed House Bill (HB) 2912, Article 15, which amended the Texas Clean Air Act (TCAA), §382.039(g) - (i) to restrict the commission from requiring distribution of LED as described in the revised SIP prior to January 1, 2005, and to allow the commission to consider, as an alternative method of compliance with LED standards, fuels to achieve equivalent emission reductions. The commission, in September 2001, adopted amendments to the LED rules implementing the changes required by HB 2912, Article 15. At the direction of the EPA and in order to reduce nitrogen oxide (NO_x) emissions necessary for the Houston/Galveston/Brazoria (HGB) area to demonstrate attainment with the ozone national ambient air quality standards (NAAQS), these amendments also limited the coverage area of the LED rules from statewide to those counties previously included in the regional air pollution control strategy for the HGB nonattainment area. Under the current rules, on and after April 1, 2005, a person who sells, offers for sale, supplies, offers for supply, dispenses, transfers, allows the transfer, places, stores, or holds any diesel fuel in a stationary tank, reservoir, or other container will be allowed to sell only LED or an approved alternative in the affected areas of the state. These rules apply to the HGB, DFW, and Beaumont/Port Arthur (BPA) nonattainment areas, as well as all counties along Interstates 35 and 37 and to the north and east of those highways.

The current rules allow the use of alternative diesel formulations that have been shown to provide equivalent emission reductions, and specify the tests that can be used to demonstrate equivalence. The current rules also permit an entity regulated by the rule to use other diesel formulations if the entity submits a plan detailing how the entity will obtain equivalent reductions using a fuel strategy. The current rules also require producers of LED or alternative formulations of LED to register with the commission by December 1, 2004, or 30 days prior to beginning production.

On August 4, 2004, the commission received a petition for rulemaking by the Texas Petroleum Marketers and Convenience Store Association (TPCA). The petitioner requested that the commission extend the compliance date for LED to October 1, 2006, and to June 1, 2007, for the ultra low sulfur requirement. The commission responded by directing staff to initiate rulemaking to extend the compliance date for LED to October 1, 2005, and to strengthen registration requirements and improve the rules' enforceability. The commission also directed staff to include updates and corrections to references included in the rules.

This rule proposal implements the commission's direction in response to the petition for rulemaking. The commission proposes to amend these rules to postpone the compliance date to October 1, 2005.

The commission also proposes to add flexibility to the requirements for demonstrating that an alternative formulation is equivalent to LED, and to restructure the registration requirement to provide the commission with better and more timely information regarding the planned production of LED. The commission proposes to revise the monitoring and testing requirements to improve rule enforceability, and to reflect new compliance methods such as additive-based strategies. Also, revisions are proposed to require all producers and importers of diesel fuel to register with the commission by May 1, 2005, as to their plans to produce LED. Finally, the commission proposes to update several references included in the rules and to delete several specific references to test methods in order to be consistent with EPA test methods.

By providing additional methods of compliance and a short postponement of the compliance date, these changes are intended to lower the cost of compliance with the rules, while providing the commission with more assurance that diesel supplies will be adequate, and that the commission will have the information and authority necessary for equitable and effective enforcement of the rules.

The commission is also seeking comment on how it can better estimate the projected supply and demand for compliant diesel in the affected areas. To estimate demand, staff have relied on information supplied by the Energy Information Administration and the Office of the Comptroller on diesel sales statewide in Texas. These figures have been multiplied by the proportion of population in the affected counties to the entire state populations to determine the size of the diesel market in the HGB, DFW, and regional areas. To evaluate the likely supply, staff have relied upon the market share data and estimated production submitted under alternative emission reduction plans. Staff have also received data from registered producers and importers on TxLED and TxLED-equivalent formulations. The commission is soliciting comment on how these methods of projecting supply and demand can be improved, and on how and where better information may be obtained on supply and demand.

SECTION BY SECTION DISCUSSION

The commission proposes administrative changes throughout these sections to be consistent with Texas Register requirements and other agency rules.

The proposed amendment to §114.6, Low Emission Fuel Definitions, contains revisions to the definition of diesel fuel. The proposed amendment to the definition of diesel fuel replaces "Number" with "Grade No." for better consistency with common or commercial terms and replaces the language referencing American Society for Testing and Materials (ASTM) Test Method D975-98b with "the active version of ASTM D975 (Standard Specification for Diesel Fuel Oils)." This proposed revision is necessary to promote consistency with widely recognized national standards. ASTM International is a voluntary standards development organization made up of over 30,000 members representing producers, users, consumers, government, and academia. ASTM members set consensus standards for their respective industries.

The proposed amendment to §114.312, Low Emission Diesel Standards, amends subsection (f), concerning the automatic acceptance of diesel fuel approved by the California Air Resources Board (CARB), to clarify that, to satisfy the requirements of subsection (a), a formulation must have been approved by an executive order of the CARB as of the effective date of the rule's revision in January 2001, rather than at the time the fuel is produced. Formulations approved after the effective date of the January 2001 revision could be approved under revised subsection (g).

Proposed revisions to subsection (g) would provide the executive director additional discretion when evaluating and accepting diesel fuel formulations approved by the CARB. Under these proposed revisions, a producer of an alternative diesel fuel formulation would now be subject to subsection (g). The sole discretion provided to the executive director for approval of alternative diesel fuel formulations is also clarified by deleting the reference to also require approval from the EPA. Under these proposed revisions, any producer of an alternative diesel fuel formulation having a post-January 2001 approved CARB executive order for a Certified Diesel Fuel Formulation could provide the executive order to the executive director for consideration in satisfying the emission and performance testing requirements in §114.315(c) and (d) as required by subsection (g). The amendment also removes redundant and unnecessary language regarding proprietary and/or confidential information submitted by the producer of an alternative diesel fuel formulation.

The proposed amendment to §114.314, Registration of Diesel Producers and Importers, contains revisions requiring all producers and importers that now provide diesel fuel for ultimate use in the affected 110 counties to register with the executive director no later than May 1, 2005. The language now in §114.314 only requires those producing and importing LED to register. This proposed revision is necessary to provide more comprehensive data on the future quantities of both LED and non-LED fuel being supplied into the affected area. The additional data will allow the commission to develop more effective enforcement strategies for the rule, if necessary. This data can also be used for analysis of any possible withdrawal of producers or importers from the diesel fuel market within the affected counties and subsequent supply shortages that could occur. This section is proposed to be restructured into subsections and paragraphs. Proposed new subsection (b) is added to require producers and importers that are new to the market in the listed counties, after December 1, 2004, to register at least 30 days prior to the first date of providing diesel fuel for use in the listed counties. Proposed new subsection (c) moves current language regarding the prescribed forms for registration to its own subsection. This proposed subsection also includes added language specifying what information the producer or importer must provide in the registration.

The proposed amendment to §114.315, Approved Test Methods, revises subsection (a) to delete paragraphs (1) through (9) relating to the test method requirements for sulfur content, aromatic hydrocarbon content, cetane number, polycyclic aromatic hydrocarbon content, nitrogen content, gravity index, viscosity, flashpoint, and distillation temperatures and to substitute a reference to the procedures and methods in ASTM D975, which is the standard specification for diesel fuel oils. This proposed revision is necessary to ensure the use of the most accurate testing methods and to promote consistency with widely recognized national standards.

The proposed amendment to §114.315(b) allows modifications to the test methods specified in this section if approved by the executive director. This proposed revision allows the executive director greater flexibility in approving modified or alternative test methods.

The proposed amendment to §114.315(c) clarifies and updates existing references and provides additional flexibility in the testing of alternative formulations. The proposed revision to §114.315(c)(1)(C) would clarify the diesel grades and sulfur content of the reference fuel for the testing of alternative formulations. Proposed revisions to §114.315(c)(1)(C) and also to §114.315(c)(4) replace or add language to reference the active version of the appropriate test methods or procedures rather than the date-specific versions. These revisions are intended to ensure the use of the most accurate and up-to-date testing methods or procedures by ASTM or EPA. The proposed revision to §114.315(c)(4)(C) provides additional flexibility in the testing of new diesel formulations under §114.312(g) by adding a new test sequence in proposed clause (iii) and allowing other test sequences to be approved at the discretion of the executive director in proposed clause (iv). The proposed revision to §114.315(c)(4)(D) eliminates the need for parties conducting the testing of alternative diesel fuel formulations to contact the executive director by telephone and in writing when any unscheduled interruptions or delays occur during testing.

The proposed amendment to §114.315(d) eliminates a reference to EPA and also the language "the formulations are intended only for use in non-road equipment and, through emissions and performance testing with supporting data," which will allow alternative diesel fuel formulations to be approved, as specified in this subsection, for all compression-ignition engines. The most extensive revision proposed in §114.315(d) is the added requirements for what must be included in the application for approval of alternative diesel fuel formulations using additives. Proposed new paragraph (1) outlines that the application provided to the executive director must include the identity, chemical composition, and concentration of each additive used in the formulation, and the test method by which the presence and concentration of the additive may be determined. Proposed new paragraph (2) outlines what will be included in the executive director's approval notification of an alternative diesel fuel formulation. The proposed paragraph would require an approval notification to identify the total aromatic hydrocarbon content, cetane number, and other parameters, as appropriate, and in accordance with the test methods identified in §114.315(a). For alternative diesel fuel formulations using additives, the proposed paragraph would require the approval notice to specify, at a minimum, the identity, the minimum concentration, and the treatment rate of the additives used, along with the minimum specifications for the base fuel to be used in the approved formulation as determined by the test method identified in §114.315(d)(1). Proposed new §114.315(d)(2)(B) adds language stating that the executive director will assign an identification number to the approved alternative diesel fuel formulation for better tracking purposes.

The proposed amendment to §114.316, Monitoring, Recordkeeping, and Reporting Requirements, revises subsection (b) to clarify the sampling and testing intervals for the producer or importer of LED by deleting the term "each final blend" and replacing it with "at the rate of one sample and test per 100,000 gallons of LED produced." The proposed revision to subsection (c) would also alter the frequency and compounds required to be analyzed to ensure appropriate sampling for additive-based alternative formulations. The proposed revision to subsection (e) provides alternative certification statements depending on the type of fuel produced or supplied. The proposed new subsection (i) will now require those producers with an approved alternative emission reduction plan to submit quarterly reports, including diesel fuel and additive volumes. These quarterly reports will provide needed enforcement requirements that were previously not detailed in §114.318 but simply included as language "contain adequate enforcement provisions," which will now be deleted.

The proposed amendment to §114.318, Alternative Emission Reduction Plan, restructures the section into four subsections

for added clarity and revises language. Proposed subsection (a) states that an approved alternative emission reduction plan will only satisfy the requirements of §114.312(a) and not the entire division. Proposed subsection (b) states what must be demonstrated in the alternative emission reduction plan in order to be approved by the executive director. Due to the proposed revisions in §114.316(i), which added needed enforcement requirements that were previously not detailed in §114.318, the language "contain adequate enforcement provisions," will now be deleted. Proposed subsection (c) contains the current language on applicant's use of early reductions. Finally, proposed subsection (d) adds to the current language that the executive director approval of an alternative emission reduction plan must occur prior to the use of that plan for compliance with the requirements of this section.

The proposed amendment to §114.319, Affected Counties and Compliance Dates, extends the compliance date of April 1, 2005, to October 1, 2005. This revision is intended to allow the commission to more accurately determine the supply of LED into the affected counties once implemented and to identify appropriate investigation and enforcement strategies. This six-month extension to the compliance date, combined with the revisions to §§114.314, 114.315, and 114.318, should enable the commission to more accurately analyze the supply of diesel fuel to the affected counties.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Grants Management Section, has determined that for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency or other units of state or local governments as a result of administration or enforcement of the proposed rules. However, state agencies or local governments that purchase diesel fuel in the HGB, DFW, and BPA nonattainment areas, as well as the other 95 counties affected by the proposed rulemaking, would experience a delay in any cost increases for the purchase of diesel by six months, which could result in a more positive cash flow and possible budget flexibility.

Under the current rules, suppliers of diesel to the affected area must comply with LED fuel standards starting April 1, 2005. The proposed rules would extend this deadline to October 1, 2005. Under the proposed rules, suppliers, producers, and importers of LED would have until October 1, 2005, to produce or import diesel fuel complying with LED standards for the HGB, DFW, and BPA nonattainment areas, as well as 95 counties bordering Interstates 35 and 37 and to the north and east of those highways. The proposed rules would also establish May 1, 2005, as a firm, mandatory deadline for producers to notify the commission whether or not they will be producing LED fuel. The proposed rulemaking specifies the tests that demonstrate compliance with LED standards and procedures to be used if alternative diesel fuel formulations are to be approved by the executive director.

The costs projected for implementing the current rules were an increase in production costs of $.04 to $.08 per gallon for LED. This proposed rulemaking allows flexibility in meeting the LED fuel standards and could possibly result in lower production and retail costs depending on the options chosen for rule compliance.

PUBLIC BENEFITS AND COSTS

Ms. Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed deadline extension will be the possible development or approval of alternative diesel fuel formulations or additives that may be less costly to produce and to purchase. The public will experience the loss of the LED strategy during the 2005 ozone season. However, the proposed rules will not affect the attainment date of 2007.

Under the current rules, production costs of meeting LED standards were projected at $.04 to $.08 per gallon. Entities that could decide to produce fuels meeting the LED standards, could see this cost decrease depending on whether they choose to employ the commission approved alternate formulations of LED or other commission approved fuel strategies. The buying public may not experience higher fuel costs as soon as projected under the current rules. Under the proposed rules, cost increases for LED may not be as severe as those originally projected.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications from this proposed rulemaking are anticipated for small or micro-businesses. Currently, there are no diesel fuel producers or importers that would be considered small or micro-businesses. If production costs decrease because of added flexibility in producing fuel complying with the LED standards, retailers may see a decrease in their costs to purchase the fuels for resale. If the deadline for complying with LED standards is extended, retailers may find that their costs to purchase diesel fuel may not rise as quickly or as much as anticipated. The strategies employed by producers and importers of diesel fuel to produce and price a fuel complying with the LED standards will determine the cost that retailers pay for the fuel they sell.

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 considering the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a "major environmental rule." 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 proposed amendments to §§114.6, 114.312, 114.314 - 114.316, 114.318, and 114.319 would extend the compliance date for the LED standards by six months. In addition, the rulemaking could enhance enforcement of and provide needed flexibility in the LED air pollution control program as part of the strategy to reduce emissions of NO_x necessary for the counties in the HGB, BPA, and DFW nonattainment areas to be able to demonstrate attainment with the ozone NAAQS. While this strategy is intended to protect the environment by reducing NO_x emissions that help form ozone, the commission does not find that the additional diesel fuel producers and importers covered by this rulemaking comprise a sector of the economy, or that the revisions will adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety in the DFW, HGB, and BPA nonattainment areas.

The proposed amendments to Chapter 114 are not subject to the regulatory analysis provisions of §2001.0225(b), because the proposed rules do not meet any of the four applicability requirements. Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal 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.

Specifically, the LED fuel requirements in Chapter 114 were developed as part of the control strategy to meet the one-hour ozone NAAQS set by the EPA under the Federal Clean Air Act (FCAA), 42 USC, §7409, and therefore meet a federal requirement. The amendments to this chapter were developed in order to strengthen and provide flexibility in meeting the LED requirements, and were also developed as a result of a petition for rulemaking by the TPCA to extend the compliance date of the LED standards. The FCAA, 42 USC, §7410, requires states to adopt and submit 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 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 42 USC, Chapter 85, Air Pollution Prevention and Control). While 42 USC, §§7401 *et seq*. does require some specific measures for SIP purposes, like the inspection and maintenance program, the statute also provides flexibility for states to select other necessary or appropriate measures. The federal government, in implementing 42 USC, §§7401 *et seq*., recognized that the states are in the best position to determine what programs and controls are necessary or appropriate to meet the NAAQS, and provided for the ability of states and the public to collaborate on the best methods for attaining the NAAQS within a particular state. However, this flexibility does not relieve a state from developing and submitting a SIP 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.

As discussed earlier in this preamble, this rulemaking action implements requirements of 42 USC, §§7401 *et seq*. 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 is it 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 TCAA), and the Texas Water Code, which are cited in the STATUTORY AUTHORITY section of this preamble, including Texas Health and Safety Code, §§382.012, 382.019, 382.202, and 382.208. 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 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 specific purposes of this strategy are to achieve reductions of NO_x emissions to reduce ozone formation in the HGB, BPA, and DFW nonattainment areas and help bring these areas into compliance with the air quality standards established under federal law as NAAQS for ozone. If adopted, the amendments would extend the compliance date for the LED standards by six months. In addition, the rulemaking would enhance enforcement of and provide needed flexibility in the LED air pollution control program by adding enforcement provisions to the alternative emission reduction plan requirements, allowing new NO_x calculation models developed by EPA to be used to determine equivalency of alternative diesel fuel formulations to LED standards, and strengthening registration requirements in order to collect more comprehensive data on diesel supply in Texas. These amendments will not place a burden on private, real property because this action does not require an investment in the permanent installation of new refinery processing equipment.

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 as part of the LED air pollution control program were developed in order to meet the one-hour 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 one-hour ozone standard will eventually require substantial reductions in NO_x emissions as well as volatile organic compound emissions. This rulemaking is only one step among many necessary for attaining the one-hour 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 HGB, BPA, and DFW areas exceeding the federal one-hour 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 these nonattainment areas and 95 central and eastern Texas counties. 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 determined the proposed rulemaking relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq*.), and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by 30 TAC §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to actions and rules subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the proposed amendments are consistent with the applicable CMP goal expressed in 31 TAC §501.12(1) of protecting and preserving the quality and values of coastal natural resource areas, and the policy in 31 TAC §501.14(q), which requires that the commission protect air quality in coastal areas. The proposed rulemaking and SIP revision will ensure that the amendments comply with 40 Code of Federal Regulations (CFR) Part 50, National Primary and Secondary Air Quality Standards, and 40 CFR Part 51, Requirements for Preparation, Adoption, and Submittal of Implementation Plans. This rulemaking action is consistent with CMP goals and policies, in compliance with 31 TAC §505.22(e).

The commission solicits comments on the consistency of the proposed amendments with the CMP during the public comment period.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

Chapter 114 is an applicable requirement under 30 TAC Chapter 122, Federal Operating Permits Program; therefore, owners or operators subject to the federal operating permit program must, consistent with the revision process in Chapter 122, revise their operating permit to include the revised Chapter 114 requirements at their sites affected by the revisions to Chapter 114.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on January 18, 2005, at 2:00 p.m. in Building F, Room 2210, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. A time limit may be established at the hearing to assure that enough time is allowed for every interested person to speak. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes before the hearing and will answer questions before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the 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 Lola Brown, Office of Environmental Policy, Analysis, and Assessment, Texas Commission on Environmental Quality, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. All comments should reference Rule Project Number 2005- 008-114-AI. Comments must be received by 5:00 p.m., January 18, 2005. Copies of the proposed rules can be obtained from the commission's website at *http://www.tnrcc.state.tx.us/oprd/rules/propadop.html*. For further information, please contact Clifton Wise, Policy and Regulations Division, at (512) 239-2263 or Scott Carpenter, Technical Analysis Division, at (512) 239-1757.

SUBCHAPTER A. DEFINITIONS

30 TAC §114.6

STATUTORY AUTHORITY

The amendment 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. The amendment is 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 control of the state's air; §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA; §382.019, concerning Methods Used to Control and Reduce Emissions from Land Vehicles, which authorizes the commission to adopt rules to control and reduce emissions from engines used to propel land vehicles; §382.202, concerning Vehicle Emissions Inspection and Maintenance Program, which authorizes the commission to establish vehicle fuel content standards after January 1, 2004, as long as distribution of Texas LED as described in the SIP is not required prior to February 1, 2005, and authorizes the commission to consider alternative emission reduction plans to comply with Texas LED requirements; and §382.208, concerning Attainment Program, which authorizes the commission to develop and implement transportation programs and other measures necessary to demonstrate attainment and protect the public from exposure to hazardous air contaminants from motor vehicles.

The proposed amendment implements Texas Water Code, §5.103 and §5.105, and Texas Health and Safety Code, §§382.002, 382.011, 382.012, 382.017, 382.019, 382.202, and 382.208.

§114.6. Low Emission Fuel Definitions.

Unless specifically defined in Texas Health and Safety Code, Chapter 382, also known as the Texas Clean Air Act (TCAA) [~~the TCAA~~] or in the rules of the commission, the terms used in this subchapter have the meanings commonly ascribed to them in the field of air pollution control. In addition to the terms that [~~which~~] are defined by the TCAA, §3.2 [~~of this title (relating to Definitions)~~], and §101.1 of this title (relating to Definitions), the following words and terms, when used in Subchapter H of this chapter (relating to Low Emission Fuels), [~~shall~~] have the following meanings, unless the context clearly indicates otherwise.

(1) Additive--Any substance, other than one composed solely of carbon and/or hydrogen, that is intentionally added to gasoline or diesel fuel, including any added to a motor vehicle fuel system, and that is not intentionally removed prior to sale or use and that is approved by and registered with the United States Environmental Protection Agency [~~EPA~~] in accordance with 40 Code of Federal Regulations Part 79.

(2) - (6) (No change.)

(7) Diesel fuel--Any fuel that is commonly or commercially known, sold, or represented as Grade No. [~~diesel fuel Number~~] 1-D or Grade No. [~~Number~~] 2-D diesel fuel, in accordance with the active version of [~~the~~] American Society for Testing and Materials (ASTM) D975 [~~Test Method D975-98b~~] (Standard Specification for Diesel Fuel Oils)[~~, dated 1998~~].

(8) Final blend--A distinct quantity of low emission diesel (LED) that [~~LED which~~] is introduced into commerce without further alteration, which would tend to affect a regulated LED specification of the fuel.

(9) - (13) (No change.)

(14) Low emission diesel (LED)--Any diesel fuel:

(A) sold, intended for sale, or made available for sale that [~~which~~] may ultimately be used to power a diesel fueled compression-ignition engine in the counties listed in §114.319 of this title (relating to Affected Counties and Compliance Dates);

(B) - (C) (No change.)

(15) - (16) (No change.)

(17) Non-road equipment--Any device powered by a gasoline fueled spark-ignition engine or a diesel fueled compression-ignition engine that [~~which~~] is not required to be registered under Texas Transportation Code [~~TTC~~], §502.002.

(18) Produce--Perform the process to convert liquid compounds that [~~which~~] are not motor vehicle fuel into motor vehicle fuel, except where a person supplies motor vehicle fuel to a producer who agrees in writing to further process the motor vehicle fuel at the production facility and to be treated as a producer of the motor vehicle fuel, only the final producer shall be deemed for all purposes under Subchapter H of this chapter to be the producer of the motor vehicle fuel.

(19) - (22) (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 December 17, 2004.

TRD-200407371
Stephanie Bergeron Perdue
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: January 30, 2005
For further information, please call: (512) 239-0348

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SUBCHAPTER H. LOW EMISSION FUELS
DIVISION 2. LOW EMISSION DIESEL

30 TAC §§114.312, 114.314 - 114.316, 114.318, 114.319

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. 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 control of the state's air; §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA; §382.019, concerning Methods Used to Control and Reduce Emissions from Land Vehicles, which authorizes the commission to adopt rules to control and reduce emissions from engines used to propel land vehicles; §382.202, concerning Vehicle Emissions Inspection and Maintenance Program, which authorizes the commission to establish vehicle fuel content standards after January 1, 2004, as long as distribution of Texas LED as described in the SIP is not required prior to February 1, 2005, and authorizes the commission to consider alternative emission reduction plans to comply with Texas LED requirements; and §382.208, concerning Attainment Program, which authorizes the commission to develop and implement transportation programs and other measures necessary to demonstrate attainment and protect the public from exposure to hazardous air contaminants from motor vehicles.

The proposed amendments implement Texas Water Code, §5.103 and §5.105, and Texas Health and Safety Code, §§382.002, 382.011, 382.012, 382.017, 382.019, 382.202, and 382.208.

§114.312. Low Emission Diesel Standards.

(a) No person shall sell, offer for sale, supply, or offer for supply, dispense, transfer, allow the transfer, place, store, or hold any diesel fuel in any stationary tank, reservoir, or other container in the counties listed in §114.319 of this title (relating to Affected Counties and Compliance Dates), that [~~which~~] may ultimately be used to power a diesel fueled compression-ignition engine in the affected counties, that does not meet either the low emission diesel (LED) standards of subsections (b) - (d) of this section, or the requirements of subsection (f) [~~or (g)~~] of this section.

(b) Sulfur content.

(1) The maximum sulfur content of LED must [~~shall~~] not exceed 500 parts per million (ppm) by weight per gallon in the counties specified in §114.319 [~~§114.319(a) and (b)~~] of this title.

(2) The maximum sulfur content of LED must [~~shall~~] not exceed 15 ppm by weight per gallon in accordance with the counties and compliance date specified in §114.319(c) of this title.

(c) The maximum aromatic hydrocarbon content of LED is 10% by volume per gallon; or the LED has been reported in accordance with all of the requirements of §114.313 of this title (relating to Designated Alternative Limits), where:

(1) (No change.)

(2) the DAL [designated alternative limit] exceeds 10% by volume, the excess aromatic hydrocarbon content is fully offset in accordance with §114.313 of this title.

(d) (No change.)

(e) Subsection (a) of this section does [shall] not apply to a sale, offer for sale, or supply of diesel fuel to a producer where the producer further processes the diesel fuel at the producer's production facility prior to any subsequent sale, offer for sale, or supply of the diesel fuel.

(f) Diesel fuel that [which] has been produced to comply with all specifications for a Certified Diesel Fuel Formulation as approved by an executive order by the California Air Resources Board that was in effect as of January 18, 2001, may be used to satisfy the requirements of subsection (a) of this section.

(g) Alternative diesel fuel formulations that [which] the producer has demonstrated to the satisfaction of the executive director [and the EPA], through emissions and performance testing methods prescribed in §114.315(c) and (d) of this title (relating to Approved Test Methods), as achieving comparable or better reductions in emissions of oxides of nitrogen, volatile organic compounds, and particulate matter may be used to satisfy the requirements of subsections (c) and (d) of this section. For alternative diesel fuel formulations that incorporate additive systems, the estimated emissions benefits of the alternative diesel fuel formulation may be determined by comparing the emissions and performance characteristics of the alternative diesel fuel with the additive system versus the emissions and performance characteristics of a diesel fuel without the additive system, as determined by the testing methods prescribed in §114.315(c) and (d) of this title. [The commission recognizes that fuel content specifications, additive formulation, and testing technology often include factors that can reasonably be considered proprietary or confidential. Therefore, proprietary] Proprietary or confidential information supplied by the producer for evaluation of an alternative diesel fuel formulation must be identified as such when submitted. Decisions regarding confidentiality will be made subject to the Texas Public Information Act, Texas Government Code, Chapter 552.

§114.314. Registration of Diesel Producers and Importers.

(a) Each producer and importer that sells, offers for sale, supplies, or offers for supply from its production facility or import facility [low emission] diesel fuel that [(LED) which] may ultimately be used in counties listed in §114.319 of this title (relating to Affected Counties and Compliance Dates) on or before December 1, 2004, shall register with the executive director by May 1, 2005 [December 1, 2004 to begin production or importation of LED April 1, 2005. Those producers or importers not registered by December 1, 2004, may not begin production or importation of LED until after April 30, 2005, and registration must occur within 30 days after the first date that such person will produce or import LED].

(b) Each producer or importer that did not begin to sell, offer for sale, supply, or offer to supply from its production facility or import facility diesel fuel that may ultimately be used in counties listed in §114.319 of this title until after December 1, 2004, shall register with the executive director at least 30 days prior to the first date the diesel fuel is to be made available for use in the listed counties.

(c) Registration must [shall] be on forms prescribed by the executive director and must [shall] include:

(1) a statement indicating whether the producer or importer will or will not be producing or importing low emission diesel for use in the counties listed in §114.319 of this title on or after October 1, 2005;

(2) a statement of acceptance of the standards and enforcement provisions of this division; and

(3) [shall include] a statement of consent by the registrant that the executive director is [shall be] permitted to collect samples and access documentation and records.

(d) The executive director shall maintain a listing of all registered producers and importers [suppliers].

§114.315. Approved Test Methods.

(a) Compliance with the low emission diesel (LED) fuel content requirements of §114.312 of this title (relating to Low Emission Diesel Standards) must [shall] be determined by applying the [following] test methods and procedures specified in the active version of American Society for Testing and Materials (ASTM) D975 (Standard Specification for Diesel Fuel Oils), as appropriate.

[(1) The sulfur content of low emission diesel (LED) shall be determined by the American Society for Testing and Materials (ASTM) Test Method D2622-98 (Standard Test Method for Sulfur in Petroleum Products by Wavelength Dispersive X-ray Fluorescence Spectrometry), dated 1998.]

[(2) The aromatic hydrocarbon content of LED shall be determined by ASTM Test Method D5186-99 (Standard Test Method for Determination of Aromatic Content and Polynuclear Aromatic Content of Diesel Fuels and Aviation Turbine Fuels by Supercritical Fluid Chromatography), dated 1999.]

[(3) The cetane number of LED shall be determined by ASTM Test Method D613-95 (Standard Test Method for Cetane Number of Diesel Fuel Oil), dated 1995.]

[(4) The polycyclic aromatic hydrocarbon content of LED shall be determined by ASTM Test Method D2425-99 (Standard Test Method for Hydrocarbon Types in Middle Distillates by Mass Spectrometry), dated 1999.]

[(5) The nitrogen content of LED shall be determined by ASTM Test Method D4629-96 (Standard Test Method for Trace Nitrogen in Liquid Petroleum Hydrocarbons by Syringe/Inlet Oxidative Combustion and Chemiluminescence Detection), dated 1996.]

[(6) The American Petroleum Institute (API) gravity index of LED shall be determined by ASTM Test Method D287-92 (Standard Test Method for API Gravity of Crude Petroleum and Petroleum Products (Hydrometer Method)), dated 1995.]

[(7) The viscosity of LED shall be determined by ASTM Test Method D445-97 (Standard Test Method for Kinematic Viscosity of Transparent and Opaque Liquids (the Calculation of Dynamic Viscosity)), dated 1997.]

[(8) The flashpoint of LED shall be determined by ASTM Test Method D93-99c (Standard Test Methods for Flash-Point by Pensky-Martens Closed Cup Tester), dated 1999.]

[(9) The distillation temperatures of LED shall be determined by ASTM Test Method D86-00 (Standard Test Method for Distillation of Petroleum Products at Atmospheric Pressure), dated 2000.]

(b) Modifications to the testing methods and procedures in this section may be approved by the executive director. [Alternatives to the test methods prescribed in subsection (a) of this section may be used if validated by Title 40 Code of Federal Regulations (CFR), Part 63, Appendix A (related to Test Methods), Method 301 (related to Field Validation of Pollutant Measurement Methods from Various Waste Media), dated December 29, 1992. For the purposes of this subsection, substitute "executive director" in each location that Test Method 301 references "administrator."]

(c) The executive director, upon application of any producer or importer, may approve alternative diesel fuel formulations as prescribed under §114.312(g) of this title in accordance with the following procedures.

(1) The applicant shall initially submit a proposed test protocol to the executive director, that must [~~which shall~~] include:

(A) the identity of the entity that [~~which~~] will conduct the tests described in paragraph (4) of this subsection;

(B) (No change.)

(C) test data showing that the candidate fuel meets the specifications for the appropriate Grade No. 1-D S15 or S500, or Grade No. 2-D S15 or S500 [~~Number 1-D or 2-D~~] diesel fuel as specified in [~~ASTM D975-98b (Standard Specification for Diesel Fuel Oils), dated 1998,~~] the active version of ASTM D975 (Standard Specification for Diesel Fuel Oils), and identifying the characteristics of the candidate fuel identified in paragraph (2) of this subsection;

(D) test data showing that the fuel to be used as the reference fuel satisfies the characteristics [~~specifications~~] identified in paragraph (3) of this subsection;

(E) (No change.)

(F) notification of any outlier identification and exclusion procedure that will be used, and a demonstration that any such procedure meets generally accepted statistical principles. The tests must [~~shall~~] not be conducted until the protocol is approved by the executive director. Upon completion of the tests, the applicant may submit an application for certification to the executive director. The application must [~~shall~~] include the approved test protocol, all of the test data, a copy of the complete test log prepared in accordance with paragraph (4)(D) of this subsection, a demonstration that the candidate fuel meets the requirements for certification specified in this subsection, and other information as the executive director may reasonably require. Upon review of the certification application, the executive director shall grant or deny the application. Any denial must [~~shall~~] be accompanied by a written statement of the reasons for denial.

(2) The applicant shall supply the candidate fuel to be used in the comparative testing in accordance with paragraph (4) of this subsection.

(A) The sulfur content, total aromatic hydrocarbon content, polycyclic aromatic hydrocarbon, nitrogen content, and cetane number of the candidate fuel must [~~shall~~] be determined as the average of three tests conducted in accordance with the referenced test method specified in subsection (a) of this section.

(B) The identity and concentration of each additive in the candidate fuel must [~~shall~~] be determined by a test method specified by the applicant and approved by the executive director to adequately determine the presence and concentration of the additive.

(C) The applicant may also specify any other parameters for the candidate fuel, along with the test method for determining the parameters. The applicant shall provide the chemical composition of each additive in the candidate fuel, except when [~~that if~~] the chemical composition of an additive is not known to either the applicant or to the manufacturer of the additive (if other), the applicant may provide a full disclosure of the chemical process of manufacture of the additive in lieu of its chemical composition.

(3) The reference fuel used in the comparative testing described in paragraph (4) of this subsection must [~~shall~~] be produced from straight-run diesel fuel by a hydrodearomatization process and must [~~shall~~] have the following characteristics determined in accordance with the referenced test method specified in subsection (a) of this section:

(A) - (I) (No change.)

(4) Exhaust emission tests using the candidate fuel and the reference fuel specified in paragraph (3) of this subsection must [~~shall~~] be conducted in accordance with the federal test procedures as specified in [~~Title~~] 40 CFR[~~,~~] Part 86 (Control of Emissions from New and In-Use Highway Vehicles and Engines), Subpart N (Emission Regulations for New Otto-Cycle and Diesel Heavy-Duty Engines - Gaseous and Particulate Exhaust Test Procedures), as amended [~~dated 1998~~].

(A) The tests must [~~shall~~] be performed using a Detroit Diesel Corporation Series-60 engine or an engine specified by the applicant and approved by the executive director to be equally representative of the post-1990 model year heavy-duty diesel engine fleet.

(B) The comparative testing must [~~shall~~] be conducted by a third party [~~third-party or third-parties~~] that is [~~are~~] mutually agreed upon by the executive director and the applicant. The applicant shall be responsible for all costs of the comparative testing.

(C) The applicant shall ensure that [~~conduct~~] a minimum of five exhaust emission tests are conducted on the engine with each fuel, using either of the following sequences, where "R" is the reference fuel and "C" is the candidate fuel:

(i) RC, RC, RC, RC, RC (and continuing in the same order); [~~or~~]

(ii) RC, CR, RC, CR, RC (and continuing in the same order);

(iii) RRRRR, CCCCC (and continuing in the same order); or

(iv) a sequence determined to be equivalent and approved by the executive director.

(D) The applicant shall submit a test schedule to the executive director at least one week prior to commencement of the tests. The test schedule must [~~shall~~] identify the days that [~~on which~~] the tests will be conducted, and must [~~shall~~] provide for conducting the test consecutively without substantial interruptions other than those resulting from the normal hours of operations at the test facility. The executive director or his designee shall be permitted to observe any tests. The party conducting the testing shall maintain a test log that [~~which~~] identifies all tests conducted, all engine mapping procedures, all physical modifications to or operational tests of the engine, all re-calibrations or other changes to the test instruments, and all interruptions between tests and the reason for each such interruption. [~~The party conducting the tests or the applicant shall notify the executive director by telephone and in writing of any unscheduled interruption resulting in a test delay of 48 hours or more, and of the reason for such delay. Prior to restarting the test, the applicant or person conducting the tests shall provide the executive director with a revised schedule for the remaining tests.~~] All tests conducted in accordance with the test schedule, other than any tests rejected in accordance with an outlier identification and exclusion procedure included in the approved test protocol, must [~~shall~~] be included in the comparison of emissions in accordance with paragraph (5) of this subsection.

(E) In each test of a fuel, exhaust emissions of oxides of nitrogen (NO_x), volatile organic compounds (VOC), and particulate matter (PM) must [~~shall~~] be measured.

(5) The average emissions during testing with the candidate fuel must [~~shall~~] be compared to the average emissions during testing

with the reference fuel specified in paragraph (3) of this subsection, applying one-sided Student's t statistics as set forth in Snedecar and Cochran, *Statistical Methods* (7th edition), page 91, Iowa State University Press, 1980. The executive director may [~~shall~~] issue a certification in accordance with this paragraph only if the executive director [~~he or she~~] makes all of the following determinations:

(A) the average individual emissions of NO_x, VOC, and PM, respectively, recorded during testing with the candidate fuel are comparable or better than [~~do not exceed~~] the average individual emissions of NO_x, VOC, and PM, respectively, recorded during testing with the reference fuel; and

(B) use of any additive identified in accordance with paragraph (2)(B) of this subsection in diesel powered engines will not increase emissions of noxious or toxic substances that [~~which~~] would not be emitted by such engines operating without the additive.

(6) If the executive director finds that a candidate fuel has been properly tested in accordance with this subsection, and makes the determinations specified in paragraph (5) of this subsection, then the executive director may [~~shall~~] issue an approval notification certifying that the alternative diesel fuel formulation represented by the candidate fuel may be used to satisfy the requirements of §114.312(a) of this title. The approval notification must [~~shall~~] identify all of the characteristics of the candidate fuel determined in accordance with paragraph (2) of this subsection.

(A) The approval notification must [~~shall~~] provide that the approved alternative diesel fuel formulation has the following specifications:

(i) - (iii) (No change.)

(B) All such characteristics must [~~shall~~] be determined in accordance with the test methods identified in subsection (a) of this section. The approval notification must [~~shall~~] assign an identification number to the specific approved alternative diesel fuel formulation.

(d) Notwithstanding subsection (c) of this section, the executive director, upon application of any producer or importer, may approve alternative diesel fuel formulations as prescribed under §114.312(g) of this title that [~~which~~] may be used to satisfy the requirements of §114.312(c) and (d) of this title if [~~the formulations are intended only for use in non-road equipment and, through emissions and performance testing with supporting data,~~] the producer or importer has demonstrated to the satisfaction of the executive director that the formulation will achieve [~~and the EPA as achieving~~] comparable or better reductions in emissions of NO_x, VOC, and PM.

(1) For alternative diesel fuel formulations that use an additive to achieve reductions, the applicant shall provide to the executive director upon application, the identity, chemical composition, and concentration of each additive used in the formulation, and the test method by which the presence and concentration of the additive may be determined.

(2) If the alternative diesel fuel formulation has been demonstrated to the satisfaction of the executive director to achieve comparable or better reductions in emissions of NO_x, VOC, and PM under this subsection, then the executive director may issue an approval notification certifying that the alternative diesel fuel formulation may be used to satisfy the requirements of §114.312(a) of this title.

(A) The approval notification must identify the following specifications of the alternative diesel fuel formulation as approved under this subsection:

(i) the total aromatic hydrocarbon content, cetane number, and other parameters as appropriate and as determined in accordance with the test methods identified in subsection (a) of this section; or

(ii) for an alternative diesel fuel using an additive to achieve reductions, the identity, minimum concentration and treatment rate of the additive, and the minimum specifications of the base fuel used in the approved formulation and as determined by the test method identified in paragraph (1) of this subsection.

(B) The approval notification must assign an identification number to the specific approved alternative diesel fuel formulation.

§114.316. Monitoring, Recordkeeping, and Reporting Requirements.

(a) Every producer or importer that has elected to sell, offer for sale, supply, or offer for supply low emission diesel fuel (LED) in counties listed in §114.319 of this title (relating to Affected Counties and Compliance Dates) is subject to the requirements of this section. Under these requirements LED that [~~which~~] has been produced or imported must conform with the standards for sulfur content, aromatic hydrocarbon content, and minimum cetane number as specified in §114.312 of this title (relating to Low Emission Diesel Standards) or other standards, including the type and concentration of additive as specified in accordance with §114.312(g) of this title. All records relating to LED must contain a statement declaring whether the aromatic hydrocarbon content of the sample conforms to the basic standard, to a designated alternative limit (DAL) in accordance with §114.313 of this title (relating to Designated Alternative Limits), to a limit specified in a Certified Diesel Fuel Formulation as approved by an executive order issued by the California Air Resources Board (CARB) as accepted under §114.312(f) of this title, or whether the diesel fuel conforms to an alternative diesel fuel formulation approved under §114.312(g) of this title.

(b) Each producer or importer of a diesel fuel that conforms to §114.312(a) - (f) of this title shall sample and test for the sulfur content, aromatic hydrocarbon content, and minimum cetane number in the [~~each final blend of~~] LED that [~~which~~] the producer or importer has produced or imported, by collecting and analyzing a representative sample of diesel fuel taken [~~from the final blend,~~] at a rate of one sample and test per 100,000 gallons of LED produced using the methodologies specified in §114.315 of this title (relating to Approved Test Methods). [~~If a producer or importer blends diesel fuel components directly to pipelines, tank ships, railway tank cars, or trucks and trailers, the loading(s) shall be sampled and tested for the sulfur content, aromatic hydrocarbon content, and minimum cetane number by the producer or importer or authorized contractor.~~] The producer or importer shall maintain, for two years from the date of each sampling, records showing the sample date, identity of blend sampled, container or other vessel sampled, final blend volume, and the sulfur content, aromatic hydrocarbon content, and minimum cetane number. All diesel fuel produced by the producer or imported by the importer and not tested as LED by the producer or importer as required by this section will [~~shall~~] be deemed to exceed the standards specified in §114.312 of this title, unless the producer or importer demonstrates that the diesel fuel meets those standards and limits.

(c) Each producer or importer of a diesel fuel that conforms to §114.312(g) of this title shall sample and test for the sulfur content and other appropriate components of the alternative diesel fuel formulation as approved by the executive director in the [~~each final blend of~~] LED that [~~which~~] the producer or importer has produced or imported, by collecting and analyzing a representative sample of diesel fuel taken at a rate of one sample and test per 100,000 gallons of LED produced [~~from the final blend,~~] using the methodologies specified in §114.315 of this title. If a producer or importer blends the diesel fuel components of the approved alternative diesel fuel formulation to produce a final blend of LED

directly to pipelines, tank ships, railway tank cars, or trucks and trailers, the loading(s) must [~~shall~~] be sampled and tested for the sulfur content and other appropriate components of the alternative diesel fuel formulation as approved by the executive director by the producer or importer or authorized contractor at a rate of one sample and test per 50,000 gallons of LED produced. If the approved blend contains an additive system, the producer or importer or authorized contractor shall maintain records showing that sufficient additive was added to maintain the appropriate additive concentration as approved by the executive director. The producer or importer shall maintain, for two years from the date of each sampling, records showing the sample date, identity of blend sampled, container or other vessel sampled, final blend volume, and the sulfur content and other appropriate fuel components. All diesel fuel produced by the producer or imported by the importer and not tested as LED by the producer or importer as required by this section will [~~shall~~] be deemed to exceed the standards specified in §114.312 of this title, unless the producer or importer demonstrates that the diesel fuel meets those standards and limits.

(d) A producer or importer subject to the requirements of this division shall provide to the executive director any records required to be maintained by the producer or importer in accordance with this section within five days of a written request from the executive director, if the request is received before expiration of the period during which the records are required to be maintained. Whenever a producer or importer fails to provide records regarding a final blend of LED in accordance with the requirements of this section, the final blend of diesel fuel will [~~shall~~] be presumed to have been sold by the producer or importer in violation of the standards specified in §114.312 of this title, to which the producer or importer has elected to be subject.

(e) All parties in the distribution chain (producer, importer, terminals, pipelines, truckers, rail carriers, and retail fuel dispensing outlets) subject to the provisions of §114.312 of this title shall [~~must~~] maintain copies or records of product transfer documents for a minimum of two years and shall upon request, make such copies or records available to representatives of the commission, United States Environmental Protection Agency [~~EPA~~], or local air pollution agency having jurisdiction in the area. The product transfer documents must contain, at a minimum, the following information:

(1) - (6) (No change.)

(7) one of the following certification statements, as appropriate [~~statement~~]:

(A) "This product complies with the requirements for low emission diesel fuel specified in Title 30 Texas Administrative Code, §114.312 and may be used in any Texas county requiring the use of low emission diesel fuel in compression-ignition engines."; or

(B) "This product may only be used for the purpose of producing low emission diesel fuel specified in Title 30 Texas Administrative Code §114.312 and may not be used in any Texas county requiring the use of low emission diesel fuel in compression-ignition engines without a further process that may be required to comply with the requirements of Title 30 Texas Administrative Code, §114.312."; or

(C) "This product has been produced in compliance with a TCEQ approved alternative emission reduction plan as allowed under Title 30 Texas Administrative Code, §114.318 and may be used in any Texas county requiring the use of low emission diesel fuel in compression-ignition engines."; and

(8) (No change.)

(f) For each final blend that [~~which~~] is sold or supplied by a producer or importer from the party's production facility or import facility, and that [~~which~~] contains volumes of diesel fuel that the party has produced and imported and volumes that the party neither produced nor imported, the producer or importer shall establish, maintain, and retain adequately organized records containing the following information.

(1) The volume of diesel fuel in the final blend that was not produced or imported by the producer or importer, the identity of the person(s) [~~persons(s)~~] from whom such diesel fuel was acquired, the date(s) that [~~on which~~] it was acquired, and the invoice(s) representing the acquisition(s).

(2) (No change.)

(3) A producer or importer subject to this subsection [~~(f) of this section~~] shall establish such records by the time the final blend triggering the requirements is sold or supplied from the production or import facility, and shall retain such records for two years from such date. During the period of required retention, the producer or importer shall make any of the records available to the executive director upon request.

(g) Each producer or importer electing to sell, offer for sale, supply, or offer to supply LED in accordance with §114.312 of this title shall provide a [~~report on each final blend and a~~] quarterly summation report to the executive director no later than the 15th day [~~fifteenth~~] of the month following the end of the calendar quarter. The quarterly report must [~~on each final blend shall~~] provide, at a minimum, the information required to be collected by subsections (b), (c), and (f) of this section and a [~~. The quarterly report shall provide, at a minimum,~~] reconciliation of the quarter's transactions relative to the requirements of subsections (b), (c), and (f) of this section. Updates or revisions to estimated transaction volumes required by subsections (b) and (c) of this section must [~~shall~~] be included in this report.

(h) (No change.)

(i) Each producer electing to sell, offer for sale, supply, or offer to supply diesel fuel in accordance with §114.318 of this title (relating to Alternative Emission Reduction Plan) shall provide a quarterly report to the executive director no later than the 15th day of the month following the end of the calendar quarter. The quarterly report must provide, at a minimum, the following information:

(1) the volume of diesel fuel produced by the producer that is subject to the provisions of the alternative emission reduction plan as approved by the executive director;

(2) the volume of diesel fuel that was not produced by the producer but was sold or supplied by the producer in the counties listed in §114.319 of this title and is subject to the provisions of the alternative emission reduction plan as approved by the executive director and the identity of the persons(s) from whom such diesel fuel was acquired and the date(s) that it was acquired. The producer shall retain records of the invoice(s) representing the acquisition(s) for two years from such date; and

(3) the volume of additive (if any) utilized by the producer to produce diesel fuel that is subject to the provisions of the alternative emission reduction plan as approved by the executive director and the identity of the additive and additive manufacturer.

[~~(i) Each producer or importer electing to sell, offer for sale, supply, or offer to supply LED under §114.312(f) of this title shall sample and test for the polycyclic aromatic hydrocarbon content and nitrogen content in each final blend of LED which the producer or importer has produced or imported using the fuel specifications for polycyclic aromatic hydrocarbons and nitrogen set by the executive order issued by the CARB for the Certified Diesel Fuel Formulation used to produce the LED, by collecting and analyzing a representative sample of diesel fuel taken from the final blend using the methodologies specified~~

in §114.315 of this title and shall include a record of these tests in the report required by subsection (g) of this section.]

§114.318. Alternative Emission Reduction Plan.

(a) Diesel fuel that [which] is sold, offered for sale, supplied, or offered for supply by a producer who submits [by January 31, 2003] an alternative emission reduction plan, that [which] contains a substitute fuel strategy and that [which] is approved by the executive director and the United States Environmental Protection Agency (EPA) [EPA no later that May 31, 2003,] will be considered in compliance with the requirements of §114.312(a) of this title (relating to Low Emission Diesel Standards) [this division].

(b) In order to be approved, the plan must demonstrate the market share the producer supplies, demonstrate the reductions associated with compliance with this division attributable to the market share, and specify a substitute fuel strategy that will achieve equivalent reductions[, and contain adequate enforcement provisions].

(c) Early reductions may be deemed to be equivalent by the executive director and the EPA.

(d) An alternative emission reduction [The executive director may allow plans to be submitted after January 31, 2003; however any] plan must be approved by the executive director prior to the use of that plan for compliance with the requirements of this section [division].

§114.319. Affected Counties and Compliance Dates.

(a) Beginning October [April] 1, 2005, affected persons in the counties listed in subsection (b) of this section shall be in compliance, as applicable, with §§114.312 - 114.317 of this title (relating to Low Emission Diesel Standards; Designated Alternate Limits; Registration of Diesel Producers and Importers; Approved Test Methods; Monitoring, Recordkeeping, and Reporting Requirements; and Exemptions to Low Emission Diesel Requirements) for [that] diesel fuel that [which] may ultimately be used to power a diesel-fueled compression-ignition engine in a motor vehicle.

(b) Beginning October [April] 1, 2005, affected persons in the following counties shall be in compliance with §§114.312 - 114.317 of this title for [that] diesel fuel that [which] may ultimately be used to power a diesel-fueled compression-ignition engine in a motor vehicle or in non-road equipment:

(1) Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall and Tarrant;

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

(4) Anderson, Angelina, Aransas, Atascosa, Austin, Bastrop, Bee, Bell, Bexar, Bosque, Bowie, Brazos, Burleson, Caldwell, Calhoun, Camp, Cass, Cherokee, Colorado, Comal, Cooke, Coryell, De Witt, Delta, [Ellis,] Falls, Fannin, Fayette, Franklin, Freestone, Goliad, Gonzales, Grayson, Gregg, Grimes, Guadalupe, Harrison, Hays, Henderson, Hill, Hood, Hopkins, Houston, Hunt, Jackson, Jasper, [Johnson,] Karnes, [Kaufman,] Lamar, Lavaca, Lee, Leon, Limestone, Live Oak, Madison, Marion, Matagorda, McLennan, Milam, Morris, Nacogdoches, Navarro, Newton, Nueces, Panola, [Parker,] Polk, Rains, Red River, Refugio, Robertson, [Rockwall,] Rusk, Sabine, San Jacinto, San Patricio, San Augustine, Shelby, Smith, Somervell, Titus, Travis, Trinity, Tyler, Upshur, Van Zandt, Victoria, Walker, Washington, Wharton, Williamson, Wilson, Wise, and Wood.

(c) Beginning June 1, 2006, affected persons in the counties listed in subsection (b) of this section shall be in compliance with §114.312(b)(2) of this title for [that] diesel fuel that [which] may ultimately be used to power a diesel-fueled compression-ignition engine in a motor vehicle or in non-road equipment.

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 December 17, 2004.

TRD-200407372
Stephanie Bergeron Perdue
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: January 30, 2005
For further information, please call: (512) 239-0348

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 10. TEXAS WATER DEVELOPMENT BOARD

CHAPTER 373. GRANTS ADMINISTRATION

31 TAC §§373.1 - 373.14, 373.16 - 373.30, 373.32 - 373.44

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

The Texas Water Development Board (the board) proposes the repeal of 31 TAC Chapter 373, §§373.1 - 373.14, 373.16 - 373.30 and 373.32 - 373.44, concerning the Grants Administration. The repeal is proposed for cleanup and clarification as a result of the four-year rule review requirement of Texas Government Code, §2001.039.

The board proposes to repeal §§373.1 - 373.14, 373.16 - 373.30 and 373.32 - 373.44. The Construction Grants Program has expended all the funds provided for it and all projects receiving funding from the program have been closed out. In addition, there is no evidence that funding for this program will be revived by the federal government.

Melanie Callahan, Director of Fiscal Services, has determined that for the first five-year period the proposed repeal is in effect there will be no fiscal implications on state or local government, or local economies.

Ms. Callahan has determined that for the first five years the repeal, as proposed, is in effect the public benefit anticipated as a result of enforcing the repeal will be more effective administration of the rules. Ms. Callahan has determined there will be no economic costs to small businesses or individuals required to comply with the repeal as proposed.

Comments on the proposed repeal will be accepted for 30 days following publication and may be submitted to Srin Surapanani, Attorney, General Counsel's Office, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, by e-mail to srin.surapanani@twdb.state.tx.us or by fax at (512) 463-5580.

The repeal is proposed under the authority of the Texas Water Code, §6.101 which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Texas Water Code and other laws of the State.

The statutory provision affected by the repeal is Texas Water Code, §16.093.

§373.1. Introductions; Scope and Interpretation of Rules.
§373.2. Definitions.
§373.3. Eligibility Determination; Eligible Applicants; Applicant Eligibility under 208 and 303e Water Quality Management Plans.
§373.4. Preparation and Submission.
§373.5. Fundable Projects.
§373.6. Public Hearings.
§373.7. Effective Period.
§373.8. Projects Categorized and Rated.
§373.9. Population Classes.
§373.10. Projects Ranked; Equal Priority Rating Scores.
§373.11. Obligation Period.
§373.12. Reserves.
§373.13. Advance of Allowance for Small Communities.
§373.14. Population Class Apportionment.
§373.16. Use of Funds.
§373.17. Fundable Portion of Project Priority List.
§373.18. Planning Portion of Project Priority List.
§373.19. Redistribution of Funds.
§373.20. Preapplication Conferences.
§373.21. Authorization to Submit Applications.
§373.22. Notice of Authorization.
§373.23. Submission of Application.
§373.24. Application Returned; Additional Information.
§373.25. Failure to Complete Application Process.
§373.26. Project Certification.
§373.27. Approved Project Schedule; Project Changes.
§373.28. Failure to Proceed According to Schedule.
§373.29. Request for Grant Increase.
§373.30. Review of Project Priority List.
§373.32. Project Funding Bypass.
§373.33. Additional Allotment.
§373.34. Project Removal.
§373.35. Minor Revisions.
§373.36. Rating Criteria; Maximum Points.
§373.37. Rating Sheets.
§373.38. Rating Tables.
§373.39. Rating Sheet No. 1.
§373.40. Rating Sheet No. 2.
§373.41. Rating Sheet No. 3.
§373.42. Rating Sheet No. 4.
§373.43. Rating Sheet No. 5.
§373.44. Rating Sheets 1-5, Tables I-V, and Figure 1--Population Density Point Curve.

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 December 15, 2004.

TRD-200407355
Suzanne Schwartz
General Counsel
Texas Water Development Board
Proposed date of adoption: February 16, 2005
For further information, please call: (512) 475-2052

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 5. TEXAS BOARD OF PARDONS AND PAROLES

CHAPTER 143. EXECUTIVE CLEMENCY

SUBCHAPTER A. FULL PARDON AND RESTORATION OF RIGHTS OF CITIZENSHIP

37 TAC §143.2

The Texas Board of Pardons and Paroles proposes amendments to 37 TAC §143.2, concerning pardons for innocence. The amendment is proposed for the purpose of clarifying the procedures for consideration of a pardon based on actual innocence. Specifically, in order for the Board to consider the petition, the Board must receive recommendations from at least two trial officials, with one of those trial officials submitting documentary evidence of actual innocence, or the Board must receive a certified order or judgment of the district court accompanied by certified copies of the findings of fact and conclusions of law where the court recommends that the Court of Criminal Appeals grant state habeas relief on the grounds of actual innocence. In addition, evidence submitted must include results of any DNA or other forensic tests and may include affidavits of witnesses upon which the recommendation of actual innocence is based.

Rissie Owens, Chair of the Board, has determined, that for the first five-year period the proposed amendments are in effect, no fiscal implications exist for state or local government as a result of enforcing or administering this section.

Ms. Owens also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of the amendments will be to clarify the procedures for consideration of a pardon based on actual innocence. There will be no effect on small or micro-businesses. There are no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments should be directed to Laura McElroy, General Counsel, Texas Board of Pardons and Paroles, 211 W. 14th Street, Suite 500, Austin, Texas 78701. Written comments from the general public should be received within 30 days of the publication of this proposal.

The amended rule is proposed under Article IV, Section 11 of the Texas Constitution and Article 48.01, Code of Criminal Procedure, that invest the Board of Pardons and Paroles with the power to recommend clemency, including pardons, commutations of sentence, and reprieves; and under §508.036(b), Government Code, that provides the Board with authority to adopt rules relating to the decision-making processes used by the Board of Pardons and Paroles.

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

§143.2. Pardons for Innocence.

(a) On the grounds of innocence of the offense for which convicted the board will [~~only~~] consider applications for recommendation to the governor for a [~~full~~] pardon for innocence upon receipt of:

(1) a written [~~unanimous~~] recommendation of at least two of the current trial officials of the court of conviction, with one trial official submitting documentary evidence of actual innocence; or [~~and~~]

[~~(2) affidavits of witnesses upon which the recommendation of innocence is based; and~~]

(2) [~~(3) if the basis for the recommendation is evidence not previously available,~~] a certified order or judgment of a court having jurisdiction accompanied by a certified copy of the findings of fact and conclusions of law where the court recommends that the Court of Criminal Appeals grant state habeas relief on the grounds of actual innocence.

(b) Evidence submitted under subsection (a)(1) of this section shall include the results and analysis of pre-trial and post-trial DNA tests or other forensic tests, if any, and may also include affidavits of witnesses upon which the recommendation of actual innocence is based.

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 December 20, 2004.

TRD-200407388
Laura McElroy
General Counsel
Texas Board of Pardons and Paroles
Earliest possible date of adoption: January 30, 2005
For further information, please call: (512) 406-5388

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TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 27. TOLL PROJECTS

The Texas Department of Transportation (department) proposes amendments to §27.32, concerning private toll roads, §27.43 and §27.44, concerning regional tollway authorities, and §27.72 and §27.73, concerning county toll roads.

EXPLANATION OF PROPOSED AMENDMENTS

Transportation Code, Chapter 362, provides that a private entity or corporation may not construct any privately-owned toll project that connects to a road, bridge, or highway included in the state highway system unless the project is approved by the Texas Transportation Commission (commission). Section 27.32 describes the studies an applicant must undertake as part of submitting an application to the department for the approval of a project.

Transportation Code, Chapter 366, authorizes the commission to transfer a segment of the non-tolled state highway system to a regional tollway authority. Section 27.43 describes the procedures for the transfer.

Transportation Code, §201.113, authorizes the commission and a regional tollway authority to enter into an agreement for the improvement by the regional tollway authority of portions of the state highway system. Section 27.44 contains provisions for those projects that are approved.

Transportation Code, §284.009, provides that the commission may convey a non-toll state highway or a segment of a non-toll state highway, including real property acquired to construct or operate a highway, to a county for operation and maintenance as a toll road project. Section 27.72 describes the provisions for the transfer.

Transportation Code, §362.051, provides that a governmental or private entity must obtain the commission's approval before beginning construction of a toll road, toll bridge, or turnpike that is to be part of the state highway system. Section 27.73 describes what is required by the county to secure approval.

The sections as currently written contain provisions for environmental review and public involvement for private toll roads; conversion of an existing segment of the free state highway system to a turnpike project and transfer to a regional tollway authority; improvement of the state highway system by regional tollway authorities; transfer of a non-toll state highway or segment to a county for operation and maintenance as a toll road project; and construction by a county of a toll road, toll bridge, or turnpike that is to be part of the state highway system.

The amendments provide needed clarifications to the environmental study, coordination, public involvement, and environmental documentation processes to make the rules easier to understand.

Concerning the amendment to §27.32, the term environmental documentation is used rather than the existing reference to environmental assessment and/or an environmental impact statement in order to capture all possible environmental documentation that could be prepared by the applicant. The existing language refers to §2.43, subsections (d) and (e), which are limited to environmental assessments and environmental impact statements. The amended language refers to the entire Chapter 2, Subchapter C, to better capture the requirements for all environmental documentation and public involvement.

Section 27.32 is amended to include an added provision specifying that the environmental document must describe all reasonable and feasible measures to avoid, minimize, or mitigate for adverse environmental impacts and all practicable measures to enhance the environment since this is one of the criteria used by the commission for approval. The provisions in Chapter 2, Subchapter C, related to environmental activities that need to be conducted, are written with references to the department. To clarify roles and responsibilities of the applicant and the department and to maximize flexibility in that regard, the amended language includes new provisions for projects planned and developed by private entities and corporations regarding roles and responsibilities under Chapter 2, Subchapter C, relating to environmental studies, public involvement, notice requirements, approval of documentation, notices, and reports.

The amendments also include expanded language regarding the project record in order to better outline submission by the private entity or corporation to the department of documentation, reports, summaries, and certifications for the project record.

Amended §27.43 has an added provision specifying that the regional tollway authority is responsible for obtaining all required environmental permits and approvals and commitments for all state and federal environmental laws and regulations for all projects undertaken on facilities under this section since the facility is transferred to the regional tollway authority and removed from the state highway system making the regional

authority entirely liable and responsible for the facility. For transferred facilities, existing provisions outlining that the regional tollway authority complete a study consistent with the National Environmental Policy Act and provide for public involvement in accordance with §§2.40-2.51 of this title are deleted and replaced with another provision. The proposed amended provision requires the regional tollway authority to agree to provide for public involvement and to conduct a study of the social and environmental impact for all projects undertaken on the facility. Transferred facilities are removed from the state highway system and the regional tollway authority is entirely liable and responsible for the facility. The department felt it inappropriate to be prescriptive regarding the form and format of the study and public involvement for these transferred facilities. However, the amendments further clarify that projects shall be developed in accordance with §2.50 under Chapter 2, Subchapter C, if federal-aid or federal-aid and state highway funds are requested and approved to assist the project.

Amended §27.44 includes a new provision specifying that the environmental review and public involvement for all improvements of the state highway system under the provisions of this subsection must be done in accordance with Chapter 2, Subchapter C, of this title, titled Environmental Review and Public Involvement for Transportation Projects. The existing language is limited to indicating that the regional tollway authority will comply with all applicable federal, state, and department requirements, including environmental clearance but does not specify what that entails. Chapter 2, Subchapter C, describes activities that need to be conducted with references to the department. In order to clarify roles and responsibilities of the regional tollway authority and the department and to maximize flexibility in that regard, the amended language includes new provisions for projects planned and developed by the regional tollway authority regarding roles and responsibilities under Chapter 2, Subchapter C, relating to environmental studies, public involvement, notice requirements, approval of documentation, notices, and reports. The amendments further clarify that projects shall be developed in accordance with §2.50 if federal-aid or federal-aid and state highway funds are requested and approved to assist the project. The existing language indicates that if federal or state financial assistance is requested, the regional tollway authority will comply with all federal, state, and department requirements applicable to federal and state financed projects.

Amended §27.72 clarifies that the county is responsible for obtaining all environmental permits and approvals and for compliance with all federal and state environmental laws, regulations, and policies applicable to the highway and related improvements. In addition, proposed new provisions include agreement by the county to provide for public involvement and to conduct a study of the social and environmental impact of all proposed improvements to the highway and toll road. The existing language indicates that the county agrees to assume all liability and responsibility for existing and future environmental permits, issues, and commitments.

Amended §27.73 clarifies that the county must conduct a study of the social and environmental impacts and provide for public involvement in accordance with Chapter 2, Subchapter C, regardless of the funds used to assist with the project for toll road projects that are approved under this section since they are to be part of the state highway system. The amendments further clarify that projects shall be developed in accordance with §2.50 if federal-aid or federal-aid and state highway funds are requested and approved to assist the project. Chapter 2, Subchapter C, describes activities that need to be conducted with references to the department. In order to clarify roles and responsibilities of the regional tollway authority and the department and to maximize flexibility in that regard, the amended language includes new provisions for projects planned and developed by the regional tollway authority regarding roles and responsibilities under Chapter 2, Subchapter C. Existing language indicates that the county's request to the commission must include documentation demonstrating that the environmental review and public involvement for the project have been conducted in the manner prescribed by Chapter 2, Subchapter C. The amended language is intended to better outline the roles and responsibilities of the county and the department in conducting the environmental review and public involvement.

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. Although there are costs associated with complying with state and federal environmental laws and regulations, these are accrued on a project by project basis and are difficult to quantify. The amendments will not cause additional costs above those already experienced by the department as a part of the normal project development, environmental, and public involvement processes. There are no additional anticipated economic costs for persons required to comply with the sections as proposed.

Dianna F. Noble, P.E., Director, Environmental Affairs 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. Noble 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 a clarification of the required environmental process used for transportation projects. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments may be submitted to Dianna F. Noble, P.E., Director, Environmental Affairs Division, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is January 31, 2005.

SUBCHAPTER C. PRIVATE TOLL ROADS

43 TAC §27.32

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.

CROSS REFERENCE TO STATUTE: Transportation Code, Chapter 366, §284.009, and §362.051

§27.32. Preliminary Studies.

(a) Studies. Prior to submitting an application to the department for the approval of a project, an applicant shall conduct a feasibility study and a study of the social and environmental impact of the project.

(1) Feasibility study. An applicant shall conduct a feasibility study to determine the financial viability of the proposed project. The study shall include:

(A) the proposed method for financing the planning, design, construction, maintenance, and operation of the project; and

(B) traffic data and projections.

(2) Social and environmental impact. An applicant shall conduct a study of the social and environmental impact of the project, consistent with the spirit and intent of the National Environmental Policy Act, 42 United States Code §§4321 et seq., and 23 United States Code §109(h). The study shall include the following components.

(A) Route and alignment. The applicant shall provide a design geometric layout certified by a professional engineer registered in Texas to be in accordance with design manuals that will:

(i) identify the selected route and alignment as well as the alternative routes and alignments which were considered;

(ii) provide evidence of the project's logical termini and independent utility;

(iii) provide the location of interchanges, mainlanes, grade separations, ramps, profiles and horizontal alignment, projected traffic volumes, and right-of-way limits for all routes and alignments considered; and

(iv) identify revisions or changes to state highway system facilities necessitated by the project.

(B) Environmental documentation.

(i) An applicant shall prepare an environmental document in accordance with Chapter 2, Subchapter C, of this title (relating to Environmental Review and Public Involvement for Transportation Projects).

(ii) The environmental document must describe all reasonable and feasible measures to avoid, minimize, or mitigate for adverse environmental impacts and all practicable measures to enhance the environment.

~~*[(i)* An applicant shall prepare an environmental assessment and/or an environmental impact statement in accordance with §2.43(d) and (e) of this title (relating to Highway Construction Projects--State Funds).]~~

(iii) [~~(ii)~~] The form and content of an environmental document [~~assessment and environmental impact statement~~] prepared by an applicant and any decision by an applicant that an environmental impact statement is not necessary must be approved by the department.

(b) Public involvement. An applicant shall provide for public involvement by:

(1) complying with §2.43(c) of this title (relating to Non Federal-Aid Transportation Projects);

~~[(1) complying with §2.43(b) (1) and (2) of this title (relating to Highway Construction Projects--State Funds);]~~

(2) holding one or more public hearings following the completion of the studies required by this section as may be necessary to ensure participation by each community affected by the project; and

(3) notifying the department in writing not less than ten days in advance of all public meetings and public hearings held under this section.

~~[(c) Record. An applicant shall provide the department a summary of all public meetings and a summary and analysis of all public hearings held under this section. The summary and analysis for each public hearing shall include:]~~

~~[(1) the verbatim transcript of the hearing;]~~

~~[(2) a summary of comments received, and the response to and analysis of comments;]~~

~~[(3) any proposed changes in project location and design planned as a result of comments; and]~~

~~[(4) certification that the public hearings were held in accordance with §2.43(b) (2) of this title (relating to Highway Construction Projects--State Funds), and the Civil Rights Act of 1964.]~~

(c) [~~(d)~~] Revision to environmental document. Following the public hearing, an applicant shall revise the environmental document for the project to address any issues or concerns identified during the public involvement process.

(d) Respective roles and responsibilities. The applicant shall request that the department make a determination of the respective roles and responsibilities of the applicant and the department under Chapter 2, Subchapter C, of this title (relating to Environmental Review and Public Involvement for Transportation Projects). The applicant shall comply with the department's directives. The directives will specify who will conduct the following work, either by the applicant or by the department:

(1) preparation and completion of environmental studies;

(2) submission of appropriate environmental documentation for department review;

(3) preparation of any document revisions;

(4) submission of copies of the environmental studies and documentation adequate for distribution;

(5) preparation of legal and public notices for department review and use;

(6) arrangements for appropriate public involvement, including court reporters and accommodations if requested for persons with special communication or physical needs related to public hearings;

(7) preparation of public meetings and hearing materials;

(8) preparation of any responses to comments;

(9) preparation of public meeting and public hearing summary and analysis, and the comment and response reports; and

(10) submission of documentation showing all environmental permits, issues, and commitments have been or will be completed, including copies of permits or other approvals required prior to construction.

(e) Record. An applicant shall provide the department:

(1) the appropriate environmental document;

(2) summary and comment and response reports for all meetings;

(3) summary and analysis and comment and response reports for all public hearings;

(4) a summary of the proposed changes in the project location and design and mitigation planned as a result of comments;

(5) the verbatim transcript of any public hearing;

(6) certification that all public hearings were held in accordance with §2.43 of this title (relating to Non Federal-Aid Transportation Projects, the Civil Rights Act of 1964, and the Civil Rights Restoration Act of 1987; and

(7) revised environmental document showing the proposed changes in project location, design, and mitigation as a result of comments and public involvement.

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 December 20, 2004.

TRD-200407392
Richard D. Monroe
General Counsel
Texas Department of Transportation
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For further information, please call: (512) 463-8630

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SUBCHAPTER D. REGIONAL TOLLWAY AUTHORITIES

43 TAC §27.43, §27.44

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.

CROSS REFERENCE TO STATUTE: Transportation Code, Chapter 366, §284.009, and §362.051

§27.43. Transfer of Existing Public Highways.

(a) Purpose. Transportation Code, §366.035, provides that if the commission finds that the conversion of an existing segment of the free state highway system to a turnpike project is the most feasible and economic means to accomplish necessary expansion, improvements, or extensions to the state highway system, that segment may, on approval of the governor and the affected regional tollway authority, be transferred by order of the commission to the regional tollway authority.

(b) Public involvement. Prior to transferring an existing segment of the state highway system to the regional tollway authority, the commission will conduct a public hearing for the purpose of receiving comments from interested persons concerning the proposed transfer. The notice of the public hearing will be published in the *Texas Register* at least two weeks prior to the hearing date and, in [~~accordance with §2.43 of this title (relating to Highway Construction Projects--State Funds),~~] one or more newspapers of general circulation in the counties in which the segment is located, and a newspaper, if any, published in the counties of the applicable regional tollway authority. The department will prepare a summary of the public hearing and all comments received in response to the hearing.

(c) Reimbursement. The regional tollway authority will reimburse the commission for the cost of the transferred highway, unless the commission finds that the transfer will result in substantial net benefits to the state, the department, and the traveling public that exceed that cost. The cost shall include the total dollar amount expended by the department for the original construction of the transferred highway, including all costs associated with the preliminary engineering and design engineering for plans, specifications, and estimates, acquisition of necessary right of way, and actual construction of the highway and all necessary appurtenant facilities. Costs anticipated to be expended by the department, as evidenced by inclusion in the current three year Statewide Transportation Improvement Program, to expand, improve, or extend the highway shall be deducted from the costs to be reimbursed to the commission.

(d) Criteria. The commission may, after a review of the regional tollway authority's traffic and revenue forecasts, transfer an existing highway to the regional tollway authority, provided that:

(1) the regional tollway authority agrees, through binding written commitment, to accept the highway for maintenance and operation in a safe and efficient manner while protecting and preserving the state's investment in the facility, and to assume all responsibility of environmental permits, issues, and commitments, and obtain all required environmental permits and approvals and compliance for all state and federal environmental laws and regulations for all projects undertaken on the facility;

(2) the transfer will not adversely affect regional mobility;

(3) construction of the necessary expansion, improvement or extension can be accomplished efficiently, expeditiously, and with a minimum public investment;

(4) the department will have design review and approval for all projects undertaken on the facility;

(5) the regional tollway authority agrees to provide public involvement and to conduct a study of the social and environmental impact for all projects undertaken on this facility.

[~~(5) the regional tollway authority agrees to complete a study of the social, economic, and environmental impacts of all projects, consistent with the spirit and intent of the National Environmental Policy Act, Title 42, United States Code, §§4321 et seq., Title 23, United States Code, §109(h), and shall provide for public involvement and meet all other requirements of §§2.40-2.51 of this title (relating to Environmental Review and Public Involvement for Transportation Projects); and~~]

(6) the regional tollway authority agrees that the department will not accept the facility back into the state highway system unless it is found to be in an acceptable state of repair and maintenance and meets all current design standards used by the department.

(e) Financial assistance. When a regional tollway authority proposes an improvement to the facility and requests federal-aid or federal-aid and state highway funds to assist with the project, the project shall be developed in accordance with §2.50 of this title (relating to Financial Assistance for Toll Facilities and Pass-Through Toll Projects).

(f) [~~(e)~~] Transfer. Provided the commission finds that the conversion of a segment of the existing state highway system to a toll facility is the most feasible and economic means to accomplish necessary expansion, improvements, or extensions to the state highway system and that such conversion is in the best interest of the State of Texas, the commission will request approval from the governor to execute such a transfer. Coincident with the transfer, the commission will remove the segment of highway from the designated state highway system, and the regional tollway authority shall assume all liability, responsibility, and duty for financing, design, construction, maintenance and operation of the facility.

§27.44. Improvement of the State Highway System by Regional Tollway Authorities.

(a) Request. If requested by a regional tollway authority, and approved as provided in this section, a regional tollway authority may improve a segment of the state highway system. In this section, improvement means construction, reconstruction, and maintenance, and the making of a necessary plan or survey before beginning construction, reconstruction, or maintenance, and includes a project or activity

appurtenant to a state highway, including drainage facilities, surveying, traffic counts, driveways, landscaping, lights, or guardrails.

(b) Approval. Except as provided in subsection (d) of this section, the commission may authorize a regional tollway authority to provide for improvement of the state highway system if the regional tollway authority commits in an agreement with the department to comply with all applicable federal, state, and department requirements. In approving a request from a regional tollway authority to provide for improvement of the state highway system, the commission will consider:

(1) the capability of the regional tollway authority to award and manage the construction contract in a timely manner consistent with applicable federal and state laws and regulations;

(2) the need for expeditious project completion;

(3) the cost effectiveness of the regional tollway authority's proposal as compared to the department's management of the project; and

(4) any other considerations relating to the benefit of the state, the traveling public, and the operations of the department.

(c) Agreement. If approved by the commission pursuant to subsection (b) of this section, an agreement will be executed between the department and the regional tollway authority, outlining the responsibilities of each party and including the following provisions.

(1) The regional tollway authority will comply with all applicable federal, state, and department requirements, including, but not limited to, environmental clearance, design standards, construction oversight, and materials testing.

(2) The appropriate department division and/or the Federal Highway Administration must approve the plans, specifications, and estimates, including traffic control plans, before any advertisement of the project for bidding may occur.

(3) If federal or state financial assistance is requested, the regional tollway authority will comply with all federal, state, and department requirements applicable to federal and state financed projects, including, but not limited to, review and approval of bidding procedures, contract documents, and contracts by the appropriate department division or office prior to issuance of proposals or other documents.

(d) Feasibility determinations. The executive director or designee may approve without commission action those improvements that are necessary to determine whether it is feasible to develop a segment of the designated state highway system as a turnpike project, including preliminary plans and surveys. A regional tollway authority may provide those improvements under an agreement with the department that outlines the responsibilities of each party and includes the following provisions.

(1) The regional tollway authority will provide the improvements at its expense.

(2) If feasibility is not achieved, the regional tollway authority will provide the work product to the department.

(3) If federal financial assistance will be requested for the turnpike project, the regional tollway authority will comply with all requirements applicable to federally financed projects.

(4) Any work performed on state highway right of way will be approved in advance by the appropriate department district, including approval of traffic control plans.

(e) Environmental review and public involvement.

(1) When a regional tollway authority proposes an improvement on the state highway system and no federal-aid or state highway funds are used, the regional tollway authority shall complete environmental studies and public involvement in accordance with federal and state requirements and in accordance with Chapter 2, Subchapter C, of this title (relating to Environmental Review and Public Involvement for Transportation Projects).

(2) The department shall determine respective roles and responsibilities. The regional tollway authority shall request that the department make a determination of the respective roles and responsibilities of the regional tollway authority and the department under Chapter 2, Subchapter C, of this title. The regional tollway authority shall comply with the departments directives. The directives will specify who will conduct the following work, either by the regional tollway authority or by the department:

(A) preparation and completion of environmental studies;

(B) submission of appropriate environmental documentation for department review;

(C) preparation of any document revisions;

(D) submission of copies of the environmental studies and documentation adequate for distribution;

(E) preparation of legal and public notices for department review and use;

(F) arrangements for appropriate public involvement, including court reporters and accommodation if requested for persons with special communication or physical needs related to the public hearing;

(G) preparation of public meeting and hearing materials;

(H) preparation of and responses to comments;

(I) preparation of public meeting and public hearing summary and analysis, and the comment and response reports and submission of a verbatim transcript of any public hearing, and a signed certification that any hearing has been held in accordance with §2.43(c) of this title (relating to Non Federal-Aid Transportation Projects), the Civil Rights Act of 1964, and the Civil Rights Restoration Act of 1987; and

(J) submission of documentation showing that all environmental permits, issues, and commitments have been or will be completed, including copies of permits or other approvals required prior to construction.

(3) For proposed projects that will provide new access to a roadway requiring Federal Highway Administration approval for changes in access, the regional tollway authority shall prepare the appropriate environmental documentation in accordance with §2.42 of this title (relating to Federal-Aid Transportation Projects).

(4) When a regional tollway authority proposes to improve the state highway and requests federal-aid or federal-aid and state highway funds to assist with the project in accordance with this section, the project shall be developed in accordance with §2.50 of this title (relating to Financial Assistance for Toll Facilities and Pass-Through Toll Projects).

(f) [~~(e)~~] Acknowledgment. The regional tollway authority must acknowledge in an agreement that, while not an agent, servant, or employee of the state, it is responsible for its own acts and deeds and for those of its agents or employees during the performance of the work authorized in the agreement.

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 December 20, 2004.

TRD-200407393
Richard D. Monroe
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: January 30, 2005
For further information, please call: (512) 463-8630

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SUBCHAPTER F. COUNTY TOLL ROADS

43 TAC §27.72, §27.73

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.

CROSS REFERENCE TO STATUTE: Transportation Code, Chapter 366, §284.009, and §362.051

§27.72. Transfer of State Highways.

(a) Request.

(1) Transportation Code, §284.009, provides that the commission may convey a non-toll state highway or a segment of a non-toll state highway, including real property acquired to construct or operate the highway, to a county for operation and maintenance as a toll road project under that chapter if:

(A) the commissioners court of each county in which the highway is located approves the proposed conveyance; and

(B) the commission determines that the proposed conveyance will improve overall mobility in the region or is the most feasible and economic means of accomplishing necessary improvements to the highway.

(2) A county may request a transfer under this section by submitting a written request that includes:

(A) an explanation of how the proposed transfer will improve overall mobility in the region or is the most feasible and economic means of accomplishing necessary improvements to the highway;

(B) an explanation of how the request complies with subsection (d)(1)(E) and (F) [~~(d)(1)(D) and (E)~~] of this section;

(C) copies of any completed studies concerning the transfer;

(D) a brief description of any known environmental, social, economic, or cultural resource issues, such as impacts on wetlands and other water resources, endangered species, parks, neighborhoods, businesses, historic buildings or bridges, and archeological sites concerning the transfer; and

(E) the name and address of any individuals or organizations known to be opposed to the transfer, and a description of any known controversies concerning the transfer.

(b) Public involvement.

(1) As part of the information that will be used by the commission in determining whether to transfer a segment of the state highway system to a county, the department will:

(A) hold one or more public hearings in each county in which the project is located for the purpose of receiving oral comments;

(B) hold one or more informal public meetings, which will be held, if practicable, in the project area; and

(C) solicit written comments.

(2) Notice of a solicitation of written comments, a public meeting, and a public hearing held under paragraph (1) of this subsection will be:

(A) published in the *Texas Register*;

(B) published in one or more newspapers of general circulation in each of the counties in which the segment is located;

(C) if the toll road project is not located in the county constructing and operating the project, published in a newspaper of general circulation, if any, published in the county constructing and operating the project;

(D) posted on the department's website, with a link to the county's website, if available; and

(E) posted on the county's website, if available, with a link to the department's website.

(3) The department will publish and post notices under paragraph (2) of this subsection at least 10 days prior to the date of the hearing or meeting.

(4) A notice published or posted under paragraph (2) of this subsection will inform the public that the county's request and any studies submitted by the county in support of the request are available for review at one or more designated offices of the department and can be found on the websites of the department and, if available, the county. The notice will provide the internet address of the request and studies. The department will not make studies available on its website if it determines such action to be impractical due to the size of the files.

(5) The department will prepare a summary of the public hearings and all comments received in response to the notice and the hearings.

(c) Reimbursement. The county will reimburse the department for any funds paid by the department for the construction, maintenance, and operation of the transferred highway, unless the commission finds that the transfer will result in substantial net benefits to the state, the department, and the traveling public that equal or exceed the amount of the reimbursement waived. In computing the cost of the transferred highway, the commission will include the total dollar amount expended by the department for the original construction of the transferred highway, including all costs associated with the preliminary engineering and design engineering for plans, specifications, and estimates, acquisition of necessary right of way, and actual construction of the highway and all necessary appurtenant facilities. Costs anticipated to be expended by the department, as evidenced by inclusion in the current three-year Statewide Transportation Improvement Program, to expand, improve, or extend the highway shall be deducted from the costs to be reimbursed to the department.

(d) Criteria.

(1) The commission may, after considering public input concerning the proposed transfer, whether the public has a reasonable alternative route on non-toll roads, and the county's traffic and revenue forecasts, transfer a highway to the county if:

(A) the county agrees to assume all liability and responsibility for the safe and effective maintenance and operation of the highway on its transfer;

(B) the county agrees to assume all liability and responsibility for compliance with all federal laws, regulations, and policies applicable to the highway;

(C) the county agrees to assume all liability and responsibility for existing and future EPIC, including obtaining all environmental permits and approvals and for compliance with all federal and state environmental laws, regulations, and policies applicable to the highway and related improvements;

(D) the county agrees to provide for public involvement and to conduct a study of the social and environmental impact of all proposed improvements to the highway and toll road;

(E) [~~(D)~~] the transfer will not adversely affect regional mobility;

(F) [~~(E)~~] construction of the necessary improvements can be accomplished efficiently, expeditiously, and with minimum public investment;

(G) [~~(F)~~] the commissioners' court of each county in which the highway is located has approved the transfer;

(H) [~~(G)~~] the county agrees to comply with the design and construction standards prescribed in §27.74 of this subchapter when developing projects on the transferred highway; and

(I) [~~(H)~~] the county agrees that tolls collected from the conveyed segment of highway will not be used for any purpose other than to finance the expansion, extension, operation, and maintenance of that highway segment.

(2) The commission will consider impacts on residential neighborhoods and the length of the alternative route when considering whether an alternative route is reasonable.

(e) Preliminary approval. The commission may grant preliminary approval of the transfer of a non-toll state highway or a segment of a non-toll state highway, with final approval conditioned on the completion of preliminary studies necessary for the commission to make the findings required by subsection (d) of this section, including social, economic, and environmental studies and the preparation of traffic and revenue forecasts. The commission may require the county to pay for or complete all or a portion of the preliminary studies. Upon completion of the preliminary studies, the department will hold one or more additional public hearings. The department will publish and post notice of a hearing held under this subsection in accordance with subsection (b)(2) of this section. The commission may grant final approval of the transfer consistent with the requirements of subsections (d) and (f) of this section.

(f) Transfer. If the commission finds that the conveyance of a non-toll state highway or a segment of a non-toll state highway to a county is the most feasible and economical means to accomplish necessary improvements to that highway and that the conveyance is in the best interest of the State of Texas, the commission will approve the transfer. Coincident with the transfer, the commission will remove the segment of highway from the designated state highway system, and the county shall assume all liability, responsibility, and duty for financing, design, construction, maintenance and operation of the highway.

§27.73. Commission Approval of Toll Project Required [~~Project Approval~~].

(a) Requirements. Transportation Code, Chapter 284 authorizes a county to construct a toll road project. Transportation Code, §362.051 provides that a county must obtain the commission's approval before beginning construction. The requirement to obtain commission approval applies if the project is to be part of the state highway system. Because Transportation Code, §284.008 specifies that a county's toll road project will become a part of the state highway system when all the bonds and interest on the bonds of the project are paid, the requirements in this section apply to each county toll road project.

[~~(a) Requirements. Transportation Code, §362.051 provides that a governmental or private entity must obtain the commission's approval before beginning construction of a toll road, toll bridge, or turnpike that is to be part of the state highway system.~~]

(b) Request. To secure approval of a toll road project under this section, a county shall submit a written request for approval to the executive director. The request must be accompanied by:

(1) a summary of the anticipated financing plan for purposes of seeking the approval described in subsection (e)(2) [~~(c)(2)~~] of this section;

(2) traffic and revenue forecasts;

(3) a detailed schematic indicating the location of interchanges and mainlanes;

(4) a report identifying relocations or reconstruction to state highway system facilities anticipated in connection with the proposed toll road project;

(5) an evaluation of the toll road project's integration into the state highway system;

(6) documentation demonstrating that the environmental review and public involvement for the project have been conducted in the manner prescribed by Chapter 2, Subchapter C of this title (relating to Environmental Review and Public Involvement for Transportation Projects); and

(7) a written commitment to comply with the design and construction standards prescribed in §27.74 of this subchapter when developing the toll road project.

(c) Environmental review and public involvement.

(1) When a county proposes to develop a toll road project under this section, the county shall conduct a study of the social and environmental impacts of the project in accordance with Chapter 2, Subchapter C, of this title.

(2) The county shall provide for public involvement by complying with §2.43(c) of this title (relating to Non Federal-Aid Transportation Projects).

(3) When a county proposes to develop a toll road project under this section and requests federal-aid or federal-aid and state highway funds to assist with the project, the project shall be developed in accordance with §2.50 of this title (relating to Financial Assistance for Toll Facilities and Pass-Through Toll Projects).

(4) When a county proposes a toll road project under this section and no federal-aid or state highway funds are used, the county shall complete environmental studies and public involvement in accordance with all applicable federal and state requirements and in accordance with Chapter 2, Subchapter C, of this title.

(d) Respective roles and responsibilities. The county shall request that the department make a determination of the respective roles and responsibilities of the county and the department under Chapter 2, Subchapter C, of this title. The county shall comply with the department's directives. The directives will specify who will conduct the following work, either by the county or by the department:

(1) preparation and completion of environmental studies;

(2) submission of appropriate environmental documentation for department review;

(3) preparation of any document revisions;

(4) submission of copies of the environmental studies and documentation adequate for distribution;

(5) preparation of legal and public notices for department review and use;

(6) arrangements for appropriate public involvement, including court reporters and accommodations if requested for persons with special communication or physical needs related to the public hearing;

(7) preparation of public meeting and hearing materials;

(8) preparation of any responses to comments;

(9) preparation of public meeting and public hearing of summary and analysis, and the comment and response reports, and submission of a verbatim transcript of any public hearing and a signed certification that any hearing has been held in accordance with §2.43(c) of this title (relating to Non Federal-Aid Transportation Projects), the Civil Rights Act of 1964, and the Civil Rights Restoration Act of 1987; and

(10) submission of documentation showing that all EPIC have been or will be completed, including copies of permits or other approvals required prior to construction.

(e) [~~(c)~~] Approval. In deciding whether to approve a county toll road project, the commission will consider whether:

(1) the toll road project may be effectively integrated into the state highway system;

(2) the department is able to construct any connecting roads necessary for the toll road project to generate sufficient revenue to pay the debt incurred for its construction; and

(3) the environmental review and public involvement for the toll road project have been conducted in the manner prescribed by Chapter 2, Subchapter C of this title (relating to Environmental Review and Public Involvement for Transportation Projects).

(f) [~~(d)~~] Exception. This section does not apply to a county with a population of more than 1.5 million.

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 December 20, 2004.

TRD-200407394
Richard D. Monroe
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: January 30, 2005
For further information, please call: (512) 463-8630

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WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 371. MEDICAID AND OTHER HEALTH AND HUMAN SERVICES FRAUD AND ABUSE PROGRAM INTEGRITY

SUBCHAPTER B. OFFICE OF INSPECTOR GENERAL

1 TAC §371.15

The Texas Health and Human Services Commission has withdrawn from consideration proposed new §371.15 which appeared in the June 18, 2004, issue of the *Texas Register* (29 TexReg 5856).

Filed with the Office of the Secretary of State on December 20, 2004.

TRD-200407406
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Effective date: December 20, 2004
For further information, please call: (512) 424-6900

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SUBCHAPTER G. LEGAL ACTION RELATING TO PROVIDERS OF MEDICAL ASSISTANCE

DIVISION 1. FRAUD OR ABUSE AND ADMINISTRATIVE ENFORCEMENT INVOLVING MEDICAID

1 TAC §371.1607

The Texas Health and Human Services Commission has withdrawn from consideration proposed new §371.1607 which appeared in the June 18, 2004, issue of the *Texas Register* (29 TexReg 5861).

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TRD-200407407
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
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For further information, please call: (512) 424-6900

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TITLE 7. BANKING AND SECURITIES

PART 4. TEXAS SAVINGS AND LOAN DEPARTMENT

CHAPTER 81. MORTGAGE BANKER REGISTRATION

7 TAC §81.1, §81.2

The Texas Savings and Loan Department has withdrawn from consideration the proposed new to §81.1 and §81.2 which appeared in the November 5, 2004, issue of the *Texas Register* (29 TexReg 10188).

Filed with the Office of the Secretary of State on December 20, 2004.

TRD-200407420
John Fleming
General Counsel
Texas Savings and Loan Department
Effective date: December 20, 2004
For further information, please call: (512) 475-1353

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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 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 355. REIMBURSEMENT RATES

SUBCHAPTER C. REIMBURSEMENT METHODOLOGY FOR NURSING FACILITIES

The Texas Health and Human Services Commission (HHSC) adopts amendments to §355.306, Cost Finding Methodology; §355.307, Reimbursement Setting Methodology; and §355.403, Vendor Hold, in its Reimbursement Rates chapter, with minor changes to the proposed text as published in the October 1, 2004, issue of the *Texas Register* (29 TexReg 9285). The text of the rules will be republished. HHSC also repeals §355.401, Allowable and Unallowable Costs: 1997 and Subsequent Cost Reports; §355.402, Cost Report Requirements: 1997 and Subsequent Cost Reports; §355.405, Vendor Hold; and §355.406, Vendor Hold, in its Reimbursement Rates chapter without changes to the proposed text as published in the October 1, 2004, issue of the *Texas Register* (29 TexReg 9285) and will not be republished.

The purpose of these changes is to simplify the nursing facility reimbursement rules by: repealing obsolete and/or repetitive sections and subsections; moving subsections that will continue to be in effect from obsolete rule sections to other rule sections; and updating references to subsections that are moved. The changes also: 1) delete references to state agencies that no longer exist; 2) modify a requirement regarding the timing of forwarding final cost reports to audit; and 3) make optional a requirement regarding new independent appraisals following capital improvements.

The rule at §355.401 is repealed. Former §355.401(c) is moved to §355.306(h). References to the Texas Department of Mental Health and Mental Retardation (MHMR) and the Texas Department of Human Services (DHS) are removed because these references are extraneous and those agencies no longer exist.

The rule at §355.402 is repealed. Provisions formerly located at §355.402(d)-(f) are moved to §355.306(e)-(g). The provisions are the same except that the requirement that final cost reports be forwarded to audit within seven days of receipt is modified to indicate that the seven days begin upon receipt of an acceptable report. In addition, the requirement that a not-for-profit nursing facility obtain a new independent appraisal any time it makes capital improvements that cost more than $2,000 per licensed bed is made optional.

The paragraph located at §355.403(1) detailing circumstances that may result in vendor hold is deleted because these circumstances are detailed in §355.102, General Principles of Allowable and Unallowable Costs; §355.105, General Reporting and Documentation Requirements, Methods, and Procedures; and §355.106, Basic Objectives and Criteria for Audit and Desk Review of Cost Reports. The remaining paragraphs in §355.403 are renumbered, references to 1997 cost reports and subsequent years are deleted, and references to DHS are replaced with references to HHSC or its designee.

The rule located at §355.405 referring to cost reports for provider's fiscal years ending in calendar years 1995 and 1996 is repealed because it is obsolete. The rule located at §355.406 is deleted because it is duplicated at §355.403. References in §355.307 are modified to refer to §355.306.

HHSC did not receive any comments regarding the proposed changes during the comment period. The minor changes to the proposed text: 1) update additional references to the former Texas Department of Human Services (DHS) to the appropriate successor agency; and 2) make other nonsubstantive, technical corrections.

1 TAC §§355.306, 355.307, 355.403

The amendments are 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.

§355.306. Cost Finding Methodology.

(a) Providers excused from completing a cost report. Providers are excused from completing a cost report if:

(1) the cost report would represent costs accrued during a time period immediately preceding a period of decertification, if the decertification period was greater than either 30 calendar days or one entire calendar month.

(2) the cost report would be a final cost report (due to a change of ownership or if the facility no longer contracts to serve Medicaid clients) and one of the following applies:

(A) the final cost-reporting period would end after more than 30 calendar days, or more than one entire calendar month before the end of the facility's cost report fiscal year, during the reporting period in question; or

(B) the Texas Health and Human Services Commission (HHSC), or its designee, has excused the provider from submitting a final cost report because:

(i) the report would be due before the appropriate cost report form was finalized, which would result in the final cost report being completed on an inappropriate cost report form; or

(ii) the facility was controlled by at least two different owners during a single calendar year and each owner would otherwise have submitted a cost report with an ending date that fell within that calendar year.

(3) the cost-reporting period would be less than or equal to 30 calendar days or one entire calendar month.

(b) Exclusion of and adjustments to certain reported expenses. Providers are responsible for eliminating unallowable expenses from the cost report. HHSC reserves the right to exclude any unallowable costs from the cost report and to exclude entire cost reports from the reimbursement determination database if there is reason to doubt the accuracy or allowability of a significant part of the information reported.

(1) Cost reports included in the database used for reimbursement determination.

(A) Individual cost reports will not be included in the database used for reimbursement determination if:

(i) there is reasonable doubt as to the accuracy or allowability of a significant part of the information reported; or

(ii) an auditor determines that reported costs are not verifiable.

(B) In the event that all cost reports submitted for a specific facility are disqualified through the application of subparagraph (A)(i) and/or (ii) of this paragraph, the facility will not be represented in the reimbursement database for the cost report year in question.

(2) Adjustments and exclusions of cost report data include, but are not necessarily limited to:

(A) Fixed capital asset costs.

(i) HHSC staff determine fixed capital asset costs as detailed in this section.

(ii) Fixed capital asset costs are reimbursed in the form of a use fee calculated as described in §355.307 of this title (relating to Reimbursement Setting Methodology). The following fixed capital charges are excluded from the reimbursement base:

(I) building and building equipment depreciation and lease expense;

(II) mortgage interest;

(III) land improvement depreciation; and

(IV) leasehold improvement amortization.

(B) Limits on other facility and administration costs. To ensure that the results of HHSC's cost analyses accurately reflect the costs that an economic and efficient provider must incur, HHSC may place upper limits or caps on expenses for specific line items and categories of line items included in the rate base for the administration and facility cost centers. HHSC sets upper limits at the 90th percentile in the array of all costs per unit of service or total annualized cost, as appropriate for a specific line item or category of line item, as reported by all contracted facilities, unless otherwise specified. The specific line items and categories of line items that are subject to the 90th percentile cap are:

(i) total buildings and equipment rental or lease expense;

(ii) total other rental or lease expense for transportation, departmental, and other equipment;

(iii) building depreciation;

(iv) building equipment depreciation;

(v) departmental equipment depreciation;

(vi) leasehold improvement amortization;

(vii) other amortization;

(viii) total interest expense;

(ix) total insurance for buildings and equipment;

(x) facility administrator salary, wages, and/or benefits with the cap based on an array of nonrelated-party administrator salaries, wages, and/or benefits;

(xi) assistant administrator salary, wages, and/or benefits with the cap based on an array of nonrelated-party assistant administrator salaries, wages, and/or benefits;

(xii) facility owner, partner, or stockholder salaries, wages, and/or benefits (when the owner, partner, or stockholder is not the facility administrator or assistant administrator), with the cap based on an array of nonrelated-party administrator salaries, wages, and/or benefits;

(xiii) other administrative expenses including the cost of professional and facility malpractice insurance, advertising expenses, travel and seminar expenses, association dues, other dues, professional service fees, management consultant fees, interest expense on working capital, management fees, other fees, and miscellaneous office expenses; and

(xiv) total central office overhead expenses or individual central office line items. Individual line item caps are based on an array of all corresponding line items.

(C) Occupancy adjustments. HHSC adjusts the facility and administration costs of providers with occupancy rates below a target occupancy rate. The target occupancy rate is the lower of:

(i) 85%; or

(ii) the overall average occupancy rate for contracted beds in facilities included in the rate base during the cost reporting periods included in the base.

(D) Cost projections. HHSC projects certain expenses in the reimbursement base to normalize or standardize the reporting period and to account for cost inflation between reporting periods and the period to which the prospective reimbursement applies as specified in §355.108 of this title (relating to Determination of Inflation Indices).

(3) When material pertinent to proposed reimbursements is made available to the public, the material will include the number of cost reports eliminated from reimbursement determination for the reason stated in paragraph (1)(A)(i) of this subsection.

(c) Reimbursement determinations and allowable costs. Providers are responsible for reporting only allowable costs on the cost report, except where cost report instructions indicate that other costs are to be reported in specific lines or sections. Only allowable cost information is used to determine recommended reimbursement. HHSC excludes from reimbursement determinations any unallowable expenses included in the cost report and makes the appropriate adjustments to expenses and other information reported by providers.

(d) General information. In addition to the requirements of this section, cost reports will be governed by the information in

§355.101 of this title (relating to Introduction), §355.102 of this title (relating to General Principles of Allowable and Unallowable Costs), §355.103 of this title (relating to Specifications for Allowable and Unallowable Costs), §355.104 of this title (relating to Revenues), §355.105 of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures), §355.106 of this title (relating to Basic Objectives and Criteria for Audit and Desk Review of Cost Reports), §355.107 of this title (relating to Notification of Exclusions and Adjustments), §355.108 of this title (relating to Determination of Inflation Indices), §355.109 of this title (relating to Adjusting Reimbursement When New Legislation, Regulations, or Economic Factors Affect Costs), and §355.110 of this title (relating to Informal Reviews and Formal Appeals).

(e) Final cost reports for change of ownership. Except when excused from the requirement to submit a cost report according to subsection (a) of this section, when a facility changes ownership, the prior owner must submit a completed cost report reflecting the facility's activities from the beginning of the prior owner's cost report fiscal year until the ownership-change effective date. The prior owner's vendor payments may be held until HHSC receives an acceptable final cost report according to 40 TAC §19.2308(2) (Change of Ownership).

(1) In cases where the prior owner's vendor payment is held, within seven calendar days of receipt by HHSC of an acceptable final cost report, HHSC will forward the final cost report to audit.

(2) In cases where the facility is sold and its prior year's cost report is pending audit completion, the owner's vendor payment may be held until the audit of the prior year's cost report and the final cost report are complete.

(f) Requirements for cost report completion. A completed nursing facility cost report must:

(1) meet the definition of completed cost report specified in §355.105(b)(4)(A) of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures);

(2) have attached the property appraisal used to determine the allowable appraised property value as described in subsection (g) of this section;

(3) not report figures for days of service and number of beds that reflect occupancy of greater than 100%;

(4) have a management contract attached, if applicable; and

(5) have a lease agreement attached, if applicable.

(g) Allowable appraised property values. Allowable appraised property values are determined as follows:

(1) Proprietary facilities. The allowable appraised values of proprietary facilities to be reported on Texas Medicaid cost reports are determined from local property taxing authority appraisals. The year of the property appraisal must be the calendar year within which the provider's cost report fiscal year ends, or the prior calendar year.

(2) Tax exempt facilities. The allowable appraised property values for tax exempt facilities are determined as follows.

(A) Tax exempt facilities provided an appraisal from their local property taxing authority. Tax exempt facilities provided an appraisal from their local property taxing authority must report this appraised value on their Texas Medicaid cost report. The year of the property appraisal must be the calendar year within which the provider's cost report fiscal year ends, or the prior calendar year.

(B) Tax exempt facilities not provided an appraisal from their local property taxing authority. Tax exempt facilities not provided an appraisal from their local property taxing authority because of an "exempt" status must provide documentation received from the local taxing authority certifying exemption for the current reporting period and must contract with an independent appraiser to appraise the facility land and improvements. These independent appraisals must meet the following criteria.

(i) The appraisal must value land and improvements using the same basis used by the local taxing authority under Texas laws regarding appraisal methods and procedures.

(ii) The appraisal must be updated every five years with the initial appraisal setting the five-year interval.

(I) Facilities achieving exempt status during their fiscal year ending in calendar year 1997 or a subsequent year must submit an initial appraisal to HHSC's Rate Analysis Department as part of their cost report for the fiscal year during which the exempt status was achieved. This appraisal must be reflective of the facility's appraised value during that fiscal year.

(II) If a facility is reappraised due to improvements or reconstruction as defined in clause (iii) of this subparagraph, a new five-year interval will be set.

(iii) Facilities making capital improvements, or requiring reconstruction due to fire, flood, or other natural disaster, when the improvements or reconstruction cost more than $2,000 per licensed bed, may contract with an independent appraiser to have land and improvements reappraised within the cost reporting period in which the improvement(s) is placed into service.

(iv) If for any reason an appraisal becomes available from the local taxing authority for a provider who previously lacked such an appraisal, the provider must report, on the next Texas Medicaid cost report submitted, the local taxing authority's appraised values instead of the independent appraisal values.

(3) Governmental facilities. Governmental facilities are exempt from the requirement to report an appraised property value.

(h) In addition to the requirements of §355.102 and §355.103 of this title (relating to General Principles of Allowable and Unallowable Costs, and Specifications for Allowable and Unallowable Costs), the following apply to costs for the nursing facilities (NF) program.

(1) Medical costs. The costs for medical services and items delineated in 40 TAC §19.2601 (Vendor Payment) are allowable. These costs must also comply with the general definition of allowable costs as stated in §355.102 of this title (relating to General Principles of Allowable and Unallowable Costs).

(2) Chaplaincy or pastoral services. Expenses for chaplaincy or pastoral services are allowable costs.

(3) Voucherable costs. Except as detailed in subparagraphs (A) and (B) of this paragraph, any expenses directly reimbursable to the provider through a voucher payment and any expenses in excess of the limit, or ceiling, for a voucher payment system are unallowable costs.

(A) The ventilator dependent supplemental voucher system and the children with tracheostomies supplemental voucher system are not subject to the cost reporting restrictions described in this paragraph.

(B) Select voucher systems, when indicated by department procedures, are not subject to the cost reporting restrictions described in this paragraph. To avoid the possibility of providers being reimbursed through the voucher system and the daily rate for the same expenses, the department may not waive the cost reporting restrictions described in this paragraph unless the following criteria are met:

(i) the voucher system is a temporary system;

(ii) the costs represent ongoing costs; and

(iii) the costs are not represented in the payment rate until after the voucher system has been discontinued.

(4) Preferred items. Costs for preferred items which are billed to the recipient, responsible party, or the recipient's family are not allowable costs.

(5) Preadmission Screening and Annual Resident Review (PASARR) expenses. Any expenses related to the direct delivery of specialized services and treatment required by PASARR for residents are unallowable costs.

(6) Advanced Clinical Practitioner (ACP) or Licensed Professional Counselor (LPC) services. Expenses for services provided by an ACP or LPC are unallowable costs.

§355.307. Reimbursement Setting Methodology.

(a) Case mix classes. The Texas Health and Human Services Commission (HHSC) reimbursement rates for nursing facilities (NFs) vary according to the assessed characteristics of recipient. Rates are determined for 11 case mix classes of service, plus a 12th, temporary classification assigned by default when assessment data are incomplete or in error.

(b) Reimbursement determination. HHSC applies the general principles of cost determination as specified in §355.101 of this title (relating to Introduction).

(1) Rate Components. Under the case mix methodology, reimbursements are comprised of five cost-related components: the direct care staff component; the other recipient care component; the dietary component; the general/administration component; and the fixed capital asset component. The direct care staff component is calculated as specified in §355.308 of this title (relating to Direct Care Staff Rate Component).

(A) The dietary rate component is constant across all case mix classes.

(i) For rates effective May 1, 2000, using the inflation factors used in determination of the nursing facility rates in effect January 1, 2000, project the costs in the 1998 Texas Nursing Facility Cost Report data base to the rate period beginning January 1, 2000, and ending August 31, 2000. Using these projected costs, determine the median per diem dietary cost (weighted by Medicaid days of service in the data base) in the array of allowable per diem costs for all contracted nursing facilities included in the January 1, 2000, data base, multiplied by 1.07.

(ii) For rates effective September 1, 2000, multiply the dietary per diem rate from clause (i) of this subparagraph by 1.016.

(iii) For rates effective September 1, 2001, and thereafter, the dietary component is calculated at the median cost (weighted by Medicaid days of service in the rate base) in the array of projected allowable per diem costs for all contracted nursing facilities included in the rate base, multiplied by 1.07.

(B) The general/administration rate component is constant across all case mix classes.

(i) For rates effective May 1, 2000, the general/administration rate component is equal to the difference between the general, administration, and dietary rate component in effect January 1, 2000, and the dietary rate component as calculated in subparagraph (A)(i) of this paragraph.

(ii) For rates effective September 1, 2000, multiply the general/administration per diem rate from clause (i) of this subparagraph by 1.016.

(iii) For rates effective September 1, 2001, and thereafter, the general/administration component is calculated at the median cost (weighted by Medicaid days of service in the rate base) in the array of projected allowable per diem costs for all contracted nursing facilities included in the rate base, multiplied by 1.07.

(C) The fixed capital asset component is constant across all case mix classes.

(i) For rates effective May 1, 2000, the fixed capital asset component is equal to the fixed capital asset component in effect January 1, 2000.

(ii) For rates effective September 1, 2000, the fixed capital asset component is equal to the fixed capital asset component from clause (i) of this subparagraph multiplied by 1.016.

(iii) For rates effective September 1, 2001 and thereafter, the fixed capital asset component is calculated as follows:

(I) Determine the 80th percentile in the array of allowable appraised property values per licensed bed, including land and improvements. Appraised values for this purpose are determined as follows:

(-a-) For proprietary facilities, tax exempt facilities provided an appraisal from their local property taxing authority, and tax exempt facilities not provided an appraisal from their local property taxing authority because of an "exempt" status whose independent appraisal is in the first year of its five-year interval as described in §355.306(g)(2)(B)(ii) of this title (relating to Cost Finding Methodology), allowable appraised values are determined as described in §355.306(g) of this title (relating to Cost Finding Methodology).

(-b-) For tax exempt facilities not provided an appraisal from their local property taxing authority because of an "exempt" status whose independent appraisal is not in the first year of its five-year interval as described in §355.306(g)(2)(B)(ii) of this title (relating to Cost Finding Methodology), allowable appraised values are determined by indexing the facility's allowable appraised value as determined in §355.306(g) of this title (relating to Cost Finding Methodology) to the median increase in appraised values among contracted facilities in the state as a whole from the reporting period coinciding with the first year of the facility's five-year interval to the reporting period upon which reimbursements are to be based.

(-c-) Those facilities that do not report an allowable appraised value as described in §355.306(g) of this title (relating to Cost Finding Methodology) are not included in the array for purposes of calculating the use fee.

(II) Project the 80th percentile of appraised property values per bed by one-half the forecasted increase in the personal consumption expenditures (PCE) chain-type price index from the cost reporting year to the rate year.

(III) Calculate an annual use fee per bed as the projected 80th percentile of appraised property values per bed times an annual use rate of 14%.

(IV) Calculate a per diem use fee per bed by dividing the annual use fee per bed by annual days of service per bed at the higher of 85% occupancy, or the statewide average occupancy rate during the cost reporting period.

(V) The use fee is limited to the lesser of the fee as calculated in subclauses (I) - (IV) of this clause, or the fee as calculated by inflating the fee from the previous rate period by the forecasted rate of change in the PCE chain-type price index.

(2) Case mix classification system. All Medicaid recipients are classified according to the Texas Index for Level of Effort (TILE) classification system described in §371.212 of this title (relating to Case Mix Classification System). The TILE classification system includes four clinical categories, which are further subdivided on the basis of an activity of daily living (ADL) scale, resulting in a total of 11 TILE case mix groups. A 12th group is used by default when a recipient's case-mix group membership is indeterminate because of assessment errors or omissions. Each of the 12 case-mix groups, including the default group, is assigned a case-mix index of effort. This index indicates the relative amount of staff time required on average to deliver care to recipients in that group. The case-mix index for each of the 11 TILE groups is determined through statistical and clinical analyses of recipient resource utilization data previously collected in Texas NFs. The lowest index for the 11 TILE groups is used as the case-mix index for the default group.

(3) Per diem rate methodology. Staff determine per diem rate recommendations for each of the 11 TILE groups and for the default group according to the following procedures:

(A) Determine the statewide average case mix index for all Medicaid recipients, except those in the default group. Weight the indexes from paragraph (2) of this subsection, which are based on a sample of nursing facilities, by the estimated statewide recipient days of service by case mix group during the cost reporting period covered by the rate base and determine the weighted average. The statewide average index is based on the most recent and complete data available indicating recipient days of service by case mix group that correspond to the period covered by the cost reports included in the rate base.

(B) Determine the standardized statewide case mix index for each of the 11 TILE groups by dividing each of the indexes described under paragraph (2) of this subsection by the statewide average case mix index described under subparagraph (A) of this paragraph.

(C) The other recipient care rate component varies according to case mix class of service.

(i) For rates effective May 1, 2000, using the inflation factors used in determination of the nursing facility rates in effect January 1, 2000, project the costs in the 1998 Texas Nursing Facility Cost Report data base to the rate period beginning January 1, 2000, and ending August 31, 2000. Using these projected costs, determine the sum of other recipient care costs in all nursing facilities included in the 1998 data base. Then divide the total by the sum of recipient days of service in all facilities in the 1998 data base. Multiply the resulting weighted, average per diem cost of other recipient care by 1.07. The result is the average other recipient care rate component. To calculate the other recipient care per diem rate component for each of the 11 TILE case mix groups and for the default group, multiply each of the standardized statewide case mix indexes used in determination of the nursing facility rates in effect January 1, 2000, by the average other recipient care rate component.

(ii) For rates effective September 1, 2000, multiply the average other recipient care per diem rate from clause (i) of this subparagraph by 1.016. To calculate the other recipient care per diem rate component for each of the 11 TILE case mix groups and for the default group, multiply each of the standardized statewide case mix indexes used in determination of the nursing facility rates in effect January 1, 2000, by the average other recipient care rate component.

(iii) For rates effective September 1, 2001, and thereafter, the average other recipient care rate component is calculated as follows. Adjust the raw sum of other recipient care costs in all nursing facilities included in the rate base in order to account for disallowed costs and inflation, as specified in §355.306 of this title (relating to Cost Finding Methodology). Then divide the adjusted total by the sum of recipient days of service in all facilities in the current rate base. Multiply the resulting weighted, average per diem cost of other recipient care by 1.07. The result is the average other recipient care rate component. To calculate the other recipient care per diem rate component for each of the 11 TILE case mix groups and for the default group, multiply each of the standardized statewide case mix indexes from subparagraph (B) of this paragraph by the average other recipient care rate component.

(D) Total case mix per diem rates vary according to case mix class of service and according to participant status in Direct Care Staff Rate enhancements described in §355.308 of this title (relating to Direct Care Staff Rate Component).

(i) For each participating facility, for each of the 11 TILE case mix groups and for the default group, the recommended total per diem rate is the sum of the following five rate components:

(I) the dietary rate component from paragraph (1)(A) of this subsection;

(II) the general/administration rate component from paragraph (1)(B) of this subsection;

(III) the fixed capital asset use fee component from paragraph (1)(C) of this subsection;

(IV) the case mix group's other recipient care per diem rate component by case mix group from subparagraph (C) of this paragraph; and

(V) the case mix group's total direct care staff rate component for that participating facility as determined in §355.308(l) of this title (relating to Direct Care Staff Rate Component).

(ii) For nonparticipating facilities, for each of the 11 TILE case mix groups and for the default group, the recommended total per diem rate is the sum of the following five rate components:

(I) the dietary rate component from paragraph (1)(A) of this subsection;

(II) the general/administration rate component from paragraph (1)(B) of this subsection;

(III) the fixed capital asset use fee component from paragraph (1)(C) of this subsection;

(IV) the case mix group's other recipient care per diem rate component by case mix group from subparagraph (C) of this paragraph; and

(V) the case mix group's total direct care staff base rate component as determined in §355.308(k) of this title (relating to Direct Care Staff Rate Component).

(E) Qualifying ventilator-dependent residents may receive a supplement to the per diem rate specified in subparagraph (D) of this paragraph.

(i) To qualify for supplemental reimbursement, a resident must require artificial ventilation for at least six consecutive hours daily and the use must be prescribed by a licensed physician.

(ii) A ventilator-dependent resource differential case mix index is calculated, based on time-study research data.

This resource differential index reflects the difference between direct nursing services for ventilator-dependent residents and services for residents in the most severe heavy-care TILE group. The per diem rate supplement is calculated by multiplying the resource differential case mix index times the per diem average other recipient care rate component, as described in subparagraph (C) of this paragraph and by the average direct care staff base rate component as described in §355.308(k) of this title (relating to Direct Care Staff Rate) and summing the products.

(iii) The supplemental reimbursement for residents requiring continuous artificial ventilation is 100% of the per diem ventilator rate supplement.

(iv) The supplemental reimbursement for residents not requiring continuous artificial ventilation daily but requiring artificial ventilation for at least six consecutive hours daily is 40% of the per diem ventilator rate supplement.

(F) Qualifying children with tracheostomies requiring daily care may receive a supplement to the per diem rate specified in subparagraph (D) of this paragraph.

(i) To qualify for supplemental reimbursement, a resident must be less than 22 years of age; require daily cleansing, dressing, and suctioning of a tracheostomy; and be unable to do self care. The daily care of the tracheostomy must be prescribed by a licensed physician.

(ii) The supplemental reimbursement for children receiving daily tracheostomy care is 60% of the per diem ventilator rate supplement as specified in subparagraph (E) of this paragraph.

(G) Children with qualifying conditions as specified in subparagraphs (E) and (F) of this paragraph may receive only one of the supplemental reimbursements. Therefore, children with tracheostomies who are also ventilator-dependent are not eligible to receive both supplemental reimbursements.

(4) Case mix classification effective periods. The effective periods of case mix classifications are defined as follows.

(A) A recipient's case mix classification and associated per diem rate payment remain in effect until the recipient's next required assessment, unless one of the following events takes place:

(i) a provider submits an off-cycle assessment as specified in 1 TAC §371.2412(a)(5) (relating to Texas Index for Level of Effort (TILE) Assessments);

(ii) an HHSC nurse reviewer revises the recipient's assessment and TILE classification under the provisions of 1 TAC §371.2412(b) (Texas Index for Level of Effort (TILE) Assessments); or

(iii) the recipient is discharged from the Medicaid nursing facility vendor payment system for more than 30 days prior to receiving a permanent medical necessity determination.

(B) The case mix classification and associated per diem payment rate of a recipient in the default group are changed retroactively when the provider furnishes HHSC with corrected data that permit classification in one of the 11 TILE case mix groups.

(c) Special reimbursement class. HHSC may define special reimbursement classes, including experimental reimbursement classes of service to be used in research and demonstration projects on new reimbursement methods and reimbursement classes of service, to address the cost differences of a select group of recipients. Special classes may be implemented on a statewide basis, may be limited to a specific region of the state, or may be limited to a selected group of providers.

(1) Pediatric Care Facility Class. The purpose of this special class is to recognize, through the adoption of a facility-specific payment rate, the cost differences that exist in a nursing facility or distinct unit of a nursing facility that serves predominantly children.

(2) Definitions.

(A) Pediatric care facility--A pediatric care facility is an entire facility that has maintained an average daily census of 80% or more children for the six-month period prior to its entry into the pediatric care facility class based on the entire licensed facility. A pediatric care facility can also be a distinct unit of a facility that has maintained an average daily census of 85% or more children for the six-month period prior to its entry into the pediatric care facility class based on the distinct unit of the facility. To remain a pediatric care facility, the pediatric care facility must maintain an average daily census of 80% or more children if the pediatric care facility is an entire facility and 85% or more children if the pediatric care facility is a distinct unit of the facility. The contracted provider must request in writing by certified mail or by special mail delivery where the delivery can be verified to become a member of the pediatric care facility special reimbursement class. The request must be sent to the Texas Health and Human Services Commission.

(B) Distinct unit--A portion of a nursing facility that is physically separate from (beds are not commingled with) other units of the facility. The distinct unit can be an entire wing, a separate building, an entire floor, or an entire hallway. The distinct unit consists of all beds within the designated area. A distinct unit must consist of 28 or more Medicaid-contracted beds.

(C) Children--For the purposes of this pediatric care facility class, children are defined as being at or below 22 years of age.

(3) Payment rate determination. Payment rates will be determined in the following manner:

(A) Cost reports and payment rate determination for pediatric care facilities are governed by the requirements specified in Subchapter A of this chapter (relating to Cost Determination Process). A nursing facility that contains a pediatric care facility distinct unit must complete two cost reports: one report for the pediatric care facility distinct unit and one report for the remainder of the facility.

(B) Payment rates for this class of service will be determined on a facility-specific basis for the pediatric care facility. The total allowable costs from the most recent cost report deemed acceptable are adjusted for inflation from the cost report period to the rate period. The adjusted cost is divided by the greater of total patient days of service reported on the cost report or the days of service at 85% of contracted capacity of the pediatric care facility. The resulting cost per day is multiplied by a factor of 1.03 to determine the final facility-specific rate. If no acceptable cost report is available, the provider will be required to submit a cost report covering the time period specified by HHSC.

(C) The facility-specific payment rate from paragraph (3)(B) of this subsection will be paid for all Medicaid residents of a qualifying pediatric care facility regardless of the TILE level of the resident.

(D) Residents of the pediatric care facility will not be eligible to receive the ventilator-dependent or the children-with-tracheostomies supplemental reimbursements.

(E) Pediatric care facilities are not eligible to participate in §355.308 of this title (relating to Enhanced Direct Care Staff Rate).

(d) Nurse aide training and competency evaluation costs.

(1) DADS reimburses nursing facilities for the actual costs of training and testing nurse aides as required under the Omnibus Budget Reconciliation Act of 1987 (OBRA '87). Payments are based on cost reimbursement vouchers that are to be submitted quarterly. Allowable costs are limited to those costs incurred for training provided after October 1, 1990, for:

(A) actual training course expenses up to a set amount determined by DADS per nurse aide;

(B) competency evaluation; or

(C) supplies and materials used in the nurse aide training not already covered by the training course fee.

(2) Nurse aide salaries while in training are factored into the vendor rate and are not to be included on the reimbursement voucher.

(3) Training program costs that exceed the DADS cost ceiling must have prior approval from DADS before costs can be reimbursed. A written request to Provider Billing Services must include:

(A) name and vendor number of facility.

(B) description of training program for which the facility is seeking reimbursement approval, to include:

(i) name, telephone number and address of the nurse aide training and competency evaluation program (NATCEP);

(ii) whether the NATCEP program is facility or non-facility-based; and

(iii) name of the NATCEP program director.

(C) an explanation of why the cost for the NATCEP exceeds the reimbursement ceiling. The explanation must include:

(i) a completed nurse aide unit cost calculation form for a facility-based NATCEP; or

(ii) a breakdown of the nurse aide unit cost by the instructor fees and training materials for a non-facility-based NATCEP.

(D) an explanation of why the nursing facility cannot utilize a training program at or below the reimbursement ceiling and what steps the facility has taken to explore more cost efficient training courses. The explanation must include:

(i) the availability of NATCEPs, such as the location or the frequency of training offered, in the geographic region of the facility;

(ii) the name and address of each NATCEP that the facility has explored as a provider of nurse aide training; and

(iii) the cost per nurse aide for each NATCEP identified in clause (i) of this subparagraph, as specified in subparagraph (C)(i) or (ii) of this paragraph.

(4) All prior approval requests as outlined in paragraph (3) of this subsection must be submitted to DADS, Provider Billing Services that:

(A) may request additional information in order to evaluate a reimbursement request; and

(B) will make the final decision on a reimbursement request.

(5) All nurse aide training courses must be approved by DADS before costs associated with them can be reimbursed.

(6) Nursing facilities are responsible for tracking and documenting nurse aide training costs for each nurse aide trained. All documentation is subject to DADS audits. If substantiating documentation for amounts billed to DADS cannot be verified, DADS will immediately recoup funds paid to the facility.

(7) Individuals who have successfully completed a nurse aide training and competency evaluation program (NATCEP) may be directly reimbursed for costs incurred in completing a NATCEP. The individual must meet all of the conditions specified in subparagraphs (A) - (E) of this paragraph.

(A) The individual must not have been employed at the time of completing the NATCEP.

(B) The individual must have been employed by, or received an offer of employment from, a nursing facility not later than 12 months after successfully completing the NATCEP.

(C) The individual must have been employed by the facility for no less than six months.

(D) The nursing facility must not have claimed reimbursement for training expenses for the individual.

(E) The individual must be listed on the current Nurse Aide Registry.

(8) Individuals must submit cost reimbursement vouchers to DADS with proof that the individual has been employed by a facility for no less than six months.

(9) Individuals who leave nursing facility employment before accruing the required six months of employment, as specified in paragraph (7)(C) of this subsection, may receive 50% reimbursement as long as the individual was employed for no less than three months.

(10) Reimbursement to individuals may not exceed the reimbursement ceiling as detailed in paragraph (1)(A) of this subsection.

(e) Oxygen costs. Oxygen costs incurred on or after January 1, 1995, will not be reimbursed on cost reimbursement vouchers. Those oxygen costs must be reported as expenses on the cost report.

(f) For rates effective September 1, 2003 and September 1, 2004, the rates for the dietary rate component from subsection (b)(1)(A) of this section, the general/administration rate component from subsection (b)(1)(B) of this section, fixed capital asset component from subsection (b)(1)(C) of this section, the other recipient care rate component from subsection (b)(3)(C) of this section, the supplement to per diem rates for qualified ventilator-dependent residents from subsection (b)(3)(E) of this section, the supplement to per diem rates for qualified children with tracheostomies from subsection (b)(3)(F) of this section and the pediatric care facility rate from subsection (c) of this section will be equal to the rates in effect August 31, 2003 adjusted as necessary to remain within appropriations. Adjustments necessary to remain within appropriations will apply equally in percentage terms across each component of the nursing facility rate and each add-on.

§355.403. Vendor Hold.

The Texas Health and Human Services Commission (HHSC) or its designee may delay or withhold vendor payment to a provider in order to investigate or correct financial or accounting irregularities or to obtain required documentation.

(1) Vendor payments will be held until the circumstances resulting in vendor hold are corrected.

(2) A provider has the right to appeal a vendor hold as specified in 1 TAC §§357.481 - 357.490 (Right to a Hearing).

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 December 20, 2004.

TRD-200407423
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Effective date: January 9, 2005
Proposal publication date: October 1, 2004
For further information, please call: (512) 424-6900

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1 TAC §§355.401, 355.402, 355.405, 355.406

The repeals are 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.

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For further information, please call: (512) 424-6900

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1 TAC §355.308

The Health and Human Service Commission (HHSC) adopts amendments to §355.308, Direct Care Staff Rate Component, in its Reimbursement Rates chapter, without changes to the proposed text as published in the October 1, 2004, issue of the *Texas Register* (29 TexReg 9293) and will not be republished. The purpose of these amendments is to: (1) make changes to the actions HHSC or its designee will take if a provider fails to repay or submit an acceptable payment plan within 60 days of notification; (2) allow providers that were reclassified from a Level 0 to nonparticipants to be considered for reinvestment; and (3) update agency references. The amended rule is adopted

The amendments make changes to the actions that HHSC or its designee will take, after proper notification, if a provider fails to repay the amount due or submit an acceptable payment plan within 60 days of notification of a recoupment. The amended rule now: (1) allows HHSC to recoup owed funds from other Medicaid contracts controlled by the provider; (2) limits the placement of vendor holds on all Medicaid contracts rather than on all HHSC contracts; and (3) continues to bar providers from receiving any new contracts (not just Medicaid contracts) with HHSC or its designee until repayment is made in full. The amendments clarify that informal reviews and formal appeals relating to Staffing and Compensation Reports are governed by 1 TAC §355.110 (relating to Informal Reviews and Formal Appeals).

The amendments will allow providers that were reclassified from a Level 0 to nonparticipant in fiscal year 2004 due to legislation contained in H.B. 2292, 78th Legislature, Regular Session, 2003 (H.B. 2292), to be considered for reinvestment in fiscal years 2004 and 2005. The amendments also update agency references that changed as a result of implementing H.B. 2292. Specifically, references to the Texas Department of Human Services are replaced with references to the Texas Department of Aging and Disability Services, HHSC, or its designee, or Medicaid, as appropriate.

HHSC did not receive any comments regarding the proposed rule during the comment period.

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.

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CHAPTER 371. MEDICAID AND OTHER HEALTH AND HUMAN SERVICES FRAUD AND ABUSE PROGRAM INTEGRITY

The Texas Health and Human Services Commission (the Commission) adopts new §§371.17, 371.25, and 371.29 of Subchapter B; §371.1611 of Subchapter G, Division 1; §371.1619 of Subchapter G, Division 2; §§371.1653, 371.1661, 371.1663, 371.1675 and 371.1679 of Subchapter G, Division 4; §§371.1723, 371.1727, 371.1735, 371.1739, and 371.1741 of Subchapter G, Division 6, concerning duties of functions of the Office of Inspector General (Inspector General), relating to fraud and abuse investigations, program integrity, and sanctions in Medicaid and all other health and human services programs, without changes to the proposed text as published in the June 18, 2004, issue of the *Texas Register* (29 TexReg 5855) and will not be republished.

The Commission adopts amended rule §371.1605 of Subchapter G, Division 1, specifying statutory authority of the creation, duties, and responsibilities of the Inspector General, with changes to the proposed text as published in the June 18, 2004, issue of the *Texas Register* (29 TexReg 5855). The text of the rule will be republished.

The Commission adopts new §371.1 of Chapter 371, Subchapter A; §§371.11, 371.13, 371.19, 371.21, 371.23, 371.27, 371.31, and 371.33 of Subchapter B; §§371.1601, 371.1603, and 371.1609 of Subchapter G, Division 1; §§371.1613, 371.1615, and 371.1617 of Subchapter G, Division 2; §§371.1629, 371.1631, and 371.1633 of Subchapter G, Division 3; §§371.1643, 371.1645, 371.1647, 371.1649, 371.1651, 371.1655, 371.1657, 371.1659, 371.1665, 371.1667, 371.1669, 371.1671, 371.1673, 371.1677, 371.1681, 371.1683, 371.1685, 371.1687 and 371.1689 of Subchapter G, Division 4; §§371.1701, 371.1703, 371.1705, and 371.1707 of Subchapter G, Division 5; §§371.1721, 371.1725, 371.1729, 371.1731, 371.1733, and 371.1737, of Subchapter G, Division 6, concerning duties of functions of the Inspector General, relating to fraud and abuse investigations, program integrity, and sanctions in Medicaid and all other health and human services programs, with changes to the proposed text as published in the June 18, 2004, issue of the *Texas Register* (29 TexReg 5855). The text of the rules will be republished.

The Commission withdraws proposed new §371.15 and §371.1607, elsewhere in this issue of the *Texas Register*.

The repeal of existing §§371.1501, 371.1503, 371.1505, 371.1507, and 371.1509 of Chapter 371, Subchapter F; §§371.1601, 371.1603, 371.1607, 371.1609, 371.1611, 371.1613, 371.1615, 371.1617, 371.1619, 371.1621, 371.1623, 371.1625, 371.1627, and 371.1629 of Subchapter G, Division 1; §§371.1641, 371.1643, and 371.1645 of Subchapter G, Division 2; §§371.1661, 371.1663, 371.1665, 371.1667, 371.1669, 371.1671, 371.1673, and 371.1675 of Subchapter G, Division 3, concerning the same, which the new sections and one amended section replace, are contemporaneously adopted in this issue of the *Texas Register*.

The key difference between the new sections and the repealed sections is that the new sections and one amended section create the Office of Inspector General and include duties and responsibilities for fraud and abuse investigations and program integrity, not only in the Medicaid program, but expansion of that authority into all health and human services agencies and programs.

The adoption of the three new subchapters, containing all new sections and one amended section, is to implement the additions and revisions to state statutes passed in the 78th Legislature, 2003, through HB 2292 and 1743, that established the Office of Inspector General within the Commission and consolidated fraud, abuse, and waste investigations plus audit and other multiple compliance functions for Texas Medicaid and all health and human services programs under the Inspector General. Federal and state statutes require the Commission to establish policies to deter, detect, and investigate individuals and entities involved in fraud and abuse involving the health and human services programs, including Medicaid. The rules were also established to redesign and restructure the flow of the subchapters, and to ensure compliance with existing federal regulations and statutes all of which are designed to strengthen the state's ability to improve fraud and abuse detection, investigation, criminal referral and prosecution, and recovery of overpayments plus damages and penalties against Texas Medicaid and health and human services providers, recipients, and contractors.

Comments were received from the Texas Association for Home Care, Texas Health Care Association, Texas Medical Association, Texas Department of Health, Coalition for Nurses in Advanced Practice, J. Paul and Polly Craig Methodist Retirement Community, and the Health and Human Services Commission. These comments follow:

The Office of Inspector General has reorganized internally since the publication of the proposed rules. Some of the comments received suggested changes to division titles or division responsibilities that had changed since the publication of the proposed rules. Additionally, numerous comments were received suggesting clarification of which programs were applicable to certain sections of the rules or whether certain programs were applicable to certain sections and suggesting the term "department" be clarified or better defined. As a result of these cumulative comments, the Commission reviewed the rules in their entirety and amended the rules to bring them into compliance with the organizational changes and to clarify, when necessary, the distinction between that portion of the rules that are specific to Medicaid only and that portion specific to Medicaid and all other Health and Human Services (HHS) agencies and programs. For purposes of these rules, the term "HHS programs" includes the Commission and all programs administered by the Commission and all other HHS agencies and programs under the umbrella of the Commission. Additionally, in response to comments, technical, non-substantive changes have been made for purposes of clarification or to correct grammar or usage.

Comments were received regarding several sections of the rules suggesting those sections did not apply to certain HHS programs. The Commission responds that Chapter 531.102(a) of the Texas Government Code not only charges the Office of Inspector General with the responsibility for investigating fraud and abuse in Medicaid and other HHS programs, but also with the responsibility of enforcing state law relating to the provision of health and human services in both Medicaid and other HHS programs. The Inspector General is also charged with imposing sanctions for violations of the Medicaid program. The Inspector General may also investigate suspected regulatory violations in other HHS programs and, upon a finding of violations, may direct the HHS programs to take appropriate enforcement action to the extent of the HHS program's regulatory authority. The rules were therefore amended for purposes of clarification of the Inspector General's authority.

One commenter stated that in §371.1 all services billed must be provided by providers who are enrolled as a provider and have signed a contract or provider agreement. They commented that physicians could bill for services provided by advanced practice nurses and physician assistants. The Commission has amended the rules to allow for an exception if program rules permit the provider to bill for the services of other qualified persons.

One commenter questioned whether §371.15 and §371.1607 also applied to the Women, Infants, and Children (WIC) program. The Commission responds that the enabling legislation establishing the Inspector General places responsibility on the Inspector General for the investigation of fraud and abuse in the provision of health and human services and the enforcement of state law relating to the provision of those services. The WIC program is a health and human services program and as such, the Inspector General has the authority to investigate fraud and abuse in that program. The rules, however, have been amended

to eliminate §371.15 and §371.1607. The Commission will rely upon applicable state and federal law with regard to the confidentiality of information and materials subpoenaed or compiled in connection with Inspector General investigations.

Two commenters were concerned that §371.15 and §371.1607 fail to provide for access to any subpoenaed or compiled information by the Inspector General to be available to the provider and that they should be made available to the provider. The Commission responds that the rules have been amended to eliminate §371.15 and §371.1607. The Commission will rely upon applicable state and federal law with regard to the confidentiality of information and materials subpoenaed or compiled in connection with Inspector General investigations.

One commenter suggested deleting the word "Medicaid" in §371.21(a)(4) and §371.1633(a)(4). The Commission has amended §371.21(a)(4) and §371.1633(a)(4) to delete the term "Medicaid" because the enabling legislation was an amendment to the Government Code and applied to all HHS agencies and programs, not just Medicaid.

One commenter questioned whether §371.21 extended to WIC agency personnel and records and WIC vendors and participants. The enabling legislation establishing the Inspector General places responsibility on the Inspector General for the investigation of fraud and abuse in the provision of health and human services and the enforcement of state law relating to the provision of those services. Further, it specifies that the Inspector General have subpoena authority in connection with an investigation conducted by the Inspector General. The WIC program is a health and human service program and as such §371.21 would be applicable to the WIC agency personnel and records and WIC vendors and participants, in connection with an Inspector General investigation.

One commenter was concerned that §371.21 did not speak to the Inspector General leaving, with the provider, copies of original records confiscated. The Commission responds that it has addressed this issue in §371.1643(e)(8). The Commission declines to amend the rule.

Two commenters were concerned with §371.21(a)(4), relating to a determination that "an immediate threat to the health or safety of a Medicaid recipient" should be eliminated, as this has nothing to do with the production of a witness or documents in connection with an investigation. The Commission responds that its rules, statutes and regulations governing fraud and abuse mandate that the Inspector General conduct investigations. As a result of an investigation, the Inspector General or other state or federal investigative authorities may determine the existence of an immediate threat and it may be necessary to compel the production of a witness or documents. The Commission declines to amend the rule as suggested.

One commenter questioned whether §371.23 and §371.1631(a)(9) apply only to providers or persons associated with the medical assistance program (Medicaid). The Commission has amended §371.23 to make it clear that the rule applies only to the Medicaid program. The rule does not apply to other health and human service programs.

Two commenters were concerned that the Commission had not provided guidance on determining a reasonable amount of a surety bond and had not defined "demonstrated significant potential for fraud or abuse" in §371.23(a). The Commission responds that it used those specific terms, as they were the terms provided in the statute.

One commenter suggested that in §371.23(d) and §371.1721(b)(8)(D) there should be a consideration of defining the term "pattern." The Commission responds that it has deleted the term "pattern" in §371.23(b) and (d) and has substituted "acts and behavior" that would indicate the existence of fraud or abuse. These terms are more descriptive of the conduct that would lead to a determination of fraud or abuse.

The Commission has also deleted the term "pattern of non-compliance" from §371.1645 and has inserted the term "or analysis" to better define the realm of criteria used by the OIG in determining appropriate sanctions and to make clear that in determining the imposition of sanctions, the OIG may analyze all of the relevant information gained in its investigation.

Two commenters advised that the term timely posted, in §371.23(h), was not defined. The Commission responds that upon notice of the need for a bond, the Commission would provide a deadline for the posting of the bond.

Two commenters were concerned that, in §371.23(i), failure to post a surety bond would be considered as an administrative action. It is the Commission's position that subsection (i) speaks to the Commission's requirement that a surety bond be posted and does not speak to a provider's failure to post a surety bond.

One commenter questioned whether §371.31 was applicable to providers, recipients, and the WIC program. The Commission responds that the rule is applicable only to recipients in programs that are referenced in §531.008(c) of the Government Code and the Commission is amending the rule to reflect this clarification.

Two commenters were concerned that §371.33 expanded the Medicaid fraud pilot program authorized by HB2292. The Commission disagrees that §371.33 is an expansion of the Medicaid fraud pilot program. This section is not related to the Medicaid fraud pilot program authorized by HB2292. This section was authorized by Senate Bill 30 of the 75th legislative session and by Human Resources Code §32.021. This section was originally adopted effective June 28, 1998, in accordance with Senate Bill 30. Due to the restructuring of the fraud and abuse rules, the original adopted section is being repealed and is being replaced by §371.33.

One commenter was concerned that §371.33(c)(1)(D) could be read as being inclusive of private pay patients who had not authorized the release of their medical records. The Commission has amended the section to specify records of Medicaid and other HHS program recipients.

One commenter was concerned that requirements of §371.33(c)(3) did not apply to all aspects of the business conducted by home health agencies and durable medical equipment providers. The Commission has amended this section by deleting subsection (c)(3) in the adopted rules.

One commenter suggested adding to §371.1601 the definitions of the terms "Waste" and "Social Security Act." The Commission has amended §371.1601 by adding these terms and their definitions.

Two commenters expressed that providers might or might not be aware of previously sent interpretations or of authorized government explanations as provided in the definition of "Abuse" in §371.1601. The Commission responds that providers sign a contract or provider agreement agreeing to abide by all policies, procedures, rules, regulations and statutes and any interpretation or explanation of those is a further definition of the provider's responsibility. The Commission declines to amend the rule.

One commenter expressed that a clarification needed to be made in the definition of "Exclusion" in §371.1601 to ensure that it was clear that, in the event of an exclusion, the contract or provider agreement that would be automatically cancelled as a part of the exclusion was the contract or provider agreement signed by the provider or contractor when applying for participation as a provider or contractor in the Medicaid or other state health and human services program. The cancellation would not apply to any settlement agreements or agreements for other purposes that were signed by the provider or contractor. The Commission has clarified the rule accordingly.

Two commenters suggested the last sentence of the definition of "Exclusion" in §371.1601 is confusing and not necessary. The Commission disagrees that it is confusing and has determined that it was necessary for clarification.

Two commenters recommended placement of certain provisions and definitions of the terms "Failure to Grant Immediate Access" and "Immediate Access" in §§371.1601, 371.1617, and 371.1643(e). The Commission has amended §371.1601 to add the definition of "Immediate Access" and to place a reference to that definition in §371.1601 under the definition of "Failure to Grant Immediate Access."

A commenter suggested the addition of mother-in-law as an immediate family member in the definition of "Immediate Family Member" in §371.1601. The Commission responds that "mother-in-law" was inadvertently left out of the list of relationships qualifying as an immediate family member. Federal regulations at 42 CFR §1001.1001(a)(1)(ii)(B)(2) define "Immediate Family Member" to include "mother-in-law." The Commission has amended §371.1601 to include "mother-in-law" in the definition of "Immediate Family Member."

One commenter suggested deleting the phrase "whether in writing or not" from the definition of "Professionally Recognized Standards of Health Care" in §371.1601. The Commission responds that the phrase is pertinent and necessary. In the medical profession, professional opinion and expertise of qualified professionals is an important aspect that may be considered. The Commission declines to amend the rules as suggested.

One commenter suggested clarification of the term "Provider" in §371.1601 to read "(i) provide medical assistance, Medicaid, or any other health and human service in any health and human service program under contract or provider agreement with the Commission, its designee, or a health and human service agency; or; . . ." The Commission has amended the rule to include the suggested language.

One commenter suggested §371.1601(45) is not in compliance with WIC regulations regarding collection methodology of an overpayment. The Commission is amending the rule to add the following sentence: "Some HHS programs may not have the full range of recoupment options."

One commenter suggested amending the definition of "Subcontractor" in §371.1601 by deleting the words "disclosing entity" and the parenthesis around the word "provider" for clarification. The Commission responds that the term "disclosing entity" is the specific term utilized in 42 CFR §455.101 and the Commission as a point of clarification added the term "provider" in parenthesis. The Commission declines to amend the rule as suggested.

Two commenters were concerned that, in subsection (a) of §371.1603, the Inspector General could deny or postpone a decision to enroll a provider in HHS programs or services. The Commission responds that upon an investigation or finding of fraud or abuse of the Medicaid or other HHS programs, the Inspector General may prevent the provider from obtaining a provider number or from otherwise participating in Medicaid or other HHS programs that the provider is not currently participating in. Authority for this action is provided in Human Resources Code §32.021 and Government Code §531.033 and §531.102(a). The Commission declines to amend this subsection.

Two commenters were concerned that §371.1603(c) did not include timeframes for completion of an integrity review and took exception to the term "preliminary investigation." The Commission responds that any timelines are procedural in nature and should not be included in this rule. Federal regulations at 42 Code of Federal Regulations (CFR) §455.14 requires the Inspector General to complete a "preliminary investigation" upon the receipt of a complaint or the identification of questionable practices of Medicaid fraud or abuse.

Two commenters were concerned with due process regarding administrative actions in §371.1603 and §371.1631(a). The Commission responds that it does not agree that provider's are entitled to any additional due process other than that which is included in the rules. Providers are afforded all due process rights afforded by law. The Commission declines to make any amendments based on that suggestion.

One commenter suggested adding to §371.1605 the statutory authority for enforcement and investigation inclusive of the WIC program to include Title 7 of the Code of Federal Regulations. The Commission responds that the citation offered for inclusion in this section is a regulation rather than a statute. The Commission did not include citations for regulations in the rules, only citations for state and federal statutes. The rules cite Texas Government Code §531.001 et seq., which is inclusive of §531.102 that states the Inspector General is responsible for the investigation of fraud and abuse in the provision of health and human services and the enforcement of state law relating to the provision of those services. The WIC program is included in these services and the previous WIC investigative staff has been transferred into the Inspector General to conduct WIC investigations.

Two commenters suggested the language in §371.1615 "other official program manuals and publications, including all official interpretation or explanations of the above that are applicable to the services they render and seek reimbursement" is overly broad and is also beyond statutory or regulatory requirements. The Commission disagrees that the language is overbroad and responds that, upon contracting with the individual programs, the provider agrees to abide by all rules, regulations, statutes, policies, and procedures. An interpretation is merely a clarification and thus a part of those cited above. The Commission disagrees that the rule is beyond statutory or regulatory requirements. Authority for this rule may be found in Government Code §531.033 and Human Resources Code §32.021. The Commission declines to amend the language.

Some commenters expressed a concern about the grounds/criteria in §371.1617, raising the argument that a minor infraction could result in imposition of a sanction, investigation, or referral. Section 371.1617 delineates grounds or criteria that may be considered for the imposition of sanctions, investigation, and/or referral. With each case, the Inspector General must use discretion based on each individual case situation, including the evidence gathered, the degree and severity of any violation(s), or

whether the case involves fraud or abuse. It is not the Commission's intent to impose sanctions, initiate an investigation, or refer when, in the opinion of the Inspector General, a minor infraction has occurred. The following includes several comments and the Commission's response on a specific paragraph within §371.1617. This general Commission response is made a part of each of those specific paragraph comments.

Two commenters suggested a clarification to paragraph (1)(M) of §371.1617 stating it could result in the determination of a program violation for unintentionally transposed numbers or billing for the wrong service even though a valid reimbursable service was provided. The Commission responds that the examples of program violations may be grounds or criteria for administrative enforcement and/or referral for criminal, civil, or licensure or certification investigation and judicial action. In the circumstance where a full-scale investigation has not occurred or been completed, a determination of unintentional actions on the part of the provider will not occur until later in the investigation or upon completion of the investigation. Under state and federal statutory authority and regulation, a referral may occur before this determination occurs. As a result, the Commission will not amend this paragraph.

Two commenters suggested paragraph (4) of §371.1617 failed to recognize the concept of substantial compliance and suggested that as written, a single licensing or certification deficiency could warrant a decision to find a provider in violation. The Commission responds that there are certain single licensing or certification deficiencies that could warrant finding the provider in violation. An example would be the death of a patient, harm to a patient, or a substantial probability or possibility of harm. A determination of degree and severity of the violation will occur when imposing or determining the need to impose administrative actions and/or sanctions.

Two commenters suggested paragraph (5) of §371.1617 fails to recognize that the compliance provisions are often the basis of an appeal and should not be considered a violation unless it is finally adjudicated with no further opportunity to appeal. The Commission responds that there may be a regulatory action by the regulatory program staff proceeding concurrently with the Inspector General pursuing civil or criminal investigation, and/or referral as the result of potential, or a finding of, fraud or abuse. A pending appeal as the result of a regulatory action will not prevent the Inspector General from conducting their federal and state statutory responsibility. The Inspector General action may also be broader or different in scope than that of the regulatory agency. Any similar finding of a violation as the result of fraud or abuse will be adjudicated in civil or criminal court and/or in an administrative appeals hearing conducted as the result of the Inspector General's investigative findings. The Commission declines to amend the language as suggested.

One commenter suggested that adding paragraph (5)(B) of §371.1617 makes it difficult for providers to know or remember all laws, rules and regulations. The Commission responds that Chapter 32 of the Human Resources Code prescribes requirements related to the Medicaid program and Chapter 36 of that Code delineates additional violations that may not be included in §371.1617. By it's placement in the violations section of these rules, it puts the provider on notice that a delineation of other violations may exist of which the provider needs to be aware.

One commenter suggested adding to paragraph (6)(B) of §371.1617 a modifier or qualifier such as "not provided in a reasonably economical manner." The Commission responds that it does not agree that an additional qualifier is necessary.

Two commenters suggested that the reference to negligence as the basis of a program violation in paragraph (6)(C) of §371.1617 is improper, because negligence should not rise to the level of enforcement conduct. They also commented that the rule "Delivery of Health Care Services" provides that negligent practice that results in injury or death should be considered a program violation. They recommended this be eliminated. The Commission responds that it does not agree that negligence should not rise to the level of conduct requiring enforcement action. As examples, negligence on the part of a provider can result in death, injury, or the probability of death or injury of a recipient. Negligence on the part of the provider to conduct proper maintenance or repair of the building, supplies, or equipment can lead to patient harm. Federal regulations at 42 CFR §1007.11 require the state to review complaints alleging abuse or neglect of patients in health care facilities receiving payments under the state Medicaid plan. Negligence of the provider can result in neglect of a patient. The Commission declines to delete negligence as a possible program violation.

Two commenters suggested that paragraph (8) of §371.1617 be eliminated and not considered a program violation. The Commission responds that it is, at times, necessary for the Commission to impose sanctions as the result of a board order from a licensing agency. As an example, a board order may result in the Inspector General imposing an exclusion of a provider as required by 42 CFR §1001.501. Federal mandates require that this section remain.

A commenter supported the rules in paragraph (9)(C) and (D) of §371.1617 relating to enforcing wrongful denials of payments by managed care organizations and wrongful delay of payment. The commenter stated these subparagraphs are appropriate and need to be strictly enforced to assure compliance. Inappropriate delay or denial of payments to providers by managed care organizations is a program abuse and is detrimental to the delivery of quality care within the system.

One commenter recommended adding, for consistency, to §371.1629 the same sentence that exists in §371.1643(a), "Any sanctions imposed for violations of non-Medicaid, HHS programs will be in accordance with the applicable law governing the specific HHS program." The Commission responds that, due to the confusion regarding the distinction between that portion of the rules that are specific to Medicaid only and that portion specific to Medicaid and all other HHS agencies and programs, the Commission has amended these two rules for clarification to read: §371.1629(b) - "Any administrative action imposed at the direction of the Inspector General for non-Medicaid, HHS programs, will be in accordance with the applicable law governing the specific HHS program. Any administrative action imposed for fraud and abuse violations of the Medicaid program, will be in accordance with Subchapters A, B, and G of this chapter." §371.1643(a) - "In response to program violations in the Medicaid program, including but not limited to any substantiated reason specified in §371.1617 of this subchapter, the Inspector General may impose against a provider or person, as defined in §371.1601 of this subchapter, any one or combination of sanctions specified in subsection (c) of this section."

One commenter suggested deleting the word "individual" for clarification in §371.1631(a)(4) and (5) to clarify pre-payment reviews and post-payment reviews may be imposed on any

provider, individual providers and provider groups, including providers in a managed care organization, as this was the intent of the proposed rule. The Commission responds that it has amended the language in §371.1631(4) and (5) to read - "specific services of a provider, including a provider in a managed care organization, ".

Two commenters suggested that "good cause" be added to §371.1631(a)(10). The Commission responds that §371.1631(a)(10) discusses having a subpoena served as provided in Subchapter B, §371.21 and §371.1633. These two references completely describe the issuance of a subpoena, including a determination of "good cause" and examples of what might constitute "good cause." The Commission responds that sufficient explanation has been provided relating to "good cause."

One commenter suggested that the Commission or Inspector General should not be issuing subpoenas as authorized by §371.1633. The Commission responds that the issuance of subpoenas was statutorily authorized by HB2292 and as such, the Commission declines to amend the rules as suggested.

Two commenters suggested that the definitions of "Providers" and "Affiliate Relationship" fail to recognize the different entities that are offered providing limited liability to investors and that §371.1643(d)(1)(H) relating to "telephone number, business location" should be eliminated, because they discourage individuals from participating in a united basis. The Commission responds that the majority of the subsections in §371.1643 are authorized and defined by 42 CFR §1001.1001. The Inspector General must be able to appropriately deal with those providers who are affiliated with one another, but make an effort to hide that affiliation through various means. Due to the federal regulation language and the Inspector General's need to take appropriate action on certain affiliated providers, the Commission declines to amend the rules as suggested.

One commenter suggested that §371.1643(e) re-emphasize that the collection of medical records should be done in a fashion that does not interfere with patient care and respects the confidentiality of the recipient of health care services. The Commission responds that the Inspector General must have the capability to confiscate fraudulent records before they can be altered or destroyed. The proposed rules at §371.1643(e)(8) were included to address these issues as much as possible without interfering with the statutorily mandated duties of the Inspector General. Recipients waive confidentiality of medical information to the state when they enroll in the Medicaid program. Providers agree to access of those medical records by the Inspector General when they enroll as a Medicaid provider. Also, federal regulations authorize the Inspector General access to those records; therefore, confidentiality to the Inspector General is not an issue. Due to the federal regulations, both provider and recipient waivers, and the proposed rule in subsection (e)(8), the Commission declines to amend the rules as suggested.

One commenter suggested that the WIC regulatory definitions of "proxy" and "participant" be incorporated in §371.1643(d). The Commission responds that each regulatory HHS program has some language that is specific to that program. To include all program specific language would be voluminous. The Commission has incorporated language in the rules that allow for the use of generic terms that should work for all HHS agencies and programs. In §371.1601, the term "recipient" would be synonymous with "participant" and the term "person" would be synonymous with "proxy." The Commission declines to amend the rules as suggested.

One commenter suggested adding "mother-in-law" to the list of immediate family members in §371.1643(d)(3)(B). The Commission responds that mother-in-law was intended to be included in the list and is amending the rule to include "mother-in-law."

One commenter suggested that in §371.1643, the Inspector General should be authorized to review the documents of any facility only during office hours and, if copies are required, the records should not be removed from the facility and the facility should be able to make copies of the records within a reasonable time under the supervision of the Inspector General. They also responded that the rule will circumvent due process and nursing homes have frequent intrusion of representatives of various agencies and their demands for documentation. The Commission responds that §371.1643(e)(2)(B) of the rules specifies the request for records be during hours that the business or premises is open for business. Federal and state statutes mandate fraud and abuse investigations where necessary. Most investigations include, among other things, the collection and review of records in order to prove or disprove fraud or abuse. Federal regulations at 42 CFR 1001.1301 mandate the provider allow immediate access to provider records. The Commission declines to amend the rules as suggested.

One commenter advised that the last sentence of §371.1647(e)(4) states, "the provider or person may request an administrative appeal hearing as described in paragraph (1) of this subsection." Paragraph (1) does not mention an administrative appeal hearing. The Commission responds that we have amended the last sentence of §371.1647(e)(4) to replace the language, "paragraph (1) of this subsection" with "§371.1669".

Two commenters suggested that the rules in §371.1647 failed to provide a definitive time where cases on appeal shall be referred to the State Office of Administrative Hearings. The Commission responds that it is not possible to provide a definitive time due to the options provided in the rules that allow a provider or person to first select an informal review, during which time, the formal appeal hearing will not proceed. If providers or persons elect a formal administrative appeal hearing, they may also decide to initiate informal discussions, upon which the formal appeal hearing will be abated until the settlement discussions have ended. Having cases docketed at SOAH during the informal review process can potentially cause unnecessary expense and work for the provider or person and the Commission due to SOAH requiring, during settlement discussions, pre-hearing conferences, briefings, and other actions that SOAH may initiate. The Commission declines to amend the rule as suggested.

Two commenters suggested changes to §§371.1651, 371.1665, 371.1667, 371.1669, 371.1671, and 371.1687 by explaining that WIC hearings are currently fair hearings. Various HHS program's statutes and rules provide the programs with the ability to conduct fair hearings or otherwise provide appeal procedures when the HHS program imposes a sanction as part of it's regulatory function. The suggestion was that non-Medicaid hearings be fair hearings rather than formal SOAH hearings. The Commission responds that non-Medicaid, regulatory hearings will continue to be conducted in the manner currently existing under the program's rules, rather than via a SOAH hearing. Appeals of sanctions directed by the Office of Inspector General will continue to be conducted in the manner currently existing under the program's rules, rather than via a

SOAH hearing. The Commission declines to amend the rules as suggested.

One commenter suggested that Government-wide debarment/suspension rules be cited and implemented in §371.1653 of the proposed rules. The Commission responds that while exclusion provisions are typically those used to sanction when terminating a providers program participation, debarment/suspension provisions are always an option under the authority of federal regulations. The Commission responds that §371.1643(b) is being amended to add paragraph (7) regarding debarment/suspension to read as follows, "debarment or suspension under the authority of Code of Federal Regulations."

Two commenters suggested the sentence in §371.1667(b), "Submission of documentary evidence or written argument, however, is no guarantee that the Inspector General will not ultimately impose administrative sanctions against the provider or person." serves no purpose and is confusing. The Commission responds that it believes it is important to place providers and persons on notice of this fact, but has amended subsection (b) to clarify its intent by deleting the sentence above and replacing it with "A submission of documentary evidence or written argument does not guarantee it will be sufficient to rise to the level of acceptable evidence or argument. If, after review by the Inspector General, the documentary evidence or written argument remains unacceptable, the Inspector General may proceed with imposition of administrative sanctions."

Two commenters stated the last sentence in §371.1667(c) is vague and should be clarified, because it does not define when an informal appeal hearing will be offered. The Commission responds that the information regarding an informal review is offered in §371.1667(b). The Commission declines to amend the rule as suggested.

One commenter suggested that §371.1669(b) should be amended to change the person to whom a written request for appeal should be sent from "Director of Medicaid Integrity" to "Manager of Sanctions" to reflect the organizational structure change that occurred after the publication of the proposed rules. The Commission responds that it amended the rules to reflect the suggested change as a result of the Inspector General's organizational change.

One commenter suggested that WIC be excluded from §371.1671. The Commission responds that the Inspector General will not be settling sanctions imposed by non-Medicaid, HHS programs. The Commission declines to amend the rule as suggested.

One commenter suggested that §371.1673(c) be amended to include a prescription written by other practitioners who may legally write a prescription. The Commission responds that §371.1673(c) is amended to read as follows, "An order or prescription written before the exclusion of a physician or other practitioner, legally authorized to write a prescription, is valid for the duration of the order."

Two commenters stated §371.1681 fails to explain the parameters of the criminal background check. The Commission responds that statutory authority for criminal history background checks by the Commission and the Inspector General is provided in Human Resources Code §32.0322. This statute provides authority to the Commission and the Inspector General to obtain the criminal history record information that relates to a provider under the Medicaid program or a person applying to enroll as a provider under the Medicaid program. The Commission declines to delete these sections. The Commission has amended §§371.1683, 371.1685, and 371.1687 to eliminate all programs and operating agencies other than the Commission and the Inspector General. Also subsection (d) was added to §371.1685 to describe access to criminal history record information.

One commenter requested clarification on §371.1681(a)(1) regarding the use of the term "contractors." The Commission responds that the term, as used in subsection (a)(1), means Commission and/or health and human services agency contractors that would be determining the need for and approving individual provider or contractor participation through initial provider or contractor enrollment and enrollment for additional provider number(s). The Commission declines to amend the rule.

One commenter requested clarification of §371.1681(a)(2) abatement, denial or postponement of an initial request for provider enrollment does not afford the applicant notice or a right to hearing. The Commission responds that an applicant is not a provider or contractor and has no vested property interest in the requested provider or contractor number. Therefore, the applicant has no due process right to an appeal. The Commission declines to amend the rule.

Two commenters stated that the provisions of §371.1683 and §371.1685 are not on the face uses of the WIC program. The Commission responds that the authority for criminal history checks is only with the Commission and the Inspector General. The Commission has amended the rule to eliminate all programs other than the Commission and the Inspector General.

Two commenters suggested that §§371.1681, 371.1683, 371.1685, and 371.1687 be deleted as they were unaware of any statutory authority of the Inspector General to conduct criminal background checks on non-direct care staff of any provider. The Commission responds that statutory authority for criminal history background checks by the Commission and the Inspector General is provided in Human Resources Code §32.0322. This statute provides authority to the Commission and the Inspector General to obtain the criminal history record information that relates to a provider under the Medicaid program or a person applying to enroll as a provider under the Medicaid program. The Commission declines to delete these sections. The Commission has amended §§371.1683, 371.1685, and 371.1687 to eliminate all programs and operating agencies other than the Commission and the Inspector General. Also subsection (d) was added to §371.1685 to describe access to criminal history record information.

One commenter suggested that WIC should be excluded from §§371.15, 371.1683, 371.1689, 371.1707(a)(3), 371.1723, and 371.1727, because they contain elements inapplicable to WIC. The Commission responds that provisions of these sections are applicable to actions taken by the Inspector General on all HHS programs, including WIC. They are not applicable to the actions taken by WIC in their regulatory program function. The Commission has amended §371.1683 as explained in the paragraph above. The Commission declines to amend any of the other rules as suggested.

One commenter suggested that §371.1703(b)(2), that permits a payment hold when requested by the Attorney General's Medicaid Fraud Control Unit (AG), be amended to establish a minimum standard requirement on the AG such as "upon a showing of good cause." The Commission responds that the statute mandates the Inspector General to place a payment hold on a

provider upon receipt of a request from the AG and the statute is silent as to a required standard of evidence that has to be shown by the AG. Due to the statutory requirement, the Commission declines to amend the rule as suggested.

Three commenters collectively suggested amendments to §371.1705(3) and (4). The suggestions involved adding the term "reasonable costs" to paragraphs (3) and (4) and allow providers to recover costs in paragraph (3). The Commission responds that the costs of an appeal and an investigation are determined by actual costs that were necessary to fully investigate the case and support that case in an administrative appeal hearing. The Commission declines to amend the section as suggested.

Two commenters suggested that §371.1707 be amended to delete the sentence "Installment payments are expected to be sufficiently large to repay the debt within one year." The suggestion was that the amount and number of payments should be made on a case-by-case basis. The Commission responds that federal regulations require the state to repay the federal share of any unpaid recoupment balance 60 days after the discovery of the recoupment amount. By allowing, in some instances, up to 1 year to repay, the state is placed in the position of funding the provider's repayment of monies that were originally obtained by fraudulent or abusive means with no guarantee that the money forwarded to the federal government on behalf of the provider will ever be collected. Given the above, the Commission believes it has been more than reasonable with the current 1-year language and declines to amend the rule as suggested.

Two commenters suggested that §371.1733(b) does not provide a timeframe within which the Inspector General must complete its review and notification to the provider. It was suggested that language specifying a timeframe should be added. It was also suggested that the informal review process should not slow the formal appeal hearing. The Commission responds that different types of investigations can vary drastically on the length of time an investigation will take to complete. Many other factors also impact that time, including the cooperation or lack of cooperation on the part of the provider. In addition, having cases docketed at SOAH during the informal review process can potentially cause unnecessary expense and work for the provider or person and the Commission due to SOAH requiring, during settlement discussions, pre-hearing conferences, briefings, and other actions that SOAH may initiate. The Commission declines to amend the rule as suggested.

The Commission has created an internal appeals hearings division. Administrative Law Judges will hear administrative appeals and render decisions. The division may expand their duties to include administrative hearings on appeals of sanctions imposed by the Inspector General. As a result, amendments were made to §§371.1651, 371.1665, 371.1667, 371.1669, 371.1671, 371.1689, 371.1703, and 371.1733 to reflect the ultimate transfer of hearings responsibilities.

SUBCHAPTER A. INTRODUCTION

1 TAC §371.1

The new rule is adopted under §531.033 and §531.021 of the Texas Government Code, which provides the Commission with broad rulemaking authority. In addition, §32.021(a) and (c) of the Human Resources Code provides that the Commission shall adopt necessary rules for the proper and efficient administration of the medical assistance program. Section 531.102 of the Government Code establishes the Office of Inspector General (formerly the Office of Investigations and Enforcement) and imposes responsibility for the investigation of fraud and abuse in the provision of health and human services and the enforcement of state law relating to the provision of those services upon the Office of Inspector General. These rules specifically implement the provisions of HB2292 and HB 1743. 42 CFR §455.13 requires that the State's Medicaid agency have methods and criteria for identifying suspected fraud and abuse cases and methods for investigating fraud and abuse, and referring cases for criminal prosecution. 42 CFR, Part 455 specifies all federal requirements of the Commission to provide for Medicaid fraud and abuse program integrity. 42 CFR §1002.2 provides authority for the Commission to exclude Medicaid providers from participation in the Medicaid program. 42 CFR Parts 1002 and 1001 provide all requirements relating to exclusion of providers. Various other state and federal statutes place requirements on the Commission to implement a fraud and abuse program integrity component. The adopted rules meet the mandates of the state and federal statutes delineated above and the state statutes above provide the Commission with broad rulemaking authority for the implementation of those mandates.

§371.1. Purpose and Scope.

(a) Medicaid and other Health and Human Services (HHS) program integrity requires that appropriate and medically necessary covered health care and social services be delivered safely by qualified active providers to eligible recipients in exchange for payment rates and fees established by law, rule, or contract established prior to the delivery of services.

(b) All services billed must be provided by providers who are enrolled as a provider and have signed a contract or provider agreement unless program rules permit the provider to bill for the services of other qualified persons. Regardless of payment methodology, program requirements, established through federal and state statutes, federal regulations, administrative rules, program rules, policies, procedures and manuals, and official explanations of those rules, policies, procedures and manuals, prescribe and govern the appropriate delivery of, and payment for, health care services and items within Medicaid and other health and human services programs.

(c) Chapter 531.102(a) of the Texas Government Code mandates that the Health and Human Services Commission (the Commission), through the Commission's Office of Inspector General (the Inspector General), is the state agency responsible for investigating fraud and abuse in Medicaid and other HHS programs. In addition, the Inspector General is responsible for the enforcement of state law relating to the provision of health and human services in Medicaid and other HHS programs.

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

Filed with the Office of the Secretary of State on December 20, 2004.

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Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
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SUBCHAPTER B. OFFICE OF INSPECTOR GENERAL

1 TAC §§371.11, 371.13, 371.17, 371.19, 371.21, 371.23, 371.25, 371.27, 371.29, 371.31, 371.33

The new rules are adopted under §531.033 and §531.021 of the Texas Government Code, which provides the Commission with broad rulemaking authority. In addition, §32.021(a) and (c) of the Human Resources Code provides that the Commission shall adopt necessary rules for the proper and efficient administration of the medical assistance program. Section 531.102 of the Government Code establishes the Office of Inspector General (formerly the Office of Investigations and Enforcement) and imposes responsibility for the investigation of fraud and abuse in the provision of health and human services and the enforcement of state law relating to the provision of those services upon the Office of Inspector General. These rules specifically implement the provisions of HB2292 and HB 1743. 42 CFR §455.13 requires that the State's Medicaid agency have methods and criteria for identifying suspected fraud and abuse cases and methods for investigating fraud and abuse, and referring cases for criminal prosecution. 42 CFR, Part 455 specifies all federal requirements of the Commission to provide for Medicaid fraud and abuse program integrity. 42 CFR §1002.2 provides authority for the Commission to exclude Medicaid providers from participation in the Medicaid program. 42 CFR Parts 1002 and 1001 provide all requirements relating to exclusion of providers. Various other state and federal statutes place requirements on the Commission to implement a fraud and abuse program integrity component. The adopted rules meet the mandates of the state and federal statutes delineated above and the state statutes above provide the Commission with broad rulemaking authority for the implementation of those mandates.

§371.11. Purpose and Scope.

(a) The Office of Inspector General (the Inspector General) is a division within the Health and Human Services Commission (the Commission). The Inspector General is responsible for the investigation of fraud and abuse in the provision of health and human services (HHS) in Medicaid and other HHS programs. As part of its authority, the Inspector General may impose sanctions upon a finding by the Inspector General of fraud and abuse in Medicaid. The Inspector General is also responsible for the enforcement of state law relating to the provision of health and human services in Medicaid and other HHS programs. As a result, the Inspector General may also investigate a suspected regulatory violation in a non-Medicaid, HHS program and, upon a finding of a violation, may direct the HHS program to take appropriate enforcement action to the extent of the HHS program's regulatory authority. The Inspector General administers program integrity and enforces program violations to the extent of applicable law governing Medicaid and the provision of other health and human services. This includes pursuing Medicaid and other health and human services fraud, abuse, overpayment, and waste. To accomplish the objectives of this chapter, the Inspector General implements review processes to distinguish payment discrepancies that can be corrected through routine payment adjustments from those suspected to result from program violations requiring investigation and possible administrative enforcement or judicial action.

(b) The Inspector General establishes objectives and priorities for the office that emphasize:

(1) coordinating investigative efforts to aggressively recover funds;

(2) allocating resources to cases that have the strongest supportive evidence and the greatest potential for recovery of money; and

(3) maximizing opportunities for referral of cases to the Office of the Attorney General.

(c) In addition to performing functions and duties otherwise provided by law, the Inspector General may:

(1) assess administrative penalties otherwise authorized by law on behalf of the Commission;

(2) request that the Attorney General obtain an injunction to prevent a person from disposing of an asset identified by the Inspector General as potentially subject to recovery by the Inspector General due to the person's fraud or abuse;

(3) provide for coordination between the Inspector General and special investigative units formed by managed care organizations or entities with which managed care organizations contract to identify and investigate fraudulent claims and other types of program abuse by recipients and providers, and approve the plan of the special investigative units to prevent and reduce fraud and abuse;

(4) audit the use and effectiveness of state or federal funds, including contract and grant funds, administered by a person or state agency receiving the funds from a health and human services agency;

(5) conduct investigations relating to the funds described in paragraph (4) of this subsection; and

(6) recommend policies promoting economical and efficient administration of the funds described in paragraph (4) of this subsection and the prevention and detection of fraud and abuse in the administration of those funds.

(d) The Inspector General may require employees of health and human services agencies to provide assistance to the Inspector General in connection with its duties relating to the review, investigation, and audit of fraud, abuse, and overpayment in the provision of health and human services.

(e) The Inspector General is entitled to access to any information maintained by a health and human services agency, including internal records, relevant to the functions of the office. This chapter sets forth the types of activities performed by the Inspector General to ensure program integrity.

(f) The Commission may obtain any information or technology necessary to enable the Inspector General to meet its responsibilities as mandated by state statute.

§371.13. Statutory Authority.

The statutory authority for this subchapter is provided by Texas Human Resources Code, Chapters 32 and 36, Texas Government Code §531.001 et seq., 42 United States Code, 42 Code of Federal Regulations, and the Social Security Act.

§371.19. Investigation.

The Inspector General initiates preliminary investigations as the result of potential cases of fraud, abuse, or overpayments detected through the automation detection tools, complaints, or referrals. If as the result of a preliminary investigation, it is determined that a full-scale investigation is necessary, Inspector General investigators will develop all pertinent facts and evidence to identify persons defrauding and abusing Medicaid and other health and human service programs. During such investigations, it may be necessary for the Inspector General to

secure patient medical records, other pertinent provider files, and files for which the holder of such records may attempt to deny access. The Inspector General may subpoena such records and documents necessary and pertinent to fraud and abuse cases in accordance with §371.21 and §371.1633.

§371.21. Subpoena Authority.

(a) The Inspector General may, upon a determination of good cause, and with the approval of the Executive Commissioner or the Executive Commissioner's designee, issue a subpoena in connection with an investigation conducted by the Inspector General to compel the attendance of a relevant witness or the production of relevant evidence as determined by the Inspector General. "Good cause" to issue a subpoena will be determined from the specific circumstances of the investigation. Circumstances that may result in a determination of "good cause" include, but are not limited to, the following situations:

(1) A provider's failure to comply with an Inspector General investigative demand for the attendance of a relevant witness or the production of relevant evidence;

(2) A provider's past history of failing to comply with an Inspector General investigative demand for the attendance of a relevant witness or the production of relevant evidence;

(3) A reasonable belief that, without the issuance of a subpoena, relevant evidence will be destroyed, altered, concealed, or compromised;

(4) A determination that there is an immediate threat to the health or safety of a recipient; or

(5) A substantial likelihood of loss of state or federal funds.

(b) The subpoena may be served personally or by certified mail. Failure to comply with a subpoena will result in the Inspector General, through the Attorney General, filing suit to enforce the subpoena in a state district court.

§371.23. Surety Bond.

(a) The Inspector General may require each provider of medical assistance in the Medicaid program, in a provider type that has demonstrated significant potential for fraud or abuse, to file with the Inspector General, a surety bond in a reasonable amount. The amount of the surety bond shall not exceed the maximum amount allowed by state or federal law, plus the maximum amount of penalties allowed by state and federal law.

(b) The Inspector General will require a provider of medical assistance or person to file, with the Inspector General, a surety bond in a reasonable amount if the Inspector General identifies acts or behavior which indicate suspected fraud or abuse involving criminal conduct relating to the provider's services under the program that indicates the need for protection against potential future acts of fraud or abuse. The amount of the surety bond shall not exceed the maximum amount allowed by state or federal law, plus the maximum amount of penalties allowed by state and federal law.

(c) The surety bond required of a provider or person, by the Inspector General, under subsections (a) and (b) of this section must be payable to the Commission to compensate the Commission for damages resulting from, or penalties or fines imposed in connection with, an act of fraud or abuse committed by the provider or person under the program.

(d) The Inspector General may require a provider of medical assistance or person to file, with the Inspector General, a surety bond in an amount and manner specified by the Inspector General. A surety bond may be required if the Inspector General identifies acts or behavior which indicate suspected fraud or abuse that involves criminal conduct that relates to the provider's services under the program and that indicates the need for protection against potential loss of recoupment of overpayments, penalties, damages, or other debts assessed against the provider by the Inspector General, due to potential default of the provider or failure of the provider to reimburse the Inspector General assessed amounts. Among other reasons, a surety bond may be imposed in connection with a settlement agreement, a provisional, probationary, or closed end contract, or as a condition of reinstatement.

(e) Subject to subsections (f) or (g) of this section, the Inspector General may require each provider of medical assistance that establishes a resident's trust fund account to post a surety bond to secure the account. The bond must be payable to the Commission to compensate residents of the bonded provider for trust funds that are lost, stolen, or otherwise unaccounted for if the provider does not repay any deficiency in a resident's trust fund account to the person legally entitled to receive the funds.

(f) For that portion of a case involving a resident's trust fund accounts, the Inspector General will not require the amount of a surety bond posted for a single facility provider under subsection (e) of this section to exceed the average of the total average monthly balance of all of the provider's resident trust fund accounts for the 12-month period preceding the bond issuance or renewal date. This limitation does not apply to any other type of violations other than resident trust fund accounts.

(g) If an employee of a provider of medical assistance is responsible for the loss of funds in a resident's trust fund account, the resident, the resident's family, and the resident's legal representative are not obligated to make any payments to the provider that would have been made out of the trust fund had the loss not occurred.

(h) Failure by a provider or person to post a surety bond timely and as required by the Inspector General may result in imposition of any of the administrative actions or sanctions, as specified in §371.1631 and §371.1643, and/or imposition of damages and penalties, as specified in §371.1721 et seq. of Subchapter G.

(i) Surety bonds required by the Inspector General are considered administrative actions. Administrative actions are further described in Subchapter G, §371.1629 and §371.1631 of this title.

§371.27. Prohibition against Solicitation of Medicaid or CHIP Recipients.

(a) A provider or person who furnishes services, under the Medicaid program or Child Health Insurance Plan program, must comply with Chapter 102, Occupations Code.

(b) A provider or person is prohibited from offering to pay or agreeing to accept, directly or indirectly, overtly or covertly any remuneration in cash or in kind to or from another for securing or soliciting a patient or patronage for or from a person licensed, certified, or registered or enrolled as a provider or otherwise by a state health care regulatory or health and human service agency.

(c) A provider or person is prohibited from engaging in any of the actions or conduct described in the provisions relating to bribe, kickback, rebate, or inducement specified in Subchapter G, §371.1721.

(d) Providers or persons in violation of the prohibition against solicitation may be excluded from participation in the Medicaid and CHIP programs and may have their contract to participate cancelled.

§371.31. Federal Felony Match.

The Inspector General will implement a system to cross-reference data collected for the programs identified in §531.008(c) of the Government

Code with the list of fugitive felons maintained by the federal government. The purpose of the data match is to identify fugitive felons who may be enrolled as recipients in programs that are referenced in §531.008(c) of the Government Code.

§371.33. On-Site Reviews of Prospective Providers.

(a) The Inspector General may implement procedures targeted at minimizing the potential for fraud, abuse, false statements, misrepresentations, and omissions by prospective Medicaid and other HHS providers. The Inspector General may conduct on-site reviews of providers who have applied to provide services to recipients.

(b) On-Site Review Criteria and Effect.

(1) During its on-site review, the Inspector General will determine whether or not an applicant has the ability to provide the services proposed within its application. To make this determination, personnel will conduct the inspections and interviews set forth in subsection (c) of this section (relating to Scope of Review), and evaluate information gathered thereby within the context of applicable industry standards, including state or federal governmental licensing and/or certification standards that apply to the applicant under review.

(2) In the event an on-site review reveals that a provider is not capable of delivering the services proposed within its application or develops other evidence of fraud, abuse, false statements, misrepresentations, or omissions, the application may be denied. The Inspector General also may forward to the Attorney General or other appropriate law enforcement agency any information discovered during an on-site review that the Inspector General believes warrants further evaluation in a law enforcement context.

(c) Scope of Review.

(1) Inspections and interviews. During on-site reviews, Inspector General personnel may:

(A) inspect a provider's site for physical compliance with state and federal law governing Medicaid or other HHS providers;

(B) review and verify licenses, certifications, and accreditation required by or relevant to the Medicaid or other HHS programs;

(C) interview randomly selected provider staff-members, patients, and patients' family members;

(D) review randomly selected Medicaid and other HHS agency patients' medical records;

(E) review business records, as determined necessary by the Inspector General, of prospective provider; and

(F) verify any and all items in the application for participation, contract, provider agreement, or any other documents supplied for purposes of provider enrollment.

(2) Personnel shall conduct all interviews during on-site reviews in accordance with a standard format consistent with interview procedures established for survey and investigation of existing Medicaid and other HHS providers.

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

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SUBCHAPTER G. LEGAL ACTION RELATING TO PROVIDERS OF MEDICAL ASSISTANCE

DIVISION 1. FRAUD OR ABUSE AND ADMINISTRATIVE ENFORCEMENT INVOLVING MEDICAID AND OTHER HEALTH AND HUMAN SERVICES PROGRAMS

1 TAC §§371.1601, 371.1603, 371.1605, 371.1609, 371.1611

The amendment and new rules are adopted under §531.033 and §531.021 of the Texas Government Code, which provides the Commission with broad rulemaking authority. In addition, §32.021(a) and (c) of the Human Resources Code provides that the Commission shall adopt necessary rules for the proper and efficient administration of the medical assistance program. Section 531.102 of the Government Code establishes the Office of Inspector General (formerly the Office of Investigations and Enforcement) and imposes responsibility for the investigation of fraud and abuse in the provision of health and human services and the enforcement of state law relating to the provision of those services upon the Office of Inspector General. These rules specifically implement the provisions of HB2292 and HB 1743. 42 CFR §455.13 requires that the State's Medicaid agency have methods and criteria for identifying suspected fraud and abuse cases and methods for investigating fraud and abuse, and referring cases for criminal prosecution. 42 CFR, Part 455 specifies all federal requirements of the Commission to provide for Medicaid fraud and abuse program integrity. 42 CFR §1002.2 provides authority for the Commission to exclude Medicaid providers from participation in the Medicaid program. 42 CFR Parts 1002 and 1001 provide all requirements relating to exclusion of providers. Various other state and federal statutes place requirements on the Commission to implement a fraud and abuse program integrity component. The adopted rules meet the mandates of the state and federal statutes delineated above and the state statutes above provide the Commission with broad rulemaking authority for the implementation of those mandates.

§371.1601. Definitions.

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

(1) Abuse--Practices that are inconsistent with sound fiscal, business, or medical practices and that result in unnecessary program cost or in reimbursement for services that are not medically necessary; do not meet professionally recognized standards for health care; or do not meet standards required by contract, statute, regulation, previously sent interpretations of any of the items listed, or authorized governmental explanations of any of the foregoing.

(2) Affiliates--Persons associated with one another so that any one of them directly or indirectly controls or has the power to control another in whole or in part or meets any portion of the definition

for "Affiliate Relationship" established at §371.1643 of this subchapter relating to Use of Sanctions.

(3) Agent--Any person, company, firm, corporation, employee, independent contractor, or other entity or association legally acting for or in the place of another person or entity.

(4) At the time of the request--A requirement to produce requested records immediately upon request and without delay.

(5) CHIP--Children's Health Insurance Program.

(6) Claim--Requests for payment or reimbursement related to services or items delivered within the Medicaid or other HHS programs, which are submitted by a provider to the Medicaid or other HHS program claims administrator or an operating agency either directly by a provider or indirectly through a managed care organization.

(7) Claims Administrator--The entity designated by an operating agency to process and pay Medicaid provider claims.

(8) Closed-end Contract--A contract or provider agreement for a specific period of time. It may include any specific requirements or provisions deemed necessary by the Inspector General to ensure the protection of the program. It must be renewed for the provider to continue to participate in the Medicaid or other HHS program.

(9) Commission--The Texas Health and Human Services Commission.

(10) Controlled substances--"Controlled substance" as defined by the Texas Controlled Substances Act (Texas Health and Safety Code, Chapter 481) or its successor and the Federal Controlled Substances Act (21 USCA §8.01 et seq.) or its successor.

(11) Conviction or convicted--A person is considered to have been convicted when:

(A) A judgment of conviction has been entered against an individual or entity by a federal, state, or local court, regardless of whether:

(i) There is a post-trial motion or an appeal pending, or

(ii) The judgment of conviction or other record relating to the criminal conduct has been expunged or otherwise removed;

(B) A federal, state, or local court has made a finding of guilty against an individual or entity;

(C) A federal, state, or local court has accepted a plea of guilty or nolo contendere by an individual or entity; or

(D) An individual or entity has entered into participation in a first offender, deferred adjudication or other program or arrangement where judgment of conviction has been withheld.

(12) Exclusion--Means that items or services furnished, ordered, or prescribed by a specified individual or entity will not be reimbursed under Medicare, Medicaid and all other state health and human services programs until the individual or entity is reinstated by the Inspector General. When excluded, any provider participation contract/agreement with the excluded person or in which the excluded person is affiliated that entitles that person to participate as a provider or contractor, due to the enrollment process, is canceled. The cancellation would not apply to any settlement agreements or agreements for other purposes that were signed by the provider or contractor. An excluded provider ceases to be a "provider", as defined in this section, upon the effective date of their exclusion, thus for purposes of this subchapter, they become a "person", as defined in this section.

(13) Failure to grant immediate access--The failure to grant access to records, documents, or premises, upon reasonable request and as requested, for the purpose of reviewing, examining, and securing custody of records, access to, disclosure of, and custody of copies or originals of any records, documents, or other requested items, and others specified in §371.1643(f) of this subchapter, as determined necessary by the Inspector General or those specified in §371.1643(f) of this subchapter to perform statutory functions. Further definition and clarification is provided in §371.1643(f) and §371.1617(2) of this subchapter.

(14) False statement or misrepresentation--Any statement or representation that is inaccurate, incomplete, or not true.

(15) Federal financial participation (FFP)--The federal government's share of a state's expenditures under the Medicaid and other HHS programs and other benefit programs.

(16) Fraud--Any act that constitutes fraud under applicable federal or state law, including any intentional deception or misrepresentation made by a person with the knowledge that the deception could result in some unauthorized benefit to that person or some other person.

(17) Health Maintenance Organization (HMO)--A public or private organization organized under state law that is a federally qualified HMO or that meets the definition of HMO within this state's Medicaid plan.

(18) HHS--A health and human service agency under the umbrella of the Health and Human Services Commission (the Commission), including the Commission, a program or service provided under the authority of the Commission or a health and human service agency, including those agencies delineated in §531.001.

(19) Immediate Access--Is deemed to include the provisions established by §371.1617(2) and §371.1643(f) of this subchapter.

(20) Immediate family member--A person's spouse (husband or wife); natural or adoptive parent; child or sibling; stepparent, stepchild, stepbrother or stepsister; father-, mother-, daughter-, son-, brother- or sister-in-law; grandparent or grandchild; or spouse of a grandparent or grandchild.

(21) Indirect ownership interest--Includes an ownership interest through any other entities that ultimately have an ownership interest in the provider or person, as defined in this section, at issue. (For example, an individual has a 10 percent ownership interest in the entity at issue if they have a 20 percent ownership interest in a corporation that wholly owns a subsidiary that is a 50 percent owner of the entity at issue.)

(22) Inducement--An attempt to entice or lure an action on the part of another in exchange for, without limitation, a service, cash in any amount, entertainment, or any item of value.

(23) Inpatient institutional services--Inpatient services provided by hospitals and long-term care facilities.

(24) Licensing authority adverse action--Any action by a state or federal licensing entity (including other similar authority) against conduct that adversely affects the status of the license. Action includes revocation or suspension of a license as well as reprimand, censure, or probation.

(25) Managed Care Organization (MCO)--Any person that is authorized or otherwise permitted by law to arrange for or provide a managed care plan.

(26) Managed Care Plan--A plan under which a person undertakes to provide, arrange for, pay for, or reimburse any part of the

cost of any health care service. A part of the plan must consist of arranging for or providing health care services on a prepaid basis through insurance or otherwise, as distinguished from indemnification against the cost of those services.

(27) Medicaid Fraud Control Unit (MFCU)--The division within the attorney general's office that is responsible for investigating suspected Medicaid provider fraud and physical abuse or neglect of patients in institutional settings.

(28) Medicaid Provider Integrity Division (MPI)--The division within the Commission's Office of Inspector General (OIG) that investigates provider or contractor fraud and abuse in Medicaid and other HHS programs.

(29) Member of Household--With respect to a person, as defined in this section, with whom they are sharing a common abode as part of a single-family unit, including domestic employees, partners, and others who live together as a family unit.

(30) Office of Inspector General (OIG)--The office within the Commission responsible for the investigation of fraud and abuse and with ensuring program integrity within the Texas Medicaid program and other health and human services provided by the state and the enforcement of state law relating to the provision of those services.

(31) Open-end Provider Agreement--An agreement that has no specific termination date and continues in force as long as both parties agree.

(32) Operating agency--A state agency that operates any part of the Texas Medicaid or other HHS program.

(33) Overpayment--The amount paid by Medicaid or other HHS program to a provider or person that exceeds the amount to which the provider or person is entitled under §1902 of the Social Security Act or other state or federal statutes for a service or item furnished within the Medicaid or other HHS programs, and that is required to be refunded under §1903 of the Social Security Act or any other statute. This also includes all overpayments specified in division 5 of this subchapter. Any funds received greater than that to which the provider is entitled, whether obtained through error, misunderstanding, abuse, or fraud is considered to be an overpayment.

(34) Ownership interest--An interest in the capital, the stock or the profits of the entity or any mortgage, deed, trust or note, or other obligation secured in whole or in part by the property or assets of the person, as defined in this section.

(35) Payment Hold (Suspension of Payments)--An administrative sanction that withholds all or any portion of payments due a provider until the matter in dispute, including all investigation and legal proceedings, between the provider and the Commission or an operating agency or its agent(s) are resolved. This is a temporary denial of reimbursement under the Medicaid or other HHS program for items or services furnished by a specified provider.

(36) Person--An individual, firm, association, partnership, corporation, agency, institution, or other organization or legal entity.

(37) Probationary Contract--A contract or provider agreement for any period of time. It may include any special requirements or provisions deemed necessary by the Inspector General to ensure the protection of the program. It must be renewed by the Inspector General for the provider to continue to participate in the program.

(38) Practitioner--A physician or other individual licensed or certified under state law to practice their profession.

(39) Professionally Recognized Standards of Health Care--Statewide or national standards of care, whether in writing or not, that professional peers of the individual or entity whose provision of care is an issue, recognize as applying to those peers practicing or providing care within the State of Texas. When the Food and Drug Administration (FDA), the Centers for Medicare and Medicaid Services (CMS), or the Public Health Service (PHS), has declared a treatment modality not to be safe and effective, persons who employ such a treatment modality will be deemed not to meet professionally recognized standards of health care. This definition shall not be construed to mean that all other treatments meet professionally recognized standards.

(40) Program Violation--A failure to comply with a Medicaid or other HHS provider contract or agreement, the Texas Medicaid Provider Procedures Manual or other official program publications or any state or federal statute or regulation applicable to the Texas Medicaid or other HHS program, including any official written explanation or interpretation of the above. Fraud and abuse are program violations, but not all program violations are included in fraud and abuse. Program violations are delineated in §371.1617 of this subchapter (relating to Program Violations).

(41) Provider--

(A) Any person or legal entity, including a managed care organization and their subcontractors, furnishing Medicaid or other HHS services under a provider agreement or contract in force with a Medicaid or other HHS operating agency, and who has a provider number issued by the Commission or by any HHS agency or program or their designee to:

(i) provide medical assistance, Medicaid, or any other HHS service in any HHS program under contract or provider agreement with the Commission, its designee, or a health and human service agency; or

(ii) provide third-party billing services under a contract or provider agreement with the Commission or its designee.

(B) An excluded provider ceases to be a "provider," as defined in this section, upon the effective date of their exclusion, thus for purposes of this subchapter, they become a "person", as defined in this section.

(42) Provisional Contract--A contract or provider agreement for any period of time. It may include any special requirements or provisions deemed necessary by the Inspector General to ensure the protection of the program. It must be renewed by the Inspector General for the provider to continue to participate in the program.

(43) Reasonable request--A request for the provider or person to provide original records and documents, or copies of original records and documents, or access to records, documents, or premises, as specified in §371.1643(f) of this subchapter, made by a properly identified agent of the Commission or another state or federal agency identified in §371.1643(f) of this subchapter, during hours that the business or premises is open for business.

(44) Recipient--A person eligible for and covered by the Medicaid or any other HHS program.

(45) Recoupment of overpayment--A sanction imposed to recover funds paid to the provider or person to which they were not entitled. Recoupment of overpayments may be accomplished through a lump sum or monthly payments by the provider or person to the Inspector General or, with the approval of the Inspector General, a provider's or person's payments may be reduced by a percentage, up to 100% of payments, to apply the unpaid funds to offset the overpayment owed. The recoupment will apply to all previously submitted, pending, and subsequently submitted claims to offset overpayments previously made

to the provider or person. Some HHS programs may not have the full range of recoupment options.

(46) Requesting Agency--A governmental agency (or its authorized representative or agent) that is authorized to review and reasonably is asking to see a provider's documentation or records or that is directed or otherwise authorized by federal or state statute to review medical records and/or other documentation that providers must maintain and disclose to such agencies in order to participate in the or other HHS program and records and documents necessary for the Office of Inspector General to fulfill its statutory mandates to review and investigate providers and persons for fraud and abuse; e.g., the Commission, the relevant operating agency, Texas Attorney General's Medicaid Fraud Control Unit, U.S. Department of Health and Human Services. See also the definition for "Reasonable Request" listed in paragraph (43) of this section.

(47) Restricted reimbursement--An administrative sanction that limits or denies payment of a provider's Medicaid or other HHS program claims for specific procedures for a specified time period for services that the provider has abused or has billed inappropriately. The provider may be eligible to be paid for certain other services.

(48) Services--The types of medical assistance specified in section 1905(a) of the Social Security Act (42 U.S.C. §1396d (a)) and other HHS program services authorized under federal and state statutes that are administered by the Commission and other HHS agencies.

(49) Social Security Act--Legislation passed by Congress in 1965 that established the Medicaid program under Title XIX and created, in the same legislation, the Medicare program under Title XVIII.

(50) Solicitation--Offering to pay or agreeing to accept, directly or indirectly, overtly or covertly any remuneration in cash or in kind to or from another for securing or soliciting a patient or patronage for or from a person licensed, certified, or registered or enrolled as a provider or otherwise by a state health care regulatory or health and human service agency.

(51) State health care program--Any program that has:

(A) A state plan approved under Title XIX of the Social Security Act (Medicaid);

(B) Any program receiving funds under Title V of the Act or from an allotment to a State under such title (Maternal and Child Health Services Block Grant program); or

(C) Any program receiving funds under Title XX of the Act or from any allotment to a State under such title (Block Grants to States for Social Services).

(52) Subcontractor--Means:

(A) an individual, agency or organization to which a disclosing entity (provider) has contracted or delegated some of its management functions or responsibilities of providing medical care or other services to its patients or recipients; or

(B) an individual, agency or organization with which a fiscal agent has entered into a contract, agreement, purchase order, or lease to obtain space, equipment, or services provided under the Medicaid or other HHS agreement or contract.

(53) Suspension of payments (payment hold)--The withholding of all or any portion of payments for items or services furnished by a specified provider and due a provider until the matter in dispute between the provider and the Commissioner agent is resolved.

(54) Title XVIII--Title XVIII (Medicare) of the Social Security Act.

(55) Title XIX--Title XIX (Medicaid) of the Social Security Act.

(56) Title XX--Social Services Block Grant of the Social Security Act.

(57) Waste--Practices that spend carelessly and /or allow inefficient use of resources, items, or services.

§371.1603. Overview of Inspector General Responsibility Relating to Investigation, Referral and Administrative Enforcement in Medicaid and Other Health and Human Services Programs.

(a) The Office of Inspector General (the Inspector General) is responsible for minimizing the opportunity for provider or contractor fraud, abuse, overpayments, and waste within the Medicaid and other HHS programs, whether the fraud or abuse was committed by providers, recipients, or other persons and for protecting recipients of federally funded programs from unsafe practitioners.

(b) The Inspector General may take appropriate action as authorized in subchapters A, B, and G of this chapter to protect recipients and the programs when persons have committed, or are suspected of committing, fraud or abuse. Such actions may include administrative actions and/or sanctions and referral to appropriate law enforcement agencies for criminal investigation.

(c) The Inspector General may take action against any provider or person associated with any HHS program or service as it relates to fraud, abuse, overpayments, waste, or program violations that rise to the level of fraud, abuse, or waste of those HHS programs or services, or for any of the violations for which the Inspector General may take action against providers or persons associated with the Medicaid program, as described in this subchapter.

(d) The Inspector General may take an administrative action, sanction, impose damages or penalties, or abate, deny, or postpone a decision to enroll a provider or person in the Medicaid program, based upon an investigation or finding in the Medicaid or other HHS programs.

(e) The Inspector General may also take an administrative action, sanction, impose damages or penalties, or abate, deny, or postpone a decision to enroll a provider or person in a Medicaid program or for a Medicaid service, based upon the investigative findings related to an investigation or finding of a provider or person or their principals or affiliates within a Medicaid or HHS program or receiving a Medicaid or HHS service.

(f) Not all actions resulting in overpayment to a provider are necessarily fraudulent. Some circumstances could result in the referral of a Medicaid provider to the Attorney General's Medicaid Fraud Control Unit or Civil Fraud Division. Other circumstances could result in administrative action rather than referral for judicial action or criminal prosecution. These actions, or sanctions, could range from an educational notice to the provider explaining their error, to contract cancellation and/or exclusion from participation in the Medicaid (Title XIX), Title XX, and Title V programs.

(g) Investigation. When the Inspector General receives information regarding a possible program violation either from its review systems or through a complaint or referral filed by another agency or person, the Inspector General initiates an investigation. After completing its preliminary investigation, the Inspector General may, at its discretion, initiate settlement discussions with the person who is the subject of the investigation. If the matter cannot reasonably be settled or if the Inspector General determines that further investigation is required

before the propriety of settlement or other enforcement can be evaluated, the Inspector General may conduct a full investigation of the case.

(h) An Inspector General case remains open until the investigation is complete, the case is reasonably settled, the Inspector General makes an administrative determination that closes the case for lack of evidence or appropriate administrative enforcement, and/or legal action is completed. At any time during the investigative or enforcement process, the Inspector General maintains the authority to settle administrative cases, impose payment holds, or request the Office of the Attorney General to obtain an injunction to prevent a person from disposing of an asset identified by the OIG as potentially subject to recovery by the OIG due to the person's fraud or abuse.

(i) Referral for Legal Action. The Inspector General refers all cases of suspected Medicaid fraud or patient abuse or neglect to the Medicaid Fraud Control Unit (MFCU) or the Civil Fraud Division (CFD) at the Office of the Attorney General (OAG) for investigation regarding the need for criminal or civil prosecution. If the MFCU fails to act on a matter within 30 days of receiving a referred case from the Inspector General or returns a case to the Inspector General without initiating prosecution, the Inspector General may refer the matter to an appropriate prosecuting authority or a collection agency. Nothing in these rules is intended to prevent concurrent administrative, civil, and/or criminal investigation and action regarding suspected fraud or patient abuse or neglect. Subject to express statutory limitations, the Inspector General may proceed with recoupment and/or administrative enforcement concurrently with judicial prosecution of the same matter.

(j) Administrative Enforcement. Based upon the nature and severity of the program violation, the provider's previous history of violations, evidence of the provider's knowledge and intent, and other relevant factors, the Inspector General may select enforcement measures from the three categories set forth below and in more detail at Divisions 3 - 6 of this subchapter.

(1) Administrative Actions--The Inspector General may impose an administrative action to provide safeguards for future compliance or refer a matter for additional review or enforcement; e.g., education, referral to licensing board, referral for judicial action. The imposition of administrative actions does not give rise to due process notice or hearing requirements.

(2) Sanctions--Sanctions may directly impact a person's ability to keep or receive payments and/or the person's participation in the Medicaid program; e.g., exclusion from program participation, recoupment of overpayments, or payment hold. Imposition of sanctions triggers due process notice and hearing requirements.

(3) Damages and Penalties (formerly "Civil Monetary Penalties")--The imposition of damages or penalties for program violations (e.g., false claims, specified managed care acts or omissions) triggers due process notice and hearing requirements.

§371.1605. Statutory Authority.

The statutory authority for this subchapter is provided by Texas Human Resources Code, Chapters 32 and 36, Texas Government Code §531.001 et seq., 42 United States Code, 42 Code of Federal Regulations, and the Social Security Act.

§371.1609. Inspector General Responsibilities in Relation to Medicaid and Other Health and Human Services Provider Fraud and Abuse.

The Inspector General's responsibilities in relation to Medicaid and other HHS program fraud and abuse include the following:

(1) establishing rules for minimizing the opportunity for fraud and abuse;

(2) establishing and maintaining methods and criteria for detecting and identifying cases of possible fraud or abuse;

(3) establishing the methods for referring suspected fraud or physical abuse and neglect cases for investigation;

(4) referring cases where fraud or physical abuse appears to exist to the appropriate law enforcement agencies for prosecution;

(5) cooperating with the Medicaid Fraud Control Unit, Office of the Attorney General, by furnishing Medicaid information and data and serving as witnesses, when requested;

(6) recouping all overpayments and taking other administrative sanctions and actions;

(7) investigating cases of possible fraud or abuse;

(8) conducting an integrity review on complaints of Medicaid fraud, abuse, or physical abuse or neglect involving criminal conduct and referring suspected cases of Medicaid provider fraud and physical abuse or neglect to the Attorney General's Medicaid Fraud Control Unit, provided that the criminal referral does not preclude the Inspector General from continuing its investigation of the provider, which investigation may lead to the imposition of appropriate administrative or civil sanctions;

(9) referring a Medicaid provider to the Attorney General's Medicaid Fraud Control Unit when a provider's records are being withheld, concealed, destroyed, fabricated, or falsified. Such referral does not preclude the Inspector General from continuing its investigation of the provider;

(10) investigating recipient fraud; and

(11) imposing administrative monetary penalties and damages against providers, individuals, contractors, or recipients involved with fraud, abuse, or physical abuse or neglect.

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

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DIVISION 2. MEDICAID PROGRAM AUTHORITY AND VIOLATIONS

1 TAC §§371.1613, 371.1615, 371.1617, 371.1619

The new rules are adopted under §531.033 and §531.021 of the Texas Government Code, which provides the Commission with broad rulemaking authority. In addition, §32.021(a) and (c) of the Human Resources Code provides that the Commission shall adopt necessary rules for the proper and efficient administration of the medical assistance program. Section 531.102 of the Government Code establishes the Office of Inspector General (formerly the Office of Investigations and Enforcement) and imposes responsibility for the investigation of fraud and abuse

in the provision of health and human services and the enforcement of state law relating to the provision of those services upon the Office of Inspector General. These rules specifically implement the provisions of HB2292 and HB 1743. 42 CFR §455.13 requires that the State's Medicaid agency have methods and criteria for identifying suspected fraud and abuse cases and methods for investigating fraud and abuse, and referring cases for criminal prosecution. 42 CFR, Part 455 specifies all federal requirements of the Commission to provide for Medicaid fraud and abuse program integrity. 42 CFR §1002.2 provides authority for the Commission to exclude Medicaid providers from participation in the Medicaid program. 42 CFR Parts 1002 and 1001 provide all requirements relating to exclusion of providers. Various other state and federal statutes place requirements on the Commission to implement a fraud and abuse program integrity component. The adopted rules meet the mandates of the state and federal statutes delineated above and the state statutes above provide the Commission with broad rulemaking authority for the implementation of those mandates.

§371.1613. Program Authority.

When established by prima facie evidence, all Medicaid and other HHS program violations (defined at §371.1617 of this subchapter) are subject to administrative enforcement and/or criminal or other appropriate judicial action. The method of enforcement reflects the evidence of the intent of the non-compliant provider or person. Unintentional program violations are subject to administrative actions and sanctions. Violations the provider or person knew or should have known were false and involved program or patient abuse or fraud are also subject to administrative monetary penalties, as well as criminal or other judicial prosecution. In accordance with 42 Code of Federal Regulations (CFR) §455.13(a), the Inspector General has established methods and criteria for identifying suspected fraud cases. Criteria to establish suspected fraud is based upon evidence of intentional deception or misrepresentation or upon a program violation or violation of other governing statutory law, including without limitation neglect, that appears to have been committed intentionally or with knowing and willful disregard for program rules.

§371.1615. Provider Responsibility.

(a) Participation in the Medicaid and other HHS programs charges all providers and persons, including managed care organizations, with knowledge of the federal and state law that governed Medicaid or other HHS programs during the period of time that the program was billed. This includes knowledge of the Texas Medicaid Provider Procedures Manual, HHS program and procedure manuals, and other official program manuals and publications, including all official interpretations or explanations given to the provider or person regarding the services that they provide.

(b) Providers are charged with the responsibility of ensuring and acquiring appropriate Medicaid and other HHS program enrollment and required licenses or certifications of all individuals providing services in the provider's office or operation. Providers are also responsible for ensuring, through review of the Commission's Exclusion Database, that all employees, contractors, and other Medicaid or HHS providers, within the provider's office or operation, are not excluded from participation in the Medicaid or another HHS program. The potential sanctions, damages, and penalties imposed for failure to ensure compliance with these requirements are addressed more specifically in §371.1677 of this subchapter.

(c) A Medicaid or other HHS provider is responsible for the provider's own actions and omissions, as well as the actions and omissions of the provider's employees, contractors, and agents. This responsibility, however, does not absolve a provider's employees, contractors, and agents from their own personal responsibility and liability.

§371.1617. Program Violations.

Following is a non-exclusive list of grounds/criteria for the Inspector General's administrative enforcement and/or referral for criminal, civil, or licensure or certification investigation and judicial action regarding program violations by any provider or person. Violations result from a provider or person who knew or should have known the following were violations. The headings of each group listed below are provided solely for organization and convenience and are not elements of any program violation.

(1) Claims and Billing.

(A) submitting or causing to be submitted a false statement or misrepresentation, or omitting pertinent facts when claiming payment under Medicaid or other HHS program or when supplying information used to determine the right to payment under Medicaid or other HHS program;

(B) submitting or causing to be submitted a false statement, information or misrepresentation, or omitting pertinent facts to obtain greater compensation than the provider is legally entitled to;

(C) submitting or causing to be submitted a false statement, information or misrepresentation, or omitting pertinent facts to meet prior authorization requirements;

(D) submitting or causing to be submitted under Title XVIII (Medicare) or a state health care program claims or requests for payment containing unjustified charges or costs for items or services that substantially exceed the person's usual and customary charges or costs for those items or services to the public or the private pay patients unless otherwise authorized by law;

(E) submitting or causing to be submitted claims with a pattern of inappropriate coding or billing that results in excessive costs to the Medicaid or other HHS program;

(F) billing or causing claims to be filed for services or merchandise that were not provided to the recipient;

(G) submitting or causing to be submitted a false statement or misrepresentation that, if used, has the potential of increasing any individual or state provider payment rate or fee;

(H) submitting or causing to be submitted to the Medicaid or other HHS program a cost report containing costs not associated with the Medicaid or other HHS program or not permitted by Medicaid or other HHS program policies;

(I) presenting or causing to be presented to an operating agency or its agent a claim that contains a statement or representation that the person knows or should have known to be false;

(J) billing or causing claims to be submitted to the Medicaid or other HHS program for services or items furnished personally by, at the medical direction of, or on the prescription or order of a person who is excluded from the Texas Medicaid, other HHS program, or Medicare or has been excluded from and not reinstated within the Texas Medicaid, other HHS program, or Medicare;

(K) billing or causing claims to be submitted to the Medicaid or other HHS program for services or items that are not reimbursable by the Medicaid or other HHS program;

(L) billing or causing claims to be submitted to the Medicaid or other HHS program for a service or item which requires a prior order or prescription by a licensed health care practitioner when such order or prescription has not been obtained;

(M) billing or causing claims to be submitted to the Medicaid or other HHS program for an item or service substituted without authorization for the item or service ordered, prescribed or otherwise designated by the Medicaid or other HHS program;

(N) billing or causing claims to be submitted to the Medicaid or other HHS program by a provider or person who is owned or controlled, directly or indirectly, by an excluded person; and

(O) billing or causing claims to be submitted to the Medicaid or other HHS program by a provider or person for charges in which the provider discounted the same services for any other types of patient.

(2) Records and Documentation.

(A) failing to maintain for the period of time required by the rules relevant to the provider in question records and other documentation that the provider is required by federal or state law or regulation or by contract to maintain in order to participate in the Medicaid or other HHS program or to provide records or documents upon written request for any records or documents determined necessary by the Inspector General to complete their statutory functions related to a fraud and abuse investigation. Such records and documentation include, without limitation, those necessary:

(i) to verify specific deliveries, medical necessity, medical appropriateness, and adequate written documentation of items or services furnished under Title XIX or Title XX;

(ii) to determine in accordance with established rates appropriate payment for those items or services delivered;

(iii) to confirm the eligibility of the provider to participate in the Medicaid or other HHS program; e.g., medical records (including, without limitation, x-rays, laboratory and test results, and other documents related to diagnosis), billing and claims records; cost reports, managed care encounter data, financial data necessary to demonstrate solvency of risk-bearing providers, and documentation (including, without limitation, ownership disclosure statements, articles of incorporation, by-laws, and corporate minutes) necessary to demonstrate ownership of corporate entities; and

(iv) to verify the purchase and actual cost of products;

(B) failing to disclose fully and accurately or completely information required by the Social Security Act and by 42 CFR Part 455, Subpart B; 42 CFR Part 420, Subpart C. 42 CFR §1001.1101; and 42 CFR Part 431;

(C) failing to provide immediate access, upon request by a requesting agency, to the premises or to any records, documents, and other items or equipment the provider is required by federal or state law or regulation or by contract to maintain in order to participate in the Medicaid or other HHS program (see subparagraphs (A) and (B) of this paragraph), or failing to provide records, documents, and other items or equipment upon written request that are determined necessary by the Inspector General to complete their statutory functions related to a fraud and abuse investigation, including without limitation all requirements specified in §371.1643(f) of this subchapter. "Immediate access" is deemed to be within 24 hours of receiving a written request, unless the requesting agency has reason to suspect fraud or abuse or to believe that requested records, documents, or other items or equipment are about to be altered or destroyed, thereby necessitating access at the actual time the request is presented or, in the opinion of the Inspector General, the request may be completed at the time of the request and/or in less than 24 hours;

(D) developing false source documents or failing to sign source documents or to retain supporting documentation or to comply with the provisions or requirements of the operating agency or its agents pertaining to electronic claims submittal; and

(E) failing as a provider, whether individual, group, facility, managed care or other entity, to include within any subcontracts for services or items to be delivered within the Medicaid program all information that is required by 42 CFR §434.10(b).

(3) Program-Related Convictions.

(A) pleading guilty or nolo contendere, agreeing to an order of probation without adjudication of guilt under deferred adjudication, or being a defendant in a court judgment or finding of guilt for a violation relating to performance of a provider agreement or program violation of Medicare, the Texas Medicaid program, other HHS program, or any other state's Medicaid program;

(B) pleading guilty or being convicted of a violation of state or federal statutes relating to dangerous drugs, controlled substances, or any other drug-related offense;

(C) pleading guilty of, being convicted of, or engaging in conduct involving moral turpitude;

(D) pleading guilty or being convicted of a violation of state or federal statutes relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct relating to the delivery of a health care item or service or relating to any act or omission in a program operated or financed by any federal, state, or local government agency;

(E) being convicted in connection with the interference with or obstruction of any investigation into any criminal offense that would support mandatory exclusion under §371.1655 of this subchapter or any offense listed within paragraph (3) of this subsection regarding program-related convictions; and

(F) being convicted of any offense that would support mandatory exclusion under §371.1655 of this subchapter.

(4) Provider Eligibility.

(A) failing to meet standards required for licensure, when such licensure is required by state or federal law, administrative rule, provider agreement, or provider manual for participation in the Medicaid or other HHS program;

(B) being excluded, suspended or otherwise sanctioned within any federal program involving the provision of health care;

(C) being excluded, suspended or otherwise sanctioned under any state health care program for reasons bearing on the person's professional competence, professional performance or financial integrity;

(D) failing to fully and/or correctly complete a Provider Enrollment Agreement, Provider Re-Enrollment Agreement or other enrollment form prescribed by the relevant operating agency or its agent for enrollment; and.

(E) loss or forfeiture of corporate charter.

(5) Program Compliance

(A) failing to comply with the terms of the Medicaid or other HHS program contract or provider agreement, assignment agreement, the provider certification on the Medicaid or other HHS program

claim form, or rules or regulations published by the Commission or a Medicaid or other HHS operating agency;

(B) violating any provision of the Human Resources Code, Chapter 32 or 36, or any rule or regulation issued under the Code;

(C) submitting a false statement or misrepresentation or omitting pertinent facts on any application or any documents requested as a prerequisite for Medicaid or other HHS program participation;

(D) refusing to execute or comply with a provider agreement or amendments when requested;

(E) failing to correct deficiencies in provider operations after receiving written notice of them from an operating agency, the commission or their authorized agents;

(F) failing to abide by applicable federal and state law regarding handicapped individuals or civil rights;

(G) failing to comply with Medicaid or other HHS program policies, published Medicaid or other HHS program bulletins, policy notification letters, provider policy or procedure manuals, contracts, statutes, rules, regulations, or interpretation previously sent to the provider by an operating agency or the commission regarding any of the authorities listed above, including statutes or standards governing occupations;

(H) failing to fully and accurately make any disclosure required by the Social Security Act, §1124 or §1126;

(I) failing to disclose information about the ownership of a subcontractor with whom the person has had business transactions in an amount exceeding $25,000 during the previous 12 months or about any significant business transactions (as defined by HHS) with any wholly-owned supplier or subcontractor during the previous five years;

(J) failing, as a hospital, to comply substantially with a corrective action required under the Social Security Act, §1886(f)(2)(B);

(K) failing to repay or make arrangements that are satisfactory to the commission to repay identified overpayments or other erroneous payments or assessments identified by the commission or any Medicaid or other HHS program operating agency;

(L) committing an act described in the Social Security Act, §1128A (mandatory exclusion) or §1128B (permissive exclusion);

(M) defaulting on repayments of scholarship obligations or items relating to health profession education made or secured, in whole or in part, by HHS or the state when they have taken all reasonable steps available to them to secure repayment;

(N) soliciting or causing to be solicited, through offers of transportation or otherwise, Medicaid or other HHS program recipients for the purpose of delivering to those recipients health care items or services;

(O) marketing, supplying or selling confidential information (e.g., recipient names and other recipient information) for a use that is not expressly authorized by the Medicaid or other HHS program; and

(P) failing to abide by applicable statutes and standards governing providers.

(6) Delivery of Health Care Services.

(A) failing to provide health care services or items to Medicaid or other HHS program recipients in accordance with accepted medical community standards or standards required by statute, regulation, or contract, including statutes and standards that govern occupations;

(B) furnishing or ordering health care services or items for a recipient-patient under Title XVIII or a state health care program that substantially exceed the recipient's needs, are not medically necessary, are not provided economically or are of a quality that fails to meet professionally recognized standards of health care; and

(C) engaging in any negligent practice that results in death, injury, or substantial probability of death or injury to the provider's patients;

(7) Improper Collection and Misuse of Funds.

(A) charging recipients for services when payment for the services was recouped by Medicaid or another HHS program for any reason;

(B) misapplying, misusing, embezzling, failing to promptly release upon a valid request, or failing to keep detailed receipts of expenditures relating to any funds or other property in trust for a Medicaid or other HHS program recipient;

(C) failing to notify and reimburse the relevant operating agency or the commission or their agents for services paid by Medicaid or other HHS programs if the provider also receives reimbursement from a liable third party;

(D) rebating or accepting a fee or a part of a fee or charge for a Medicaid or other HHS program patient referral;

(E) requesting from a recipient in payment for services or items delivered within the Medicaid or other HHS program any amount that exceeds the amount Medicaid or other HHS program paid for such services or items, with the exception of any cost-sharing authorized by the program; and

(F) requesting from a third party liable for payment of the services or items provided to a recipient under the Medicaid or other HHS program, any payment other than as authorized at 42 CFR §447.20.

(8) Licensure Actions

(A) having a voluntary or involuntary action taken by a licensing or certification agency or board that requires the provider or employee to comply with professional practice requirements of the board after the board receives evidence of noncompliance with licensing or certification requirements; and

(B) having its license to provide health care revoked, suspended, or probated by any state licensing or certification authority, or losing a license or certification, because of action based on assessment of the person's professional competence, professional performance, or financial integrity, non-compliance with Health and Safety Code, statutes governing occupations, or surrendering a license or certification while a formal disciplinary proceeding is pending before licensing or certification authorities when the proceeding concerns the person's professional competence, professional performance, or financial integrity;

(9) Managed Care Organizations and Persons Providing Services or Items Through Managed Care. (Note: This paragraph includes those program violations that are unique to managed care; paragraphs (1) - (8) and (11) of this section also apply to managed care.)

(A) failing, as a managed care organization (MCO), primary care case management system (PCCM), an association, group or

individual health care provider furnishing services through an MCO, to provide to recipient enrollee a health care benefit, service or item that the organization is required to provide under its contract with an operating agency;

(B) failing, as a managed care organization, a PCCM or an association, group or individual health care provider furnishing services through an MCO, to provide to an individual a health care benefit, service or item that the organization is required to provide by state or federal law, regulation or program rule;

(C) engaging, as a managed care organization, in actions that indicate a pattern of wrongful denial or payment for a health care benefit, service or item that the organization is required to provide under its contract with an operating agency;

(D) engaging, as a managed care organization, in actions that indicate a pattern of wrongful delay of at least 45 days or a longer period specified in the contract with an operating agency, not to exceed 60 days, in making payment for a health care benefit, service or item that the organization is required to provide under its contract with an operating agency;

(E) engaging, as a managed care organization, a PCCM or an association, group or individual health care provider furnishing services through managed care, in a fraudulent activity in connection with the enrollment in the organization's managed care plan of an individual eligible for medical assistance or in connection with marketing the organization's services to an individual eligible for medical assistance.

(F) discriminating against enrollees or prospective enrollees on any basis, including, without limitation, age, gender, ethnic origin or health status;

(G) failing as a managed care organization, to comply with any term within a contract with a Medicaid or other HHS program operating agency to provide health care services to Medicaid or HHS program recipients; and

(H) failing, as a managed care organization, reasonably to provide to the relevant operating agency, upon its written request, encounter data and/or other data contractually required to document the services and items delivered by or through the MCO to Medicaid or other HHS program recipients.

(10) Cost Report Violations.

(A) reporting costs of noncovered or nonchargeable services as covered items; e.g., incorrectly apportioning or allocating costs on cost reports; including costs of noncovered services, supplies or equipment in allowable costs; arrangements between providers and employees, related parties, independent contractors, suppliers, and others that appear to be designed primarily to overstate the costs to the program through various devices (such as commissions or fee splitting) to siphon-off or conceal illegal profits;

(B) reporting costs not incurred or which were attributable to nonprogram activities, other enterprises or personal expenses;

(C) including unallowable cost items on a cost report;

(D) manipulating or falsifying statistics that result in overstatement of costs or avoidance of recoupment, such as incorrectly reporting square footage, hours worked, revenues received, or units of service delivered;

(E) claiming bad debts without first genuinely attempting to collect payment;

(F) depreciating assets that have been fully depreciated or sold or using an incorrect basis for depreciation; and

(G) reporting costs above the cost to the related party.

(11) Kickbacks and Referrals.

(A) violating any of the provisions specified in §371.1721(b) of this subchapter relating to kickbacks, bribes, rebates, referrals, inducements, or solicitation;

(B) as a physician, referring a Medicaid or other HHS program patient to an entity with which the physician has a financial relationship for the furnishing of designated health services, payment for which would be denied under Title XVIII (Medicare) pursuant to §1877 and §1903(s) of the Social Security Act (Stark I and II). Neither federal financial participation nor this state's expenditures for medical assistance under the state Medicaid plan may be used to pay for services or items delivered within the program and within a relationship that violates Stark I or II. The Commission hereby references and incorporates within these rules the federal regulations promulgated pursuant to Stark I and II, and expressly recognizes all exceptions to the prohibitions on referrals established within those rules.

(C) failing to disclose documentation of financial relationships necessary to establish compliance with Stark I and II, as set forth in subparagraph (B) of this paragraph; and

(D) offering to pay or agreeing to accept, directly or indirectly, overtly or covertly any remuneration in cash or in kind to or from another for securing or soliciting a patient or patronage for or from a person licensed, certified, or registered or enrolled as a provider or otherwise by a state health care regulatory or health and human service agency.

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 December 20, 2004.

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Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
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For further information, please call: (512) 424-6900

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DIVISION 3. ADMINISTRATIVE ACTIONS

1 TAC §§371.1629, 371.1631, 371.1633

The new rules are adopted under §531.033 and §531.021 of the Texas Government Code, which provides the Commission with broad rulemaking authority. In addition, §32.021(a) and (c) of the Human Resources Code provides that the Commission shall adopt necessary rules for the proper and efficient administration of the medical assistance program. Section 531.102 of the Government Code establishes the Office of Inspector General (formerly the Office of Investigations and Enforcement) and imposes responsibility for the investigation of fraud and abuse in the provision of health and human services and the enforcement of state law relating to the provision of those services upon the Office of Inspector General. These rules specifically implement the provisions of HB2292 and HB 1743. 42 CFR §455.13

requires that the State's Medicaid agency have methods and criteria for identifying suspected fraud and abuse cases and methods for investigating fraud and abuse, and referring cases for criminal prosecution. 42 CFR, Part 455 specifies all federal requirements of the Commission to provide for Medicaid fraud and abuse program integrity. 42 CFR §1002.2 provides authority for the Commission to exclude Medicaid providers from participation in the Medicaid program. 42 CFR Parts 1002 and 1001 provide all requirements relating to exclusion of providers. Various other state and federal statutes place requirements on the Commission to implement a fraud and abuse program integrity component. The adopted rules meet the mandates of the state and federal statutes delineated above and the state statutes above provide the Commission with broad rulemaking authority for the implementation of those mandates.

§371.1629. Use of Administrative Actions.

(a) The Inspector General utilizes administrative actions to address identified program violations through preventive means or by referral for review by an appropriate state or federal agency.

(b) The Inspector General may impose an administrative action independently or in conjunction with other enforcement measures. An administrative action need not be taken prior to the imposition of an administrative sanction. Any administrative action imposed at the direction of the Inspector General for non-Medicaid, HHS programs, will be in accordance with the applicable law governing the specific HHS program. Any administrative action imposed for fraud and abuse violations of the Medicaid program, will be in accordance with Subchapters A, B, and G of this chapter.

§371.1631. Non-exclusive List of Administrative Actions.

(a) The Inspector General may take any of the following administrative actions, singly or in combination, to prevent future program violations and/or to verify compliance with program requirements:

(1) transfer to a closed-end contract or provider agreement for a specified period of time or a provisional or probationary contract or provider agreement with variable case-by-case options applied to the terms and conditions;

(2) attendance at provider education sessions;

(3) prior authorization of selected services--Failure to submit and receive prior authorization prior to the service being rendered and billed would result in denial of the claim;

(4) prepayment review--Entails a review of all, or certain specific services of a provider, including a provider in a managed care organization, before payment. It is a different process than the Random Prepayment Review specified in §371.29 of subchapter B;

(5) postpayment review--Entails a review of all, or certain specific services of a provider, including a provider in a managed care organization, after payment;

(6) attendance in informal or formal provider corrective action meetings;

(7) submission of additional documentation or justification that is not normally required to accompany submitted claims. Failure to submit legible documentation or justification requested would result in denial of the claim;

(8) oral, written, or personal educational contact with the provider;

(9) posting of a surety bond or providing a letter of credit, as provided in Subchapter B, §371.23 of this title; and

(10) having a subpoena served to compel an appearance for testimony or the production of relevant evidence, as determined by the Inspector General, and as provided in Subchapter B, §371.21 of this title and §371.1633 of this subchapter.

(b) Referral for additional review or investigation:

(1) referral to peer review outside the Commission or operating agency;

(2) referral to the appropriate state licensing board;

(3) referral to the Department of Health and Human Services, including referral for action under the Civil Monetary Penalties Law (the Social Security Act, §1128);

(4) referral for fraud investigation and criminal fraud prosecution;

(5) referral for civil fraud prosecution and imposition of civil damages or penalties;

(6) referral for recovery of overpayments and administrative penalties and damages through judicial means;

(7) referral to a collection agency, or any other collection authority, for recovery of overpayments and administrative penalties and damages;

(8) referral to credit bureaus for failure to pay all imposed recoupments and damages and penalties; and

(9) all other referrals required to perform statutory or regulatory functions.

§371.1633. Subpoena Authority.

(a) The Inspector General may, upon a determination of good cause, and with the approval of the Executive Commissioner or the Executive Commissioner's designee, issue a subpoena, in connection with an investigation conducted by the Inspector General, to compel the attendance of a relevant witness or the production of relevant evidence as determined by the Inspector General. "Good cause" will be determined from the specific circumstances of the investigation. Circumstances that may result in a determination of "good cause" include, but are not limited to, the following situations:

(1) A provider's failure to comply with an OIG investigative demand for the attendance of a relevant witness or the production of relevant evidence;

(2) A provider's past history of failing to comply with an OIG investigative demand for the attendance of a relevant witness or the production of relevant evidence;

(3) A reasonable belief that, without the issuance of a subpoena, relevant evidence will be compromised;

(4) A determination that there is an immediate threat to the health or safety of a recipient; or

(5) A substantial likelihood of loss of state or federal funds.

(b) The subpoena may be served personally or by certified mail. Failure to comply with a subpoena will result in the Inspector General, through the Attorney General, filing suit to enforce the subpoena in a state district court.

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

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DIVISION 4. ADMINISTRATIVE SANCTIONS

1 TAC §§371.1643, 371.1645, 371.1647, 371.1649, 371.1651, 371.1653, 371.1655, 371.1657, 371.1659, 371.1661, 371.1663, 371.1665, 371.1667, 371.1669, 371.1671, 371.1673, 371.1675, 371.1677, 371.1679, 371.1681, 371.1683, 371.1685, 371.1687, 371.1689

The new rules are adopted under §531.033 and §531.021 of the Texas Government Code, which provides the Commission with broad rulemaking authority. In addition, §32.021(a) and (c) of the Human Resources Code provides that the Commission shall adopt necessary rules for the proper and efficient administration of the medical assistance program. Section 531.102 of the Government Code establishes the Office of Inspector General (formerly the Office of Investigations and Enforcement) and imposes responsibility for the investigation of fraud and abuse in the provision of health and human services and the enforcement of state law relating to the provision of those services upon the Office of Inspector General. These rules specifically implement the provisions of HB2292 and HB 1743. 42 CFR §455.13 requires that the State's Medicaid agency have methods and criteria for identifying suspected fraud and abuse cases and methods for investigating fraud and abuse, and referring cases for criminal prosecution. 42 CFR, Part 455 specifies all federal requirements of the Commission to provide for Medicaid fraud and abuse program integrity. 42 CFR §1002.2 provides authority for the Commission to exclude Medicaid providers from participation in the Medicaid program. 42 CFR Parts 1002 and 1001 provide all requirements relating to exclusion of providers. Various other state and federal statutes place requirements on the Commission to implement a fraud and abuse program integrity component. The adopted rules meet the mandates of the state and federal statutes delineated above and the state statutes above provide the Commission with broad rulemaking authority for the implementation of those mandates.

§371.1643. Use of Sanctions.

(a) In response to program violations in the Medicaid program, including but not limited to any substantiated reason specified in §371.1617 of this subchapter, the Inspector General may impose against a provider or person, as defined in §371.1601 of this subchapter, any one or combination of sanctions specified in subsection (c) of this section.

(b) The imposition of an administrative action is not prerequisite to the use of a sanction, although sanctions may be imposed in conjunction with other administrative enforcement measures.

(c) Administrative sanctions include:

(1) exclusion from participation in the Titles V, XIX (Medicaid), and XX programs for a specified period of time, permanently, or indefinitely; (In this subchapter, exclusion from Medicaid automatically precipitates concurrent exclusion from Titles V, and XX.)

(2) suspension of payments (payment hold) to a provider in Titles V, XIX (Medicaid), XX, and CHIP programs;

(3) recoupment of overpayments in Titles V, XIX (Medicaid), and XX programs;

(4) recoupment of overpayments projected from a sampling process in Titles V, XIX (Medicaid), and XX programs;

(5) restricted reimbursement for a specified period of time or indefinitely in Titles V, XIX (Medicaid), and XX programs--Specific services will not be reimbursed to an individual provider during the time the provider is on restricted reimbursement; however, other services, as determined by the Inspector General, will be reimbursed;

(6) cancellation of provider contract or provider agreement in Titles V, XIX (Medicaid), and XX, programs; and

(7) debarment or suspension under the authority of the Code of Federal Regulations.

(d) Providers or Persons Subject to Sanctions.

(1) Providers or persons furnishing services or items directly or indirectly for the Medicaid program are subject to sanctions for violations of the program;

(2) Any affiliates of a provider or person as specified in subsection (d) of this section.

(3) Providers or persons in violation of any of the violations set forth in Subchapter G of this chapter; and

(4) Providers or persons committing other program violations for which the Inspector General determines that sanctions are appropriate.

(e) Affiliate Relationship.

(1) A provider or person, as defined in §371.1601 of this subchapter, is deemed to have an affiliate relationship with another provider or person, if they:

(A) have a direct or indirect ownership interest (or any combination thereof) of 5% or more in the entity;

(B) are the owner of a whole or part interest in any mortgage, deed of trust, note or other obligation secured (in whole or in part) by the entity or any of the property assets, thereof, in which whole or part interest is equal to or exceeds 5% of the total property and assets of the entity;

(C) are an officer or director, if organized as a corporation;

(D) are a partner, if organized as a partnership;

(E) are an agent or consultant;

(F) are a managing employee, that is, a person (including a general manager, business manager, administrator or director) who exercises operational or managerial control over a person or part thereof, or directly or indirectly conducts the day-to-day operations of the entity or part thereof;

(G) are providers or person(s) associated with one another so that any one of them, directly or indirectly, controls or has the power to control another in whole or in part;

(H) share any of the following: e.g. tax identification numbers, social security numbers, bank accounts, telephone number, business location. (This is not an all inclusive list); or

(I) was formerly described in subsection (d)(1) of this section, but is no longer described, because of a transfer of ownership

or control interest to an immediate family member or a member of the person's household as defined in subsection (d)(3) of this section, in anticipation of, or following a conviction, assessment of damages or penalties under §371.1721 et seq. of this subchapter, or imposition of a sanction.

(2) The Inspector General may sanction an affiliate of a provider or person, as defined in §371.1601 of this subchapter, if a provider or person with an affiliate relationship:

(A) has been convicted of a criminal offense related to the Medicaid or Medicare program or as described in §§1128(a) and 1128(b)(1), (2), or (3) of the Social Security Act, or of an offense related to another HHS program;

(B) has had damages and penalties or assessments imposed under §371.1721 et seq. of this subchapter or §1128A of the Social Security Act; or

(C) has been excluded from participation in Medicaid, Medicare, or any state's health care program.

(3) For purposes of this section, the following terms are defined as:

(A) Agent means any person who has express or implied authority to obligate or act on behalf of a provider or person, as defined in §371.1601 of this subchapter.

(B) Immediate family member means, a person's husband, wife, or spouse; natural or adoptive parent; child or sibling; stepparent, stepchild, stepbrother or stepsister; father-, mother-, daughter-, son-, brother- or sister-in-law; grandparent or grandchild; or spouse of a grandparent or grandchild.

(C) Indirect ownership interest includes an ownership interest through any other entities that ultimately have an ownership interest in the provider or person in issue. (For example, an individual has a 10 percent ownership interest in the entity at issue if they have a 20 percent ownership interest in a corporation that wholly owns a subsidiary that is a 50 percent owner of the entity in issue.)

(D) Member of household means, with respect to a person, with whom they are sharing a common abode as part of a single-family unit, including domestic employees, partners, and others who live together as a family unit.

(E) Ownership interest means an interest in the capital, the stock or the profits of the entity or any mortgage, deed, trust or note, or other obligation secured in whole or in part by the property or assets of the person.

(f) Failure to Grant Immediate Access.

(1) The Inspector General may sanction any provider or person, including managed care organizations and their subcontractors, as defined in §371.1601 of this subchapter, that:

(A) fails to grant immediate access upon reasonable request to:

(i) the Inspector General;

(ii) the Attorney General's Medicaid Fraud Control Unit or Civil Fraud Division;

(iii) any state or federal agency authorized to conduct compliance, regulatory, or program integrity functions on the provider, person, or the services rendered by the provider or person; or

(iv) any agent or consultant of any agency or division within an agency formerly described in subparagraph (A) of this paragraph;

(B) fails to allow the Inspector General or any other federal or state agency, division, agent or consultant as described in subparagraph (A) of this paragraph to conduct any duties that are necessary to the performance of their statutory functions;

(C) fails to provide to the Inspector General or any other federal or state agency, division, agent or consultant as described in subparagraph (A) of this paragraph, upon request and as requested, for the purpose of reviewing, examining, and securing custody of records, access to, disclosure of, and custody of copies or originals of any records, documents, or other requested items, as determined necessary by the Inspector General or those specified in subparagraph (A) of this paragraph to perform statutory functions, any records the provider or person is required to maintain; any records necessary to verify items or services furnished and delivered under Medicaid, any other HHS program, or any state health care program to determine whether payment for those items or services is due or was properly made. This includes, without limitation: clinical medical patient records, other records pertaining to the patient, any other records of services provided to Medicaid or other HHS program recipients and payments made for those services, documents related to diagnosis, treatment, service, lab results, charting, billing records, invoices, documentation of delivery of items, equipment, or supplies, and radiographs and all requirements of §371.1617(a)(2) of this subchapter. It also includes the business and accounting records with backup support documentation, statistical documentation, computer records and data, patient sign in sheets, and schedules. Accessible information must include information that is necessary for the agencies specified in this paragraph to perform statutory functions. It includes those elements described in §371.1601 of this subchapter (definition of "failure to provide immediate access").

(2) For purposes of paragraph (1)(A) and (1)(B) of this subsection, the term:

(A) Failure to grant immediate access means the failure to grant access at the time of a reasonable request.

(B) Reasonable request means a request made by a properly identified agent of the Inspector General or another state or federal agency identified in paragraph (1)(A) of this subsection, during hours that the business or premises is open for business.

(3) For purposes of paragraph (1)(C) of this subsection, the term Failure to grant immediate access means:

(A) The failure to produce or make available records within 24 hours of the request for production, for the purpose of reviewing, examining, and securing custody of records upon reasonable request, as determined by the requestor, Inspector General and all other state and federal agencies, except where the Inspector General or another state or federal agency identified in paragraph (1)(A) of this subsection reasonably believes that requested documents are about to be altered or destroyed or that the request may be completed at the time of the request and/or in less than 24 hours;

(B) The failure to provide access to requested records at the time of the request, for the purpose of reviewing, examining, and securing custody of records upon reasonable request, when the Inspector General or another state or federal agency identified in paragraph (1)(A) of this subsection, has reason to believe that requested documents are about to be altered or destroyed or the request, in the opinion of the Inspector General or the other requestor, determined that the request could be met at that time and/or in less than 24 hours.

(C) Reasonable request means a request for records or documents made by a properly identified agent of the Inspector General or another state or federal agency identified in paragraph (1)(A) of

this subsection, during hours that the business or premises is open for business.

(4) In most instances, providers or persons required to produce records or documents will be required to complete a Records Affidavit, Business Records Affidavit, Evidence Receipt, and/or Patient Record Receipt, at the direction of the requestor, and to attach these documents to the records provided.

(5) As directed by the requestor, and in accordance with the provisions of subsection (e) of this section, the provider or person will relinquish custody of the records and documents and the requestor will take custody of the records and remove them from the premises. If the requestor should allow longer than "at the time of the request" to produce the records, the provider or person will be required to produce all records completed, at the time of completion or at the end of each day of production, as directed by the requestor, to the requestor who will take custody of the records. Failure to comply with the provisions of this part will result in a finding of Failure to grant immediate access.

(6) Nothing in this section shall in any way limit access otherwise authorized under State or Federal law.

(7) Exclusion.

(A) A program exclusion imposed against a provider or person under this section may be for a period equal to the sum of:

(i) The length of the period during which the immediate access was not granted, and

(ii) An additional period of up to one year.

(B) The exclusion of a provider or person may be for a longer period than the period in which immediate access was not granted based on consideration of the following factors:

(i) The impact of the failure to grant the requested immediate access on Medicaid or other HHS program;

(ii) The circumstances under which such access was refused; and

(iii) Whether the provider or person has a documented history of criminal, civil, or administrative wrongdoing. The lack of any prior record is to be considered neutral.

(C) For purposes of this section, the length of the period in which immediate access was not granted will be measured from the time the request is made.

(D) The exclusion will be effective as of the date immediate access was not granted.

(8) The Inspector General will work with the provider or person, within the limitations necessitated by the circumstances of the investigative case, to provide the provider or person, within a reasonable time, as determined by the Inspector General, and at the provider or person's expense, with copies of the records necessary for the provider to continue their immediate business. Nothing herein shall be interpreted to impede the Inspector General's or other requestor's ability to obtain all records and documents as required and to which the requestor is entitled under this section.

§371.1645. Imposing a Sanction.

(a) In determining the sanction or combination of sanctions to be imposed, the Inspector General may consider the seriousness of the program violation, the extent of the violation, degree and severity of the violation, prior non-compliance issues, prior imposition of sanctions, damages, or penalties, willingness to comply with program rules, efforts to interfere with an investigation or witnesses, recommendations of peer review groups, program violations within Medicaid, Medicare, Titles V, XX, CHIP, and other HHS programs, pertinent affiliate relationships, past and present compliance with licensure and certification requirements, or any other pertinent information or analysis deemed appropriate by the Inspector General.

(b) With regard to those exclusions for which no specific period of time is mandated by law or regulation, the Inspector General will determine the length of exclusion based upon the criteria in subsection (a) of this section.

§371.1647. Notice of Sanction.

(a) The Inspector General provides written notice of a potential sanction(s) by certified mail with return receipt or by facsimile transmission with confirmation page. A recoupment requires both an initial written notice of potential sanction and a subsequent written notice of final sanction; therefore, any additional sanctions of any type in the same notice letter with a recoupment will require both notice letters. Additional provisions regarding notice of an exclusion are provided in §371.1649 of this subchapter. If there is no specific requirement in Subchapter G for a written notice of a potential sanction for an individual specific situation, the only sanction notice letter required is the notice of final sanction.

(b) Potential sanction. The written notice of potential sanction includes:

(1) a description of the potential sanction;

(2) the basis of the potential sanction;

(3) the effect of the potential sanction;

(4) its duration (duration could be indefinite or until a certain event occurred), if appropriate; and

(5) if the sanction is an exclusion, the notice must contain a description of the method the provider uses to request reinstatement, unless the exclusion is permanent.

(c) In the case of a recoupment, a statement of the provider's or person's right to request a formal appeal hearing of the potential sanction is not provided in the initial notice letter, since this is not a final sanction. A statement of the provider's or person's right to request a formal appeal hearing of the final sanction will be subsequently provided with the final written notice of the Inspector General's final overpayment determination.

(d) Final sanction. The written notice of final sanction includes:

(1) a description of the final sanction;

(2) the basis of the final sanction;

(3) the effect of the final sanction;

(4) its duration (duration could be indefinite or until a certain event occurred), if appropriate;

(5) a statement of the provider's or person's right to request a formal appeal hearing of the sanction; and

(6) if the sanction is an exclusion, the notice must contain a description of the method the provider or person uses to request reinstatement, unless the exclusion is permanent.

(e) The sanctions will take effect in the following manner:

(1) Recoupment--The provider or person will receive a notice of a potential sanction to impose recoupment. The provider or person may request an informal review, to informally discuss the issues and allow the provider or person an opportunity to provide information they deem appropriate. Subsequently, the Inspector General will make

a final determination regarding the amount to be recouped. Upon that determination, the Inspector General will send final determination and notice of recoupment to the provider or person.

(2) Payment hold--A payment hold on payments of future claims submitted for reimbursement will be imposed, without prior notice, as specified in §371.1703(b) of this subchapter. The provider will be notified of the payment hold not later than the fifth (5th) working day after the date the hold is imposed. The payment hold will remain in effect until all issues regarding the provider's billing practices are finally resolved, including all litigation and judicial processes.

(3) Restricted reimbursement--The provider will receive final notice of intent to impose restricted reimbursement unless the provider meets one of the exception criteria enumerated in §371.1649 and §371.1651 of this subchapter. The provider may request an informal review and/or an administrative appeal hearing as described in paragraph (1) of this subsection.

(4) Exclusion--The provider or person will receive a notice of potential imposition of exclusion unless the provider meets one of the exception criteria enumerated in §371.1649 and §371.1651 of this subchapter. The provider or person may request an informal review, to informally discuss the issues and allow the provider or person an opportunity to provide information they deem appropriate. This process will occur before the Inspector General submits its final notice of exclusion to the provider or person. At that time, the provider or person may request an administrative appeal hearing as described in §371.1669 of this title.

(5) Cancellation of contract or provider agreement--The provider or person will receive a notice of potential cancellation of contract or provider agreement unless the provider meets one of the exception criteria enumerated in §371.1649 and §371.1651 of this subchapter. The provider may request an informal review as described in paragraph (1) of this subsection. This process will occur before the Inspector General submits its final notice of cancellation of contract or provider agreement to the provider or person. If a provider or person is excluded who also has a contract or provider agreement, prior notice of the cancellation of contract or provider agreement is not a requirement, since the scope and effect of the exclusion, as specified in §371.1673 of this subchapter, does not allow that person to participate in Titles XIX, V, and XX programs. The contract or provider agreement in that instance would be cancelled effective the effective date of the exclusion.

§371.1649. Exceptions to Prior Notice of Exclusion, Cancellation of Contract or Provider Agreement, and Restricted Reimbursement.

When the decision to impose an exclusion, cancellation of contract or provider agreement, or restricted reimbursement is based upon circumstances that indicate the occurrence of any of the following, the Inspector General provides written notice as specified in §371.1647 of this subchapter:

(1) any criminal conduct;

(2) any act or omission by a provider or person directly or indirectly furnishing services or items or with authority or control over the business or the furnishing of services or items within the Medicaid or Medicare programs or any other reason that results in the preclusion of federal financial participation (FFP) with regard to claims submitted by the provider or person committing the act or omission or otherwise. Medicaid is prohibited from paying 100% state general revenue funds when a loss of FFP has occurred, e.g. provider's or person's exclusion from Medicare or loss of licensure or certification;

(3) any act or omission by a provider or person directly or indirectly furnishing services or items within the Medicaid program that presents a significant health, safety, or security hazard to a recipient receiving services or items from that person;

(4) any act or omission by a provider or person directly or indirectly furnishing items or services within the Medicaid program that causes financial loss to a recipient receiving those services and that is a violation of the Medicaid program;

(5) any act or omission by a provider or person directly or indirectly furnishing items or services within the Medicaid program that indicates a pattern of repeated violations of any one or combination of those programs;

(6) any act or omission by a provider or person directly or indirectly furnishing services or items within the Medicaid program that causes a significant overpayment due to billing for services not provided or not provided according to the requirements of the Medicaid program;

(7) any act or omission by a provider or person directly or indirectly that prevents a requesting agency from obtaining immediate access, in accordance with §371.1643 of this subchapter, to premises, records, documents, or other requested items that must be maintained in order to participate in the Medicaid program or have been determined to be necessary for the complete investigation by the Inspector General or any of the other agencies and agents specified;

(8) any loss of a condition that is a requirement of the Medicaid program, e.g. loss of license, certification, Medicare participation, etc.; or

(9) if the Inspector General determines that the health or safety of individuals receiving services under Medicaid program warrants an exclusion taking place immediately in accordance with §371.1651 of this subchapter.

§371.1651. Immediate Sanctions Due to Health and/or Safety.

The Inspector General may immediately exclude a provider or person, place on restricted reimbursement, and/or cancel a contract or provider agreement of a provider or person if the Inspector General determines that the provider or person is or may be placing the health and/or safety of individuals receiving services under Medicaid at risk. In accordance with 42 CFR §1001.2003(c), the Inspector General may immediately exclude the provider or person. This may occur prior to the initiation or completion of an administrative hearing. In this situation, the provider or person's exclusion, restricted reimbursement, and/or cancellation of contract or provider agreement would be effective immediately upon notice of immediate exclusion or cancellation of contract or provider agreement.

§371.1655. Mandatory Exclusion.

The Inspector General will exclude from participation in Titles V, XIX, and XX programs:

(1) any provider or person who must be excluded pursuant to grounds set forth at 42 USC §1320a-7(a) or 42 CFR §1001.101. The length of exclusion under this subsection will be equivalent to: the length of exclusion required by federal statute or regulation plus, pursuant to state authority, a minimum period of one year beyond the federally mandated period of exclusion, determined according to the severity of the offense.

(2) any managed care organization or other entity furnishing services under a §1915(b)(1) waiver of the Social Security Act, if such organization or entity could be excluded under 42 CFR §1001.1001 ("Exclusion of Entities Owned or Controlled by a Sanctioned Person") or §1001.1051 ("Exclusion of Individuals with Ownership or Control Interest in Sanctioned Entities") or, directly or

indirectly, has a substantial contractual relationship (as defined in 42 CFR §1002.203) with an individual or entity that could be excluded under 42 CFR §1001.1001 or §1001.1051. Length of exclusion under this subsection will be equivalent to that of the person whose relationship with the entity is the basis for the exclusion, subject to the exceptions established at 42 CFR §1001.3002(c).

(3) any provider or person who is found liable for a false claim or a managed care violation set forth within the state's damages and penalties statute at §32.039(b) of the Human Resources Code. Term of exclusion under this paragraph is as follows:

(A) except as provided by subparagraph (D) of this paragraph, when the violation resulted in injury to an elderly person (as defined by Human Resources Code §48.002(a)(1), a disabled person (as defined by Human Resources Code §48.002(a)(8)(A)), or a person younger than 18 years of age, the provider or person may not provide or arrange to provide health care services under the Medicaid program for a minimum period of ten (10) years to a maximum period of permanent exclusion. The period of exclusion begins on the date on which the determination that the provider or person is liable becomes final.

(B) except as provided by subparagraph (D) of this paragraph, when the violation did not result in injury to anyone in those categories of persons listed in subparagraph (A) above, the provider or person may not provide or arrange to provide health care services under the Medicaid program for a period of three (3) years to a maximum period of permanent exclusion. The period of exclusion begins on the date on which the determination that the provider or person is liable becomes final.

(C) except as provided by subparagraph (D) of this paragraph, any provider or person who is convicted, as defined in §371.1601, or pleads guilty or nolo contendere of an offense arising from a fraudulent act under the Medicaid program, which results in injury to an elderly person (as defined by Human Resources Code §48.002(1)), a disabled person (as defined by §48.002(8)(A), or a person younger than 18 years of age. Exclusion under this subparagraph is permanent. A person excluded under this subparagraph shall not be eligible for reinstatement to the program. The period of exclusion begins on the date on which the provider or person is convicted.

(D) The Inspector General may waive the mandatory exclusion specified in subparagraphs (A) - (C) on consideration of:

(i) the provider's or person's knowledge of the violation;

(ii) the likelihood that education provided to the provider or person would be sufficient to prevent future violations;

(iii) the potential impact on availability of services on the community served by the person; and

(iv) any other reasonable factor identified by the Inspector General.

(4) any provider or person whose health care services or items are ineligible for federal financial participation. The period of exclusion begins on the date the provider's or person's health care services or items became ineligible for federal financial participation.

(5) any provider or person whose health care license, certification, or other qualifying requirement to perform certain types of service is revoked, suspended, or otherwise terminated such that the provider or person may not perform their profession due to the loss of the license, certification, or other qualifying requirement. The period of exclusion begins on the date the person lost their license, certification, or other qualifying requirement.

§371.1657. Permissive Exclusion.

The Inspector General may exclude from participation in Titles V, XIX, XX, and CHIP programs -

(1) any provider or person who commits a program violation as established by prima facie evidence, including but not limited to those set forth at §371.1617 of this subchapter, Human Resources Code §32.039(b), (u), (v) or §371.1721 et seq. of this subchapter, and Human Resources Code §36.002; and

(2) any provider or person, as defined in §371.1601 of this subchapter, who may be excluded for any reason for which the Secretary of the U.S. Department of Human Services or its agent could exclude such person under 42 USC §1320a-7(b) or 42 CFR Parts 1001 or 1003.

(3) any provider, entity, or person, if another provider, entity, or person, with whom they have a relationship:

(A) has been convicted of a criminal offense as described in §1128(a) and §1128(b)(1), (2), or (3) of the Social Security Act;

(B) has had civil money penalties or damage and penalties assessments imposed under §371.1721 et seq. of this subchapter or §1128A of the Social Security Act; or

(C) has been excluded from participation in any one of the Titles V, XVIII, XIX, XX, and CHIP program and such person:

(i) has a direct or indirect ownership interest (or any combination thereof) in the provider or person, as defined in §371.1601 of this subchapter;

(ii) is the owner of a whole or part interest in any mortgage, deed of trust, note or other obligation secured (in whole or in part) by the entity or any of the property assets thereof;

(iii) is an officer or director of the provider or person, if the entity is organized as a corporation;

(iv) is partner in the provider or person, if the provider or person is organized as a partnership;

(v) is an agent or consultant of the provider or person; or

(vi) is a managing employee, that is, a person (including a general manager, business manager, administrator, or director) who exercises operational or managerial control over the provider or person or part thereof; or

(D) was formerly described in paragraph (3) of this section, but is no longer so described, because of a transfer of ownership or control interest to an immediate family member or a member of the person's household, as defined in §371.1643 of this subchapter, in anticipation of or following a conviction, assessment of a CMP, or imposition of an exclusion or other sanction.

(4) any person that:

(A) has a direct or indirect ownership or control interest in a sanctioned entity, and who knows or should know, as defined in §1128A(i)(6) of the Social Security Act, of the action constituting the basis for the conviction or exclusion set forth in paragraph (2) of this section; or

(B) is an officer or managing employee, as defined in §371.1643 of this subchapter, of such provider, entity, or person.

§371.1659. Notice of Intent to Exclude.

Except as provided in paragraph (3) of this section, when the Inspector General proposes to exclude any person on mandatory grounds for a

period exceeding 5 years or on permissive grounds, it gives written notice of its intent to exclude.

(1) Notice of potential to exclude includes:

(A) the basis for the potential exclusion;

(B) the potential effect of the exclusion; and

(C) whether the Inspector General also proposes to cancel any provider agreement held by the provider or person to be excluded.

(2) Within 30 days of receipt of the notice of potential exclusion, which is deemed to be 5 days from the date of the notice, the provider or person receiving notice may submit to the Inspector General, any documentary evidence or written argument regarding whether exclusion is warranted and any related issues. Submission of documentary evidence or written argument, however, is no guarantee that the Inspector General will not ultimately exclude the provider or person.

(3) If the Inspector General proposes to exclude a provider or person on grounds set forth at 42 CFR §1001.1301 (failure to grant immediate access to records), §1001.1401 (hospital's failure to comply with corrective action plan required by the Health Care Finance Administration (HCFA), or §1001.1501 (default on health education loan or scholarship obligations), it need not send a notice of intent to exclude and may effect exclusion upon providing notice of exclusion as provided by §371.1661 of this subchapter.

§371.1665. Notice of Proposal to Exclude.

(a) Except as provided in subsection (e) of this section, if the Inspector General proposes to exclude a provider or person on grounds set forth at:

(1) 42 CFR §1001.901 (false or improper claims),

(2) 42 CFR §1001.951 (fraud and kickbacks and other prohibited activities), §1001.1601 (violations of the limitations on physician charges), or

(3) 42 CFR §1001.1701 (billing for services of assistant at surgery during cataract operations); the Inspector General will send written notice of this decision to the affected person.

(b) The written notice of proposal to exclude includes the same information that must be included in a notice of exclusion set forth in §371.1661 of this subchapter, as well as an indication of whether the Inspector General intends to terminate any provider agreement or contract of the affected provider or person.

(c) The exclusion will be effective 20 days from the person's receipt of the notice of proposal to exclude, unless, within that period, the affected person files with the Inspector General, a written request for an administrative hearing. A request for hearing must set forth:

(1) the specific issues or statements in the notice of proposal to exclude with which the person disagrees;

(2) the basis for the disagreement;

(3) the defenses on which reliance is intended;

(4) any reasons why the proposed length of exclusion should be modified; and

(5) reasons why the health or safety of individuals receiving services from the relevant state health care program(s) does not warrant the exclusion going into effect prior to the completion of the requested hearing.

(d) If the affected person does not file a timely written request for hearing as provided in subsection (c) of this section, the Inspector General will send a notice of exclusion as described in §371.1661 of this subchapter. If the affected person makes a timely written request for a hearing and the Inspector General determines that the health or safety of individuals receiving services under the relevant state health care program(s) does not warrant an immediate exclusion, an exclusion will not go into effect unless the hearing officer or administrative law judge at the hearing upholds the decision to exclude.

(e) If, prior to issuing a notice of proposal to exclude under subsection (a) of this section, the Inspector General determines that the health and safety of individuals receiving services under the relevant state health care program(s) warrants the exclusion taking place prior to the completion of the hearing by the relevant operating agency, the Inspector General will proceed under §371.1659 (Notice of Intent to Exclude) and §371.1661 (Notice of Exclusion) of this subchapter.

§371.1667. Due Process for Administrative Sanctions.

(a) The Inspector General affords, to any provider or person against whom it imposes sanctions, all administrative and judicial due process remedies applicable to administrative sanctions.

(b) The person is also offered, in the sanction notice letter, an opportunity to request an informal review of the imposition of sanction. The provider or person is given an opportunity to submit documentary evidence and written argument concerning whether the sanction is warranted and other related issues. A submission of documentary evidence or written argument does not guarantee it will be sufficient to rise to the level of acceptable evidence or argument. If, upon review by the Inspector General, the documentary evidence or written argument remains unacceptable, the Inspector General may proceed with imposition of administration sanctions. The provider or person may choose to request an informal review, a formal appeal hearing, or both. If both an informal review and formal appeal hearing are chosen, the formal appeal hearing and all pertinent discovery, prehearing conferences, and all other issues and activities regarding the formal appeal hearing will be abated until all informal review discussions have ended without settlement or resolution of the issues. In certain situations, the informal review will not be offered.

(c) When the exclusion is based on the existence of a criminal conviction, a civil fraud finding, a civil judgment imposing liability by federal, state, or local court, a determination by another government agency or board, any other prior determination, or provisions within a settlement agreement, the basis for the underlying determination is not reviewable and the individual or entity may not collaterally attack the underlying determination, either on substantive or procedural grounds, in an administrative appeal.

§371.1669. Notice of Appeal.

(a) To appeal a final sanction imposed by the Inspector General, a provider or person shall file a written request for appeal with the Inspector General within twenty (20) calendar days of the date of the person's receipt of the notice of final sanction, unless specified otherwise in other sections of this subchapter. The Inspector General will then forward the notice of appeal to the Commission's Office of General Counsel for docketing. If an informal review has also been requested, the appeal will be abated until all efforts to resolve or settle the sanction have been unsuccessful. At the conclusion of the informal review process, the Inspector General will then forward the notice of appeal to the Commission's Office of General Counsel for docketing.

(b) The letter requesting an appeal hearing or informal review will contain a statement as to the specific issues, findings, and/or legal authority in the notice letter with which the sanctioned provider or person disagrees, and the basis for their contention that the specific issues or findings and conclusions are incorrect. The request for a hearing must be made in writing to the Manager of Sanctions. The request

must be signed by the provider or person sanctioned or by their attorney and sent by certified mail to arrive in Sanctions by the filing deadline. No other person or party may appeal for or on behalf of the sanctioned provider or person.

§371.1671. Settlement.

The Inspector General has authority to settle any issues or case, without consent of the Administrative Law Judge.

§371.1673. Scope and Effect of Exclusion.

(a) Excluded Person and Affiliated Entities. Unless and until a person is reinstated into the Texas Medicaid program in accordance with §371.1689 of this subchapter, no payment will be made by the Medicaid program for any item or service furnished by an excluded person on or after the effective date of exclusion.

(1) A person excluded pursuant to this subchapter must neither personally nor through a clinic, group, corporation, or other association or entity, bill or otherwise request or receive payment for any Title V, XIX, XX, or CHIP programs for items or services provided on or after the effective date of the exclusion. Exclusion also prevents the excluded person from providing any services pursuant to the Medicaid program, whether or not the excluded person directly requests Medicaid program payment for such services (e.g., a person excluded may not, until reinstated, conduct TILE case assessments for an employer participating within the program).

(2) A person excluded pursuant to this subchapter must not assess care or order or prescribe services, directly or indirectly, to Title V, XIX, XX, or CHIP recipients after the effective date of exclusion. A clinic, group, corporation, or other association or entity must not submit to Title V, XIX, XX, or CHIP programs claims for any assessments, services or items provided by a person within such organization or entity who is excluded from participation, unless the services or supplies were provided before the effective date of exclusion.

(3) An entity that employs or otherwise associates with a person excluded from participation in Titles V, XIX, XX, or CHIP program pursuant to this subchapter must not include within a cost report or any documents used to determine an individual payment rate, a statewide payment rate or a fee, the salary, fringe, overhead, or any other costs associated with the person excluded.

(b) Persons other than person excluded and affiliated entities. Unless and until a person is reinstated into the Texas Medicaid program in accordance with §371.1689 of this subchapter, no payment will be made by the Medicaid program for any item or service furnished pursuant to the medical direction, prescription or assessment of a person excluded under this subchapter on or after the effective date of exclusion, when the person furnishing the item or service knew or had reason to know of the exclusion.

(c) An order or prescription written before the exclusion of a physician or other practitioner, legally authorized to write a prescription, is valid for the duration of the order.

(d) If, after the effective date of an exclusion, the excluded person submits or causes to be submitted claims for services (including case assessments) or items furnished within the period of exclusion, they may be subject to civil monetary penalty liability under §1128A(a)(1)(D), and criminal liability under §1128B (a)(3) of the Social Security Act and an administrative damage and penalty as set forth in §371.1721 et seq. of this subchapter.

§371.1677. Obligation of All Health Care Providers regarding Exclusion.

(a) Each provider or person is responsible for ensuring that items or services furnished personally by, at the medical direction of, or on the prescription or order of an excluded person are not billed to the Titles V, XIX, XX, and CHIP programs after the effective date of exclusion, as specified in this subchapter. This section applies regardless of whether an excluded person has obtained a program provider number or equivalent, either as an individual or as a member of a group, prior to being reinstated. Failure to ensure excluded providers are not participating in the activities above and/or billing for services rendered by an excluded person will result in exclusion of the currently active providers and persons allowing the forbidden activity, plus recoupment of all funds paid to the currently active provider or person for those activities, and imposition of damages and penalties against both the currently active provider or person and the excluded person. The damages and penalties are delineated in §371.1721 et seq. of this subchapter.

(b) Providers or persons must not bill recipients for services or items specified in subsection (a) of this section unless:

(1) the recipient is informed, before delivery of the item or service, that those services are not reimbursed by the Medicaid program; and

(2) the provider obtains and retains, before delivery of the item or service, a written signed consent from the recipient indicating that the recipient understands they are responsible for payment for the services and that the services or items are still desired.

(c) Providers or persons who violate these rules by billing recipients without the required disclosure and consent are subject to sanctions described in this subchapter.

§371.1681. Provider Enrollment.

(a) Basis for Initial Provider Enrollment or Request for Additional Provider Numbers.

(1) The Commission, health and human services agencies, and their contractors determine the need for and approve individual provider participation through initial provider enrollment and enrollment for additional provider number(s), including managed care organizations and their subcontractors.

(2) The request for initial provider enrollment and enrollment for additional provider numbers could result in an abatement, denial, or postponement of approval by the Commission, through the Inspector General, as specified in §371.1603(a) of this subchapter, health and human services agencies, or their contractors. In making the enrollment determination, the following will be considered

(A) accessibility of other health care to the recipient population;

(B) the provider's current or previous conduct, including conduct during participation in the Titles XVIII, XIX, XX, and V, CHIP, and any HHS programs in any state, or any conduct or action for which a sanction could have been taken, as described in subchapter G;

(C) the investigative findings in any current or previous investigation of the provider or person or their affiliates;

(D) licensure or certification actions against the provider or person or any provider or person with which they are affiliated, as described in §371.1643(e) of this subchapter;

(E) criminal history background check; and

(F) consideration of all of the above, in relation to the provider's or person's family member and member of household, as specified in §371.1643(e)(3) of this subchapter.

(b) Providers, persons, principals, or affiliates of providers or persons under investigation, who have sanctions pending, or have been sanctioned previously, by the Inspector General or any HHS program,

may have any application for enrollment or new provider number decisions abated until all investigations, sanctions, and legal proceedings are finally resolved, as specified in §371.1603(a) of this subchapter.

§371.1683. Criminal History Checks.

(a) The Commission and the Inspector General may conduct a criminal history check on any Medicaid program provider or on any person or business entity who meets the definition of "indirect ownership interest" as defined in §371.1601 who are applying to become a Medicaid provider, or who are applying to obtain a new provider number or performing provider number.

(b) The Commission and the Inspector General may require the provider or applicant to provide a report from the Texas Department of Public Safety or other appropriate law enforcement agency of the criminal history of the provider or applicant in such form as the Commission or Inspector General may require.

(1) If the Medicaid program provider or applicant is a corporation, this requirement may be extended to officers and directors of the corporation, or to shareholders of 5% or more of the outstanding shares of such corporation, or who are required to disclose their ownership interest pursuant to federal law or regulation.

(2) If the Medicaid program provider or applicant is a partnership, whether general or limited, this requirement extends to all persons or corporations owning a beneficial interest in the partnership.

(3) If the Medicaid program provider or applicant is an individual or an unincorporated association of individuals the requirement shall extend to all persons and members of the association or who are applicants or providers.

(4) Medicaid program providers and applicants shall disclose and provide complete information regarding all misdemeanor and felony convictions of offenses on the Medicaid program provider application form. Failure to make full and accurate disclosure will be grounds for immediate denial of an application or termination of a contract with a provider in the Medicaid program.

(5) The Commission and the Inspector General may exempt from this requirement any person or entity that is licensed under the laws of this State and in which licensure requires a criminal history check.

§371.1685. Use of Criminal History Record Information.

(a) If the Commission or Inspector General determines, through a criminal history check from the application for provider or performing provider status, that the provider or applicant has been convicted of one of the following crimes, the provider or applicant will not be eligible to participate in the Medicaid program, and if enrolled, the Commission or Inspector General will terminate the provider's contract, or deny the application.

(1) An offense under chapter 19, Texas Penal Code (criminal homicide);

(2) An offense under chapter 20, Texas Penal Code (kidnapping and false imprisonment);

(3) An offense under section 21.11, Texas Penal Code (indecency with a child);

(4) An offense under section 22.011, Texas Penal Code (sexual assault);

(5) An offense under section 22.02, Texas Penal Code (aggravated assault);

(6) An offense under section 22.04, Texas Penal Code (injury to a child, elderly individual, or disabled individual);

(7) An offense under section 22.041, Texas Penal Code (abandoning or endangering a child);

(8) An offense under section 22.08, Texas Penal Code (aiding suicide);

(9) An offense under section 25.031, Texas Penal Code (agreement to abduct from custody);

(10) An offense under section 25.08, Texas Penal Code (sale or purchase of a child);

(11) An offense under section 28.02, Texas Penal Code (arson);

(12) An offense under section 29.02, Texas Penal Code (robbery);

(13) An offense under section 29.03, Texas Penal Code (aggravated robbery);

(14) An offense under chapter 31, Texas Penal Code (theft);

(15) An offense under chapter 32, Texas Penal Code (fraud);

(16) An offense under chapter 34, Texas Penal Code (money laundering);

(17) An offense under chapter 35, Texas Penal Code (insurance fraud);

(18) An offense under chapter 36, Texas Penal Code (bribery and corrupt influence);

(19) An offense under chapter 37, Texas Penal Code (perjury and other falsifications);

(20) An offense under chapter 71.02, Texas Penal Code (engaging in organized criminal activity);

(21) A federal offense under the Racketeer Influenced and Corrupt Organizations Act, mail fraud, wire fraud, insurance fraud, Medicare Fraud, Medicaid Fraud, tampering with a government document, and/or violation of Federal False Claims Act.

(b) The prohibition shall also include convictions for aiding and abetting any of the above-listed offenses or for conspiracies to commit any of the above offenses.

(c) The prohibition shall also include any conviction under the laws of another state, which prohibits the conduct described in the above listed offenses.

(d) Access to Criminal History Record Information.

(1) An agency operating part of the Medicaid program under Chapter 32, Human Resources Code, is entitled to obtain from the Commission or Inspector General the criminal history record information maintained by the Commission or Inspector General that relates to a provider under the Medicaid program or a person applying to enroll as a provider under the Medicaid program.

(2) Criminal history record information obtained by the Commission or Inspector General under §371.1683 of this title, or obtained by an agency under this paragraph, may not be released or disclosed to any person except in a criminal proceeding, in an administrative proceeding, on court order, or with the consent of the provider or applicant.

§371.1687. Administrative Review of Rejection of Provider Enrollment by Reason of Criminal History.

(a) Should the Commission or Inspector General determine from information furnished by the applicant or Medicaid program provider, or from an independent criminal history check that the Medicaid program provider or applicant has been convicted of an offense described in §371.1685 of this subchapter, a notice of denial of the application or cancellation of the Medicaid program provider enrollment shall be sent to the Medicaid program provider or applicant. The notice shall state the action taken and the basis for the action, including the conviction, the jurisdiction reporting the conviction, and the source of the information.

(b) The applicant or Medicaid program provider, upon receipt of the notice of denial or cancellation, may determine that the action is based on a mistake in identity. If so, the applicant or Medicaid program provider has thirty (30) calendar days from the date of receipt of the notice to provide the Commission or Inspector General with documentation from the reporting agency correcting the mistake in identification.

(c) If the applicant or Medicaid program provider, upon receipt of the notice of denial or cancellation, determines that, although the information is correct, there exists factors, which should be considered in mitigation of the prohibition, the applicant or Medicaid program provider may request an informal desk review within twenty (20) calendar days from the receipt of the notice. The request for an informal desk review should be made in writing and addressed as directed to the Inspector General and should set out the reasons, which the applicant or Medicaid provider believes are relevant to the issue of mitigation.

(d) The following factors may be considered in the informal desk review:

(1) the nature and seriousness of the crime;

(2) the relationship of the crime to the purposes of providing medical services, supplies, or equipment;

(3) the extent to which approving an application or retaining a provider in the Medicaid program would offer the applicant or provider the opportunity to engage in further criminal activity;

(4) the relationship of the crime to the ability, capacity, or fitness required of the provider or provider applicant to perform the duties and discharge the responsibilities of a provider in the Medicaid program;

(5) the age of the provider or applicant at the time each crime was committed;

(6) the conduct and work history of the applicant or provider before and after the criminal conviction(s);

(7) evidence of the applicant's or provider's rehabilitation efforts and outcome;

(8) the number and nature of the criminal conviction(s);

(9) the length of time since the end of the sentence imposed for the conviction; and

(10) other evidence of fitness that may be relevant.

§371.1689. Reinstatement following Exclusion.

(a) A person who has been excluded from Medicaid or any state health care program by the Inspector General, as defined in §371.1601 of this subchapter, may be reinstated only by the Inspector General, the division that imposed the exclusion. The request for reinstatement may be abated, denied, or postponed by Sanctions or the Inspector General as specified in §371.1603(a) of this subchapter.

(b) A person excluded from the Medicaid program may submit to the Inspector General a request for reinstatement at any time after the period of exclusion has ended. An excluded person may not be granted a contract or provider agreement in the Medicaid program until and unless reinstatement is approved by the Inspector General and the exclusion status is removed.

(c) The Inspector General will grant reinstatement only if it is reasonably certain that the types of actions that formed the basis for the original exclusion have not recurred and will not recur. In making this determination, the agency will consider:

(1) The conduct of the provider or person before and after the date of the notice of exclusion;

(2) Whether all fines, damages, penalties and any other debts due and owing (including e.g. overpayments, penalties, damages, appeal hearing costs) to any federal, state or local government, have been paid, or satisfactory arrangements have been made that fulfill these obligations;

(3) The accessibility of other health care to the recipient population that would be served by the person who has been excluded;

(4) The person's previous conduct, including conduct during participation in the Titles XVIII, XIX, XX, and V, CHIP, and any HHS programs in any state, or any conduct or action for which a sanction could have been taken, as described in Subchapter G of this chapter;

(5) Any previous convictions, as defined in §371.1601, of the person regardless of its relation to Titles XVIII, XIX, XX, V, CHIP, or other HHS programs;

(6) Whether the Inspector General has determined that the individual or entity complies with or has made satisfactory arrangements to fulfill, all of the applicable conditions of participation or supplier conditions for coverage under the statutes and regulations;

(7) Whether the person has, during the period of exclusion, submitted claims, or caused claims to be submitted or payment to be made by the Medicaid program or any state health care program, for items or services the excluded party furnished, ordered or prescribed, including health care administrative services; and

(8) Any other factors or circumstances deemed by the Inspector General to be relevant to the determination of reinstatement.

(d) Submitting claims or causing claims to be submitted or payments to be made by the programs for items or services furnished, ordered or prescribed, including administrative and management services or salary, may serve as the basis for denying reinstatement. This section applies regardless of whether a person has obtained a program provider number or equivalent, either as an individual or as a member of a group, prior to being reinstated. The person is subject to imposition of recoupment of any payments made and administrative penalties.

(e) If a person circumvents the reinstatement requirements specified in subsections (a) and (b) of this section and receives a Medicaid program provider number, they may be excluded immediately, without the due process afforded providers specified in §371.1667 of this subchapter. They may also be subject to recoupment of all of the Medicaid provider payments made to that provider number and imposition of administrative penalties.

(f) Upon receipt of a written request, the Inspector General may require the requestor to furnish specific information and authorization for the Inspector General to obtain information from private health insurers, peer review bodies, probation officers, professional associates, investigative agencies, and others as may be necessary to determine whether reinstatement should be granted.

(g) If the Inspector General determines that the request for reinstatement should be approved from an entity, association, or affiliation whose principals were also excluded for the same violations or surrounding or regarding the same violations, that entity, association, or affiliation may be reinstated if the Inspector General determines that the principal for the entity or association:

(1) has terminated their ownership or control interest in the entity;

(2) is no longer an Officer, Director, Agent, Consultant, managing employee, or any other title with the same duties, ownership, or control of the entity; or

(3) has been reinstated in accordance with this section.

(h) Notice of action on request for reinstatement.

(1) Approval of Request for Reinstatement. If the Inspector General approves the request for reinstatement, it shall give written notice to the excluded person, and to all others who were informed of the exclusion pursuant to this subchapter, specifying the date on which Medicaid program participation may resume. The Inspector General may condition reinstatement upon the completion of a specified course of education regarding Medicaid claims and/or services or on any other basis deemed appropriate (e.g., requirement for closed-end, probationary or provisional provider agreement or contract, or any other action specified in §371.1631 of this subchapter).

(2) Denial of Request for Reinstatement.

(A) If the Inspector General denies the request for reinstatement, it will give written notice to the requesting person. Within 30 days of the date of the notice, the excluded person may submit:

(i) Documentary evidence and written argument against the continued exclusion,

(ii) A written request to present written evidence and oral argument to an Inspector General official, or

(iii) Both documentary evidence and a written request.

(B) After evaluating any additional evidence submitted by the excluded person (or at the end of the 30-day period, if none is submitted), the Inspector General will send written notice either that a subsequent request for reinstatement will not be considered until at least one year after the date of denial, or approving the request consistent with the procedures set forth in subsection (h)(1) of this section.

(C) The denial of reinstatement is not a sanction as specified in §371.1643 of this subchapter and is not subject to an administrative appeal. It is subject only to informal review by the Inspector General. It is not subject to administrative or judicial review.

(i) Reinstatement will not be effective until Sanctions or the Inspector General grants the request and provides notice under this section. Reinstatement will be effective as provided in the notice.

(j) A determination with respect to reinstatement is not appealable or reviewable.

(k) An Administrative Law Judge may not require reinstatement of an individual or entity in accordance with 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.

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Steve Aragón
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DIVISION 5. RECOVERY OF OVERPAYMENTS

1 TAC §§371.1701, 371.1703, 371.1705, 371.1707

The new rules are adopted under §531.033 and §531.021of the Texas Government Code, which provides the Commission with broad rulemaking authority. In addition, §32.021(a) and (c) of the Human Resources Code provides that the Commission shall adopt necessary rules for the proper and efficient administration of the medical assistance program. Section 531.102 of the Government Code establishes the Office of Inspector General (formerly the Office of Investigations and Enforcement) and imposes responsibility for the investigation of fraud and abuse in the provision of health and human services and the enforcement of state law relating to the provision of those services upon the Office of Inspector General. These rules specifically implement the provisions of HB2292 and HB 1743. 42 CFR §455.13 requires that the State's Medicaid agency have methods and criteria for identifying suspected fraud and abuse cases and methods for investigating fraud and abuse, and referring cases for criminal prosecution. 42 CFR, Part 455 specifies all federal requirements of the Commission to provide for Medicaid fraud and abuse program integrity. 42 CFR §1002.2 provides authority for the Commission to exclude Medicaid providers from participation in the Medicaid program. 42 CFR Parts 1002 and 1001 provide all requirements relating to exclusion of providers. Various other state and federal statutes place requirements on the Commission to implement a fraud and abuse program integrity component. The adopted rules meet the mandates of the state and federal statutes delineated above and the state statutes above provide the Commission with broad rulemaking authority for the implementation of those mandates.

§371.1701. Inspector General Investigation of Overpayments.

When an overpayment appears to result from a program violation that may involve misuse, waste, abuse or fraud, the Inspector General investigates the circumstances precipitating the overpayment. When no wrongdoing is established through investigation, the Inspector General may refer the matter for routine payment correction by the fiscal agent or an operating agency or may offer a payment plan, as discussed in §371.1671 of this subchapter. Prima facie cases of misuse, waste, abuse or fraud require appropriate administrative enforcement, including recoupment and other necessary administrative action, sanction or penalty. As set forth above, fraud also is subject to criminal prosecution.

§371.1703. Recovery of Overpayments.

(a) The Inspector General and its agents recover all overpayments made to providers within the Medicaid or other HHS program, whether the overpayment resulted from error (by the provider, the claims administrator, or an operating agency), misunderstanding, or a program violation proven to result from fraud or abuse. When the Inspector General's investigation reveals evidence of a program

violation (which may or may not include an overpayment), the Inspector General determines and imposes the appropriate administrative enforcement.

(b) Payment Hold. A payment hold on payments of future claims submitted for reimbursement will be imposed, without prior notice, after it is determined that prima facie evidence exists to support the payment hold. The payment hold may be imposed prior to completion of an investigation. It is used to withhold payments to providers that may be used subsequently to offset the overpayment or penalty amount when the investigation is complete. The provider or person will be notified of the payment hold not later than the fifth (5th) working day after the date the hold is imposed. With the exception of a payment hold imposed as a result of paragraph (2) of this subsection, the provider or person may request an informal review and/or an expedited administrative appeal hearing. These requests must be received in writing in the method prescribed by the Inspector General not later than the 10th day after the date the active provider receives notice of the payment hold. A provider's decision to seek an informal resolution under this subsection does not extend the time by which the provider must request an expedited administrative appeal hearing. On timely written request by a provider subject to a payment hold, the Inspector General will file a request for an expedited administrative hearing regarding the payment hold. Should the provider request both an informal review and an expedited administrative appeal hearing, the expedited administrative appeal hearing will be abated until the informal review process is completed. The instances in which a payment hold may be imposed without prior notice are:

(1) to compel production of records;

(2) when requested by the Attorney General's Medicaid Fraud Control Unit, as applicable;

(3) in the instance of fraud or willful misrepresentation;

(4) when the U.S. Health and Human Services imposes a payment hold (suspension of payments) against the provider for Medicare violations and that provider or person is also a provider in the Medicaid program;

(5) for any reasons specified in §§371.1609, 371.1617, 371.1621 of this subchapter, or any other provisions delineated in these rules; or

(6) for any other reason specified by statute or regulation.

(c) Injunction to Prevent Disposing of Assets and Application to Debts. Based on the results of investigative findings and evidence that potential fraud exists and a potential overpayment, penalty, or damage has been identified, a method that may be used by the Inspector General, as a fiduciary for the state, is injunctive relief. The purpose of the injunctive relief is to ensure assets remain to reimburse the state funds owed such as recoupment of overpayments and assessed damages and penalties, investigative costs, and other costs specified in §371.1705 of this subchapter. The Inspector General, for purposes of Medicaid or other HHS program reimbursement, will request that the Attorney General obtain an injunction to prevent a provider or person from disposing of an asset(s) identified by the Inspector General as potentially subject to recovery due to the provider's or person's fraud or abuse. Upon final resolution of the case, any funds derived from the forfeited asset(s), after offsetting any expenses attributable to the sale of those assets, will be applied, by the Inspector General, to the unpaid debt.

(d) Payment of recoupments. At the Inspector General's discretion, overpayments may be collected in a lump sum or through installments. The Inspector General may collect recoupments by deducting them incrementally from prospective or retrospective payments owed to the provider. If collection is made through installments, the provider must comply with the payment plan established by the Inspector General. A payment plan will be for a reasonable length of time as determined by the Inspector General considering the circumstances of each individual case.

(e) Other collection methods. When providers have not paid funds owed to the Medicaid or other HHS program, the Inspector General will utilize numerous means necessary to aggressively collect funds owed. Some of these tools are: utilizing a collection agency, collecting from Medicare for Medicaid provider debts, requesting the State Comptroller to place a hold on all state voucher revenue for a provider or person from all state agencies, requesting the Attorney General's Collection Division to file suit in district court, and receiving and reporting credit information on providers and persons with outstanding debts.

(f) Overpayments caused by an Order. An ordering provider or person causes an overpayment to be made to themselves or to another provider as a result of a false statement, misrepresentation, or omission of pertinent facts:

(1) on a claim, attachments to a claim, medical records, document serving as an order for services, or any other documentation used to adjudicate a claim for payment;

(2) any documentation submitted or maintained by the provider to support representations made on claims;

(3) any documentation submitted or maintained by the provider to support the need or the medical necessity of the service; or

(4) other documents used to establish fees, daily payment rates, or payments.

§371.1705. Other Funds Subject to Recoupment.

In the following circumstances, the Inspector General is authorized to recover the funds specified, although no claims overpayment is involved:

(1) to recover a recipient's trust fund money for distribution to appropriate recipients or their responsible parties if those funds were misapplied, misused, embezzled or not distributed as required by program rule or by law;

(2) to recover funds previously collected by a provider or person from recipients if collection was not allowed by legal authority related to the Medicaid or other HHS program;

(3) to recover from a provider or person who has unsuccessfully appealed an administrative sanction or damage or penalty, when a final order has been entered against that provider or person, the Commission's costs related to the administrative appeal. For the purpose of this paragraph, costs related to the administrative appeal is defined as and includes, without limitation:

(A) the hourly State Office of Administrative Hearings (SOAH) or other hearing process costs;

(B) court reporter costs and the costs of transcripts and copies thereof developed in preparation for, during, or after the hearing;

(C) the Commission's costs associated with discovery, including the costs of depositions, subpoenas, service of process, and witness expenses;

(D) witness expenses incurred at any time related to the administrative appeal, including during discovery or the case in chief;

(E) travel and per diem for witnesses and Commission staff and witness fee and loss of pay for witnesses;

(F) cost of preparation time, including salaries, travel and per diem;

(G) any additional costs associated with the appeal hearing or the preparation for the appeal hearing; and

(H) all costs associated with any further litigation on the case and the preparation for that litigation;

(4) to recover from a provider or person against whom a recoupment or administrative penalty is assessed all investigative and administrative costs related to the investigation that resulted in the recoupment or administrative penalty;

(5) to recover an unpaid debt plus any interest owed to any state Medicaid program or to the Medicare program as the result of fraudulent or abusive actions by a person participating in such a program. After deducting its own administrative costs incurred in recovering the funds, the Inspector General shall distribute the balance of the recovered amount to Medicare or the state Medicaid program. Recoveries will be made as required by state or federal law or pursued only upon receipt of a final adjudicated order, notice of administrative enforcement or settlement agreement (acknowledging waiver of due process) that validates the debt. Any appeal by the person from whom funds are recovered is based solely upon whether there is or is not an unpaid balance owed to the program in question; the Inspector General need not re-establish the factual or legal basis for the underlying debt.

(6) to recover from an ordering provider or person that causes, as the result of the order or prescription, an overpayment to be made to themselves or to another provider as a result of a false statement, misrepresentation, or omission of pertinent facts on a claim, attachments to a claim, medical records, or any other documentation used to adjudicate a claim for payment; any documentation submitted or maintained by the provider to support payment on individual claims or to support representations made on cost reports; any order or prescription used by the provider to show the medical necessity of the service or item provided by themselves or any other provider; or other documents used to establish fees, daily payment rates, or vendor payments.

§371.1707. Recovery When Fraud or Abuse Is Involved.

(a) Decision to recover funds. When fraud is involved, a case may be worked administratively and criminally simultaneously. When abuse or waste is involved, a case will be worked administratively by the Inspector General. At the completion of the investigation on the administrative case, the Inspector General will determine appropriate sanctions and impose those sanctions in accordance with §371.1643 of this subchapter. This process could include imposing payment hold during the pendency of the investigation after sufficient evidence is developed. After the investigation, any or all sanctions including imposing recoupment, damages and penalties, and exclusions will proceed. The criminal investigation and prosecution may proceed throughout this process.

(1) Recovery of funds that are obtained through fraudulent means by a provider or person may be recommended by the prosecuting attorney or by an administrative determination by the Inspector General.

(2) After a possible fraud referral is made to the Inspector General, health and human service program agency staff may not attempt to recover funds without prior approval from the Inspector General. Provider payments may be withheld to coincide with the investigation according to Inspector General procedures. If fraud cannot be determined, or if the prosecuting attorney declines the case, the Attorney General's relevant fraud unit returns the case to the Inspector General for administrative sanction or action.

(3) The prosecuting attorney may settle a case through a plea bargain and decide to accept restitution payments before or after an indictment, or a court may order restitution to the Commission for the amount of the full overpayment or only a portion of the overpayment. In this situation or upon conviction, a repayment schedule is developed by the court or the probation office. Whether restitution is made in lieu of a prosecution or following a court order, all restitution payments are ultimately returned to the Inspector General to reimburse the Medicaid or other HHS program for the overpayment. If the court orders restitution that is less than the full amount of the overpayment, the Inspector General may impose a recoupment for the remaining amount of the overpayment. The Inspector General may also impose additional sanctions and/or damages and penalties.

(4) The Inspector General is responsible for recoupment and/or additional sanctions, as appropriate, when referred cases do not result in prosecution. These cases are returned to the Inspector General for further administrative action.

(b) Manner of repayment. When fraud is involved, repayment is arranged based on an administrative hearing, a recommendation by the district or county attorney, or a court order. Claims are collected in one lump sum whenever possible. If the provider is financially unable to pay the indebtedness in this manner, however, payment may be accepted in regular installments. Installment payments are expected to be sufficiently large to re-pay the debt within one year.

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

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DIVISION 6. ADMINISTRATIVE DAMAGES AND PENALTIES

1 TAC §§371.1721, 371.1723, 371.1725, 371.1727, 371.1729, 371.1731, 371.1733, 371.1735, 371.1737, 371.1739, 371.1741

The new rules are adopted under §531.033 and §531.021of the Texas Government Code, which provides the Commission with broad rulemaking authority. In addition, §32.021(a) and (c) of the Human Resources Code provides that the Commission shall adopt necessary rules for the proper and efficient administration of the medical assistance program. Section 531.102 of the Government Code establishes the Office of Inspector General (formerly the Office of Investigations and Enforcement) and imposes responsibility for the investigation of fraud and abuse in the provision of health and human services and the enforcement of state law relating to the provision of those services upon the Office of Inspector General. These rules specifically implement the provisions of HB2292 and HB 1743. 42 CFR §455.13 requires that

the State's Medicaid agency have methods and criteria for identifying suspected fraud and abuse cases and methods for investigating fraud and abuse, and referring cases for criminal prosecution. 42 CFR, Part 455 specifies all federal requirements of the Commission to provide for Medicaid fraud and abuse program integrity. 42 CFR §1002.2 provides authority for the Commission to exclude Medicaid providers from participation in the Medicaid program. 42 CFR Parts 1002 and 1001 provide all requirements relating to exclusion of providers. Various other state and federal statutes place requirements on the Commission to implement a fraud and abuse program integrity component. The adopted rules meet the mandates of the state and federal statutes delineated above and the state statutes above provide the Commission with broad rulemaking authority for the implementation of those mandates.

§371.1721. Violations.

(a) Violations subject to penalties. The Inspector General may assess administrative damages and penalties against a provider or person who knew or should have known the claims submitted were false.

(b) A person commits a violation if the person:

(1) presents or causes to be presented to the Commission or its fiscal agent a claim that contains a statement or representation the person knows or should know to be false;

(2) engages in conduct that violates §102.001, Occupations Code;

(3) solicits or receives, directly or indirectly, overtly or covertly any remuneration, including any kickback, bribe, rebate, or inducement, in cash or in kind, for referring an individual to any item or service for which payment may be made, in whole or in part, under the medical assistance program, provided that this subdivision does not prohibit the referral of a patient to another practitioner within a multi-specialty group or university medical services research and development plan (practice plan) for medically necessary services;

(4) solicits or receives, directly or indirectly, overtly or covertly any remuneration, including any kickback, bribe, rebate, or inducement, in cash or in kind, for purchasing, leasing, or ordering, or arranging for or recommending the purchasing, leasing, or ordering of, any good, facility, service, or item for which payment may be made, in whole or in part, under the medical assistance program;

(5) offers or pays, directly or indirectly, overtly or covertly any remuneration, including any kickback, bribe, rebate, or inducement, in cash or in kind, to induce a person to refer an individual to another person for the furnishing of, or for arranging the furnishing of, any item or service for which payment may be made, in whole or in part, under the medical assistance program, provided that this subdivision does not prohibit the referral of a patient to another practitioner within a multi-specialty group or university medical services research and development plan (practice plan) for medically necessary services;

(6) offers, or pays, directly or indirectly, overtly or covertly any remuneration, including any kickback, bribe, rebate, or inducement, in cash or in kind, to induce a person to purchase, lease, or order, or arrange for or recommend the purchase, lease, or order of, any good, facility, service, or item for which payment may be made, in whole or in part, under the medical assistance program;

(7) provides or offers an inducement in a manner or for a purpose not otherwise prohibited by this section or §102.001, Occupations Code, to an individual, including a person, recipient, provider, or employee of a provider, for the purpose of influencing a decision regarding selection of a provider or receipt of a good or service under the medical assistance program or for the purpose of otherwise influencing a decision regarding the use of goods or services provided under the medical assistance program or for the purpose of otherwise influencing a decision regarding the use of goods or services provided under the medical assistance program;

(8) is a managed care organization that contracts with the Commission or its fiscal agent to provide or arrange to provide health care benefits or services to individuals eligible for medical assistance and:

(A) fails to provide to an individual a health care benefit or service that the organization is required to provide under the contract with the Commission or its fiscal agent;

(B) fails to provide to the Commission or its fiscal agent information required to be provided by law, Commission rule, or contractual provision;

(C) engages in a fraudulent activity in connection with the enrollment in the organizations managed care plan of an individual eligible for medical assistance or in connection with marketing the organization's services to an individual eligible for medical assistance; or

(D) engages in actions that indicate a pattern of:

(i) wrongful denial of payment for a health care benefit or service that the organization is required to provide under the contract with the Commission, its fiscal agent, or other HHS program; or

(ii) wrongful delay of at least 45 days or a longer period specified in the contract with the Commission, its fiscal agent, or other HHS program, not to exceed 60 days, in making payment for a health care benefit or service that the organization is required to provide under the contract with the Commission or its fiscal agent.

§371.1725. Exemptions.

(a) The requirements of §371.1721 of this subchapter do not apply to a claim based on a voucher unless the provider or person submitted information to the Commission or its fiscal agent for use in preparing a voucher that the provider or person knew or should have known was false or failed to correct information that the provider or person knew or should have known was false when provided an opportunity to do so. This section does not apply to a claim based on the voucher if the Commission or fiscal agent calculated and printed the amount of the claim on the voucher and then submitted the voucher to the provider for the provider's signature. The provider's or person's signature on the voucher alone does not constitute fraud.

(b) The Commission or other HHS agency allows a 30-day grace period during which the provider or person may correct errors in a voucher prepared by the Commission or other HHS agency without penalty.

§371.1729. Assessment of Damages and Penalties.

Preliminary report. If after examining the facts the Inspector General concludes that the provider or person committed a violation, the Inspector General will issue a preliminary report. The report includes the facts upon which the recommendation to assess a penalty were based and the amount of the proposed penalty.

§371.1731. Notice of Intent to Assess Damages and Penalties.

The Inspector General must give the provider or person charged with submitting a false claim a written notice of the preliminary report and the Inspector General's intent to assess a civil monetary penalty. The notice must include the following information:

(1) a brief summary of the facts;

(2) the amount of the recommended damages and penalties; and

(3) a statement of the person's right to an informal review of the alleged violation, the penalty amount, or both.

§371.1733. Due Process.

(a) Within 10 days of receiving the notice, the provider or person may send the Inspector General either:

(1) a written consent to the report, including the recommended damages and penalties; or

(2) a written request for an informal review by the Inspector General. The provider or person must specify whether they are contesting the false claim charge or the penalty amount. They must present all information and documentation to support their position.

(b) Informal review process. If the provider or person requests a review within the 10-day period, the Inspector General conducts the review and sends the person a written notice. The notice includes:

(1) the results of the review; and

(2) if the Inspector General still intends to assess damages and/or penalties after the review, the procedures to request a hearing.

(c) Administrative hearing.

(1) The person may request a hearing by writing to the Inspector General. The Inspector General must receive the request within 15 days after the person receives the notice specified in §371.1731 of this subchapter.

(2) The administrative hearing is conducted by the State Office of Administrative Hearings (SOAH) or an Administrative Law Judge employed by the Commission.

§371.1737. Payment of Damages and Penalties.

(a) Within 30 days after the date on which the Administrative Law Judge's appeal hearing decision becomes final, the provider or person shall:

(1) pay the amount of the damages and penalties;

(2) pay the amount of the damages and penalties and file a petition for judicial review contesting the occurrence of the violation, the amount of the damages and penalties, or both the occurrence of the violation and the amount of the damages and penalties; or

(3) without paying the amount of the damages and penalties, file a petition for judicial review contesting the occurrence of the violation, the amount of the damages and penalties, or both the occurrence of the violation and the amount of the damages and penalties.

(b) A provider or person who acts under §371.1673(a)(3) of this subchapter within the 30-day period may:

(1) stay enforcement of the damages and penalties by:

(A) paying the amount of the damages and penalties to the court for placement in an escrow account; or

(B) giving to the court a supersedeas bond that is approved by the court for the amount of the penalty and that is effective until all judicial review of the SOAH or other appeals process order is final; or

(2) request the court to stay enforcement of the penalty by:

(A) filing with the court a sworn affidavit of the provider or person stating the provider or person is financially unable to pay the amount of the damages and penalties and is financially unable to give the supersedeas bond; and

(B) giving a copy of the affidavit to the Inspector General by certified mail.

(c) If the Inspector General receives a copy of an affidavit under subsection (b)(2) of this section, the Inspector General may file with the court, within 5 days after the date the copy is received, a contest to the affidavit. The court shall hold a hearing on the facts alleged in the affidavit as soon as practicable and shall stay the enforcement of the damages and penalties on finding that the alleged facts are true. The person who files an affidavit has the burden of proving that the person is financially unable to pay the amount of the penalty or to give a supersedeas bond.

(d) If the provider or person charged does not pay the amount of the damages and penalties and the enforcement of the penalty is not stayed, the Inspector General may forward the matter to the attorney general for enforcement of the damages, penalties, and interest as provided by law for legal judgments. An action to enforce a penalty order under this section must be initiated in a court of competent jurisdiction in Travis County or in the county in which the violation was committed.

(e) Judicial review. Judicial review of the SOAH or other appeals process appeal decision assessing a penalty is under the substantial evidence rule. A suit may be initiated by filing a petition with a district court in Travis County, as provided by Subchapter G, Chapter 2001, Government Code.

(f) If the damages and penalties are reduced or not assessed, the Inspector General shall remit to the provider or person the appropriate amount plus accrued interest if the damages and penalties have been paid or shall execute a release of the bond if a supersedeas bond has been posted. The accrued interest on amounts remitted by the Inspector General under this section shall be paid at a rate equal to the rate provided by law for legal judgments and shall be paid for the period beginning on the date the damages and penalties were paid to the Inspector General under this section and ending on the date the damages and penalty are remitted.

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 December 20, 2004.

TRD-200407415
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Effective date: January 9, 2005
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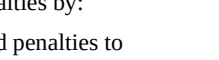
For further information, please call: (512) 424-6900



CHAPTER 371. MEDICAID AND OTHER HEALTH AND HUMAN SERVICES FRAUD AND ABUSE PROGRAM INTEGRITY

The Health and Human Services Commission (the Commission) adopts the repeal of: §§371.1501, 371.1503, 371.1505, 371.1507, and 371.1509 of Chapter 371, Subchapter F; §§371.1601, 371.1603, 371.1607, 371.1609, 371.1611, 371.1613, 371.1615, 371.1617, 371.1619, 371.1621, 371.1623, 371.1625, 371.1627, and 371.1629 of Subchapter G, Division 1;

§§371.1641, 371.1643, and 371.1645 of Subchapter G, Division 2; §§371.1661, 371.1663, 371.1665, 371.1667, 371.1669, 371.1671, 371.1673, and 371.1675 of Subchapter G, Division 3 governing Medicaid fraud and abuse investigations, sanctions, and program integrity, without changes to the proposal as published in the June 18, 2004, issue of the *Texas Register* (29 TexReg 5855) and will not be republished.

The subject matter of the repealed subchapters is addressed in three new subchapters, containing all new sections plus one amended section, contemporaneously adopted in this issue of the *Texas Register*. The repeal of the existing subchapters and the adoption of three new subchapters is to implement the additions and revisions to state statutes passed in the 78th Legislature, 2003, through HB 2292 and 1743, that established the Office of Inspector General (Inspector General) within the Commission and consolidated fraud, abuse, and waste investigations, plus audit and other multiple compliance functions for Texas Medicaid and all health and human services programs, under the Inspector General. The rules were also established to redesign and restructure the flow of the subchapters, and to ensure compliance with existing federal regulations and statutes all of which are designed to strengthen the state's ability to improve fraud and abuse detection, investigation, criminal referral and prosecution, and recovery of overpayments plus damages and penalties against Texas Medicaid and health and human services providers, recipients, and contractors.

No comments on the proposed repeals were received.

SUBCHAPTER F. PILOT PROGRAM: ON-SITE REVIEWS OF PROSPECTIVE PROVIDERS

1 TAC §§371.1501, 371.1503, 371.1505, 371.1507, 371.1509

The repeals are adopted under §531.033 and §531.021, Texas Government Code, which provides the Commission with broad rulemaking authority; §32.021(a), (c), Human Resources Code, provides that the Commission shall adopt necessary rules for the proper and efficient administration of the medical assistance program; §531.102, Government Code, establishes the Office of Inspector General (formerly the Office of Investigations and Enforcement) and imposes responsibility for investigation of fraud and abuse in the provision of health and human services and the enforcement of state law relating to the provision of those services; the rules specifically implement the provisions of HB2292 and 1743; 42 CFR §455.13 requires the Medicaid agency have methods and criteria for identifying suspected fraud and abuse cases and methods for investigating fraud and abuse, and referring cases for criminal prosecution; 42 CFR, Part 455 specifies all federal requirements of the Commission to provide for Medicaid fraud and abuse program integrity; 42 CFR §1002.2 provides authority for the Commission to exclude Medicaid providers from participation in the Medicaid program; 42 CFR Parts 1002 and 1001 provide all requirements relating to exclusion of providers; and various other state and federal statutes place requirements on the Commission to implement a fraud and abuse program integrity component. The adopted rules meet the mandates of the state and federal statutes delineated above and the state statutes above provide the Commission with broad rulemaking authority for the implementation of those mandates.

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

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TRD-200407416
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
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For further information, please call: (512) 424-6900

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SUBCHAPTER G. LEGAL ACTION RELATING TO PROVIDERS OF MEDICAL ASSISTANCE DIVISION 1. FRAUD OR ABUSE INVOLVING MEDICAL PROVIDERS

1 TAC §§371.1601, 371.1603, 371.1607, 371.1609, 371.1611, 371.1613, 371.1615, 371.1617, 371.1619, 371.1621, 371.1623, 371.1625, 371.1627, 371.1629

The repeals are adopted under §531.033 and §531.021, Texas Government Code, which provides the Commission with broad rulemaking authority; §32.021(a), (c), Human Resources Code, provides that the Commission shall adopt necessary rules for the proper and efficient administration of the medical assistance program; §531.102, Government Code, establishes the Office of Inspector General (formerly the Office of Investigations and Enforcement) and imposes responsibility for investigation of fraud and abuse in the provision of health and human services and the enforcement of state law relating to the provision of those services; the rules specifically implement the provisions of HB2292 and 1743; 42 CFR §455.13 requires the Medicaid agency have methods and criteria for identifying suspected fraud and abuse cases and methods for investigating fraud and abuse, and referring cases for criminal prosecution; 42 CFR, Part 455 specifies all federal requirements of the Commission to provide for Medicaid fraud and abuse program integrity; 42 CFR §1002.2 provides authority for the Commission to exclude Medicaid providers from participation in the Medicaid program; 42 CFR Parts 1002 and 1001 provide all requirements relating to exclusion of providers; and various other state and federal statutes place requirements on the Commission to implement a fraud and abuse program integrity component. The adopted rules meet the mandates of the state and federal statutes delineated above and the state statutes above provide the Commission with broad rulemaking authority for the implementation of those mandates.

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

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Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
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For further information, please call: (512) 424-6900

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DIVISION 2. RECOVERY OF BENEFITS WRONGFULLY RECEIVED

1 TAC §§371.1641, 371.1643, 371.1645

The repeals are adopted under §531.033 and §531.021, Texas Government Code, which provides the Commission with broad rulemaking authority; §32.021(a), (c), Human Resources Code, provides that the Commission shall adopt necessary rules for the proper and efficient administration of the medical assistance program; §531.102, Government Code, establishes the Office of Inspector General (formerly the Office of Investigations and Enforcement) and imposes responsibility for investigation of fraud and abuse in the provision of health and human services and the enforcement of state law relating to the provision of those services; the rules specifically implement the provisions of HB2292 and 1743; 42 CFR §455.13 requires the Medicaid agency have methods and criteria for identifying suspected fraud and abuse cases and methods for investigating fraud and abuse, and referring cases for criminal prosecution; 42 CFR, Part 455 specifies all federal requirements of the Commission to provide for Medicaid fraud and abuse program integrity; 42 CFR §1002.2 provides authority for the Commission to exclude Medicaid providers from participation in the Medicaid program; 42 CFR Parts 1002 and 1001 provide all requirements relating to exclusion of providers; and various other state and federal statutes place requirements on the Commission to implement a fraud and abuse program integrity component. The adopted rules meet the mandates of the state and federal statutes delineated above and the state statutes above provide the Commission with broad rulemaking authority for the implementation of those mandates.

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

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TRD-200407418
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
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For further information, please call: (512) 424-6900

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DIVISION 3. CIVIL MONETARY PENALTIES

1 TAC §§371.1661, 371.1663, 371.1665, 371.1667, 371.1669, 371.1671, 371.1673, 371.1675

The repeals are adopted under §531.033 and §531.021, Texas Government Code, which provides the Commission with broad rulemaking authority; §32.021(a), (c), Human Resources Code, provides that the Commission shall adopt necessary rules for the proper and efficient administration of the medical assistance program; §531.102, Government Code, establishes the Office of Inspector General (formerly the Office of Investigations and Enforcement) and imposes responsibility for investigation of fraud and abuse in the provision of health and human services and the enforcement of state law relating to the provision of those services; the rules specifically implement the provisions of HB2292 and 1743; 42 CFR §455.13 requires the Medicaid agency have methods and criteria for identifying suspected fraud and abuse cases and methods for investigating fraud and abuse, and referring cases for criminal prosecution; 42 CFR, Part 455 specifies all federal requirements of the Commission to provide for Medicaid fraud and abuse program integrity; 42 CFR §1002.2 provides authority for the Commission to exclude Medicaid providers from participation in the Medicaid program; 42 CFR Parts 1002 and 1001 provide all requirements relating to exclusion of providers; and various other state and federal statutes place requirements on the Commission to implement a fraud and abuse program integrity component. The adopted rules meet the mandates of the state and federal statutes delineated above and the state statutes above provide the Commission with broad rulemaking authority for the implementation of those mandates.

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

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Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
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Proposal publication date: June 18, 2004
For further information, please call: (512) 424-6900

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TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 19. QUARANTINES AND NOXIOUS PLANTS

SUBCHAPTER T. NOXIOUS PLANTS

4 TAC §19.300

The Texas Department of Agriculture (the department) adopts new §19.300, concerning a list of noxious plants without changes to the proposed text as published in the October 29, 2004, issue of the *Texas Register* (29 TexReg 9951). New §19.300 is adopted to establish a noxious plant list in accordance with the passage of Senate Bill 854, 78th Texas Legislature, 2003, which amended the Texas Agriculture Code (the Code), by adding new §71.151. Section 71.151 requires the department by rule to publish a list of noxious plant species that have serious potential to cause economic or ecological harm to the state. The new section further establishes the recognition of plants in Texas that may cause economic or ecological harm to the state. By law, the noxious plants listed may not be sold, distributed or imported in Texas. As required by §71.51, the department consulted with representatives from the agriculture industry, the horticulture industry, the Texas Cooperative Extension, the Texas Department of Transportation, the State Soil and Water Conservation Board and the Texas Department of Parks and Wildlife (TPWD) in the

preparation of this list. The department has considered scientific data and the economic impact of each plant species listed. Adopted new §19.300 establishes a list of noxious plants for Texas.

Three written comments were received regarding the adoption of the new section from the United States Department of Agriculture, Animal Health Inspection Service, Plant Protection and Quarantine (USDA-APHIS-PPQ), the TPWD and Environmental Technical Services Co. The comment from USDA-APHIS-PPQ was in favor of the proposal. Other comments made recommendations to amend the proposed rule.

TPWD submitted a comment recommending that all aquatic weeds be removed from the list as these plants are already regulated by TPWD and if the aquatic plants remain on the list, TPWD permits should be sufficient to allow their possession, sale, distribution, etc. in Texas. The department adopts new §19.300 without the changes recommended by TPWD because the new section is intended, in accordance with the Code, §71.151, to be a comprehensive list of all Texas noxious plants. It is not the intent of the department to affect the ability of TPWD to regulate aquatic plants in adopting this section. The rule does include an exemption for persons holding TPWD, as was requested by TPWD.

Environmental Technical Services Co. (ETS) recommended the removal of *Panicum repens* from the list on the basis that there is insufficient knowledge to determine if the species is noxious and capable of causing potential harm to the state. The department adopts new §19.300 without the change recommended by ETS because the department has, based upon review of scientific data available and with the advice of the entities required to be consulted by the Code, §71.151, determined that the *Panicum repens* does have serious potential to cause economic or ecological harm to the state. Furthermore, TPWD identifies this plant as a prohibited exotic species in Title 31, Chapter 57, of the Texas Administrative Code. The adopted list includes all plant species listed in Chapter 57. In support of that regulation and to make a comprehensive list of noxious plant species, *Panicum repens* will not be removed from the list.

The new section is adopted under the Texas Agriculture Code (the code), §12.016, which provides the department with the authority to adopt rules as necessary for carrying out the department's duties under the code, Chapter 71; and the code §71.151, which authorizes the department to publish a list of noxious plant species that have serious potential to cause economic or ecological harm to the state.

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

Filed with the Office of the Secretary of State on December 17, 2004.

TRD-200407380
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Effective date: January 6, 2005
Proposal publication date: October 29, 2004
For further information, please call: (512) 463-4075

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TITLE 7. BANKING AND SECURITIES

PART 2. TEXAS DEPARTMENT OF BANKING

CHAPTER 26. PERPETUAL CARE CEMETERIES

7 TAC §26.1

The Finance Commission of Texas (commission) adopts an amendment to §26.1, concerning fees a perpetual care cemetery corporation (corporation) must pay to operate a perpetual care cemetery. The amendment to §26.1 is adopted without changes to the proposed text published in the November 5, 2004, issue of the *Texas Register* (29 TexReg 10185) and will not be republished. The proposed amendments to §26.1 implement Health and Safety Code, §712.042, which authorizes the commission to set perpetual care cemetery fees in amounts sufficient to defray the cost of administering Health and Safety Code, Chapter 712 (the Act).

The amendments to §26.1 increase the amount of the annual assessment, which is the examination fee that a corporation pays to defray the cost of administering the Act. Despite inflation and rising program costs, the commission has not increased the annual assessment on corporations since 1996.

Before a corporation may obtain a corporate charter, it must establish a trust fund and deposit cash, in the statutorily designated amount, with the trustee of the trust fund. Once chartered, approximately 15 percent of the sales of a corporation is deposited into the fund. The trust fund balance is the principal balance of the fund. Before this amendment, §26.1 required each corporation to pay an annual assessment calculated at a rate of $0.0026 per dollar of the fund balance as of the last examination of the corporation. The amendments to §26.1 change the rate used by the Texas Department of Banking (department) to calculate the annual assessment.

As amended, §26.1 increases the rate to $.0030 per dollar of the fund balance as of the date of the last examination. Under amended §26.1, the minimum annual assessment is $115 and the maximum annual assessment is $6,400. Prior to the amendment to §26.1, the minimum annual assessment a corporation paid was $100 and the maximum annual assessment was $5,500.

The amendments to §26.1 also set forth the acceptable methods of paying fees and, for purposes of administrative efficiency, authorize the department to require a corporation to pay its annual assessment and annual fee by ACH debit.

The amendments to §26.1 also incorporate necessary and appropriate revisions to the existing chapter. With few exceptions, the revisions to the existing sections are nonsubstantive, and the amendments simply reflect requirements the department currently applies in connection with its administration and enforcement of the Act. For example, new §26.1(7) substitutes the term "annual assessment" for "examination fee" to more clearly describe the charge. Section 26.1 has also been rearranged so that related subject matter is grouped together in a more logical fashion.

The fee rate increase is established by the commission and not mandated by the Legislature.

The commission received one comment regarding the proposed rule. The commenter expressed opposition to any increase in fees. The commission believes the increase is necessary because the existing annual assessment does not generate enough revenue to cover the costs of performing examinations. The department has determined that the increased annual assessment will generate fees in amounts sufficient to cover the costs of administering the Act.

The amendment is adopted under Health and Safety Code, §712.042, which requires the commission to set perpetual care cemetery fees in amounts sufficient to defray the cost of administering the Act.

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

Filed with the Office of the Secretary of State on December 17, 2004.

TRD-200407379
Everette D. Jobe
Certifying Official
Texas Department of Banking
Effective date: January 6, 2005
Proposal publication date: November 5, 2004
For further information, please call: (512) 475-1300

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PART 4. TEXAS SAVINGS AND LOAN DEPARTMENT

CHAPTER 80. MORTGAGE BROKER AND LOAN OFFICER LICENSING

SUBCHAPTER B. PROFESSIONAL CONDUCT

7 TAC §80.10

The Finance Commission of Texas ("Finance Commission") adopts an amendment to 7 TAC §80.10, Prohibition on False Misleading, or Deceptive Practices and Improper Dealings, without changes to the proposed text as published in the November 5, 2004 issue of the *Texas Register* (29 TexReg 10187). The purpose of the amendment is to insure that consumers who deal with a mortgage broker or loan officer acting in more than one capacity are more adequately protected from deceptive trade practices.

The Mortgage Broker Licensing Act (the "Act") became effective September 1, 1999. It requires that mortgage brokers and the loan officers who work for them meet certain requirements, that they obtain licenses, that they adhere to certain standards of conduct, and that they provide required disclosures to mortgage loan applicants. The Act directs the Finance Commission to promulgate regulations to implement the Act (the "Regulations") and specifically authorizes the Finance Commission to adopt rules to prohibit false, misleading, or deceptive practices by mortgage brokers and loan officers. The Commissioner of the Texas Savings and Loan Department ("Department") is charged with administration of the Act.

Mortgage brokers or their sponsored loan officers are not prohibited from offering consumers other goods or services in connection with the origination of mortgage loans. By way of example, a mortgage broker may sponsor a loan officer who also acts as a credit repair specialist or real estate agent. In other instances, the licensee may offer contracting services or induce a consumer to invest loan proceeds with the licensee. These activities have resulted in numerous consumer complaints. Although the Act and existing rules are sufficiently broad enough to encompass these activities as constituting false, misleading, or deceptive practices when engaged in by a licensee, the amendment is intended to make it clear that a mortgage broker who sponsors a licensee who engages in such activities will be held responsible for the actions of the sponsored loan officer or affiliated broker, even in those circumstances where the sponsoring broker was not aware of the conduct. This is consistent with *Finance Code* §156.201(c).

The amendment creates a new subsection (e). This amendment provides that a mortgage broker or loan officer who offers or provides other services to a consumer in a transaction which is separate but related to the origination of a mortgage loan engages in a false misleading or deceptive practice under the Mortgage Broker License Act when the person engages in a false misleading or deceptive trade practice in the related transaction. By way of example, if a mortgage broker assisted a consumer in obtaining a mortgage loan, and then induced the consumer to invest the money in a fraudulent scheme sponsored by the broker, then the mortgage broker would be in violation of subsection (e) even though the fraudulent scheme was a separate transaction.

The new subsection (e) is also meant to heighten awareness of the mortgage brokers existing responsibility under *Finance Code* §156.201(c) which makes the mortgage broker responsible to the commissioner and to the public for certain conduct of sponsored loan officers.

Subsection (e)(ii) provides that a mortgage broker is responsible for the actions of a loan officer sponsored by the mortgage broker and the actions of affiliated mortgage brokers. By way of example, a mortgage broker may operate as a corporate entity and engage multiple mortgage brokers and loan officers to originate mortgage loans on behalf of the mortgage broker's corporate entity. If an affiliated mortgage broker or sponsored loan officer working for the corporate entity were to provide "credit repair" services to a consumer at the same time the person was originating a mortgage loan for the consumer, the mortgage broker sponsor/owner may be subject to disciplinary action under (e)(ii) for any false, misleading, or deceptive act committed in connection with the providing of the "credit repair" services.

The Department received comments from 10 individuals opposing adoption of this rule. Generally, these persons objected to holding mortgage brokers responsible for the acts committed by a sponsored loan officer or affiliated broker when the alleged acts were either: performed in connection with providing "non origination" services related to but separate from loan origination; or actions performed without the knowledge of the mortgage broker. The commentators believe that the rule places mortgage brokers in an unreasonable risk of liability, and that mortgage brokers lacked the ability to know what a sponsored loan officer may be doing at a branch location or other off site point of contact or place of business.

The Finance Commission disagrees. The Act makes mortgage brokers responsible for conduct of the sponsored loan officers. The Finance Commission further believes that common law also

imposes liability on mortgage brokers. Mortgage brokers are the "captains of the ship." As such, they are responsible for the activities of those whom they engage to originate loans. But for the mortgage broker providing an origination conduit to mortgage lenders, the related unlawful activities of sponsored loan officers or affiliated brokers could not occur.

Mortgage brokers have adequate tools to limit their exposure. Mortgage brokers could elect not to sponsor loan officers or affiliate with mortgage brokers who offer other services in connection with origination activity. Where a mortgage broker elects to affiliate with the provider of such other services, the mortgage broker can implement oversight and supervision procedures designed to minimize potential harm to the public and the resulting risk to the mortgage broker. Such procedures could include the mortgage broker requiring that all origination activities of these dual capacity affiliates be transacted at a specified location where the mortgage broker can adequately monitor the acts of sponsored loan officers. Regular internal quality control and internal compliance audits also may be used. Post transaction customer satisfaction surveys can be used to aid in early detection of potential problems. A mortgage broker may also reduce risk by implementing better screening and background checks on persons being considered for sponsorship or affiliation.

Another comment was filed by a law firm which regularly represents mortgage brokers. This commentator questioned the authority of the Finance Commission to adopt a rule that attempted to hold mortgage brokers and loan officers responsible under the Act for conduct other than origination of mortgage loans. The Finance Commission disagrees. Enforcement of the rule will require the establishment of a clear nexus between the performance of the other goods and services and the origination of a mortgage loan. The Finance Commission envisions that in most cases a "but for" test will be applied. That is, "But for the mortgage broker's allowing his origination business to be used as a platform for the providing of the other goods or services, would the deceptive act or practice have occurred?" Where there is no nexus between origination activity and providing of other services, no violation will occur. Therefore, the Commission believes that the rule is clearly within its authority under *Finance Code*, including §156.303(3) which governs disciplinary actions against licensees where the person has committed a deceptive act while performing an act for which a license is required. Because the rule contemplates a contemporaneous origination action, it is within the authority of the Finance Commission to enact the rule. This is further supported, in the opinion of the Commission, by the language in §156.201(c). Even if this section were to be construed as narrowly as the law firm suggested, nothing in the subsection of Act prohibits the enactment of the proposed rule, and the Finance Commission is of the opinion that it is supported by common law rules including those governing master-servant, principal-agent, or *respondeat superior*, as may be applicable.

The same commentator alternatively suggested that the rule be amended to more clearly define "separate but related transaction" and "affiliates with another mortgage broker; or to provide a safe harbor. We decline to make such a change at this time. The rule as written provides adequate guidance especially when taken with the commentary included in this preamble. We believe this optimizes protection of consumers while leaving the details of any particular business arrangement between mortgage brokers and loan officers and affiliates as to terms, conditions, oversight, and risk allocation for the market to determine.

The Texas Association of Realtors (TAR) filed a comment supporting adoption of the rule as proposed.

The amended subsections are adopted under *Finance Code*, Section 11.306, which authorizes the Finance Commission to adopt mortgage broker rules as provided by Chapter 156 of the Act, and under *Finance Code*, Section 156.102(a) and (b), which authorizes the Commissioner of the Texas Savings and Loan Department , subject to review and compliance with the directives of the Finance Commission, to adopt and enforce rules necessary for the intent of or to ensure compliance with the Act.

The section of the Act affected by the proposed amended subsection is *Finance Code*, Section 156.102(b) relating to authority for the Finance Commission to adopt rules to prohibit false, misleading, or deceptive trade practices. The amendment furthers the purposes of *Finance Code*, §156.303(a)(3).

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 December 20, 2004.

TRD-200407384
John Fleming
General Counsel
Texas Savings and Loan Department
Effective date: January 9, 2005
Proposal publication date: November 5, 2004
For further information, please call: (512) 475-1353

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TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER S. WHOLESALE MARKETS

16 TAC §25.502

The Public Utility Commission of Texas (commission) adopts new §25.502, relating to Pricing Safeguards for Markets Operated by the Electricity Reliability Council of Texas (ERCOT), with changes to the proposed text as published in the June 25, 2004, issue of the *Texas Register* (29 TexReg 6015). This is a competition rule subject to judicial review as specified by Public Utility Regulatory Act (PURA) §39.001(e). The rule is adopted under Project Number 27917.

A public hearing on the rule was held at commission offices on August 2, 2004, beginning at 9:39 a.m. Representatives from City of Austin, doing business as Austin Energy (Austin Energy); Reliant Energy, Incorporated (Reliant); the City of San Antonio, acting by and through City Public Service Board of Trustees (San Antonio); Tractebel Energy Marketing, Incorporated (Tractebel); and TXU Portfolio Management Company LP, TXU Generation Company LP, and TXU Energy Retail Company LP (TXU) made comments at the hearing and also provided written comments.

In addition, American National Power, Incorporated; Calpine Energy Services, LP; Constellation Power Source, Incorporated; Coral Power, LLC; Exelon Generation Company, LLC; FPL Energy, LLC; Mirant Americas Energy Marketing, LP; PSEG Texgen I, Incorporated; Sempra Global; Texas Independent Energy; Bastrop Energy Partners, LP; CPL Retail Energy, LP; Direct Energy, LP; Kiowa Power Partners, LLC; Tenaska Frontier Partners, Limited; Tenaska Gateway Partners, Limited; Tenaska III Texas Partners; and WTU Retail Energy, LP (collectively, Joint Commenters) made joint comments at the hearing and also provided written joint comments.

In addition to the comments received from the above-listed entities, the commission also received written comments on the rule from AEP Texas Central Company and AEP Texas North Company (AEP); Alliance for Retail Marketers (ARM); BP Energy Company (BP); Brazos Electric Power Cooperative, Incorporated (Brazos); DFW Electric Consumer Coalition (DFW Coalition); ERCOT; Lower Colorado River Authority (LCRA); Office of Public Utility Counsel (OPC); South Texas Electric Cooperative (STEC); Texas Commercial Energy (TCE); Texas Genco, LP (Texas Genco); and Texas Industrial Energy Consumers (TIEC).

In the preamble for the proposed rule, the commission identified seven specific issues upon which it sought comment. Those issues are listed below.

Issue 1: System-Wide Price Safeguards

Subsection (i) is intended to place a reasonable constraint on prices when the market is not competitive system-wide and prices cannot be determined by the normal forces of competition. In particular, it would preclude a pivotal supplier or "hockey stick offer" from setting any clearing price. "Hockey stick pricing" is when a supplier prices most of its offer competitively, but prices a small, economically expendable portion exorbitantly high. The basic mechanism included in subsection (h), referred to as the Competitive Solution Method (CSM), was developed by Staff and first proposed in Docket Number 24770, Report of the Electric Reliability Council of Texas (ERCOT) to the PUCT regarding Implementation of the ERCOT Protocols. In that docket, the commission approved a limited form of CSM for quick implementation, and decided to defer further consideration of CSM to a rulemaking, such as this one, dealing more broadly with market failure mitigation. See Docket Number 24770, Order (August 22, 2003), pages 26-27. While CSM is designed to be automatic, the ERCOT white paper addresses hockey stick pricing by relying on the independent market monitor (IMM) to identify and remove hockey stick offers on an ad hoc basis prior to market clearing. Another difference is that CSM automatically mitigates the influence of suppliers who are pivotal on a system-wide basis, while the ERCOT white paper does not. Please compare the automatic mitigation contained in the rule to the ad hoc mitigation in the white paper as well as practices in other markets (for example, New York's Automatic Mitigation Procedure), and explain why one is preferable over the others.

The bulk of the comments submitted in this rulemaking pertained to CSM. One general theme running through many of the written comments (*i.e.*, those submitted by AEP, ARM, Austin Energy, Brazos, ERCOT, Joint Commenters, LCRA, Reliant, San Antonio, and TXU) as well comments made at the public hearing was that the commission should defer consideration of CSM until the completion of the Texas Nodal Team (TNT) stakeholder process at ERCOT and the finalization of the new wholesale market design. LCRA and TXU observed that TNT stakeholders are still considering and developing market design features that would address the same problems CSM was designed to address. Among the alternatives are ERCOT's procurement of energy and reserve capacity in the same auction (*i.e.*, co-optimization of energy and capacity), and use of a small amount of responsive reserve capacity for energy deployment according to an established price curve. TXU noted that some of these proposals are similar to an approach suggested as a CSM alternative by Dr. Shmuel Oren, Senior Advisor to the commission's Market Oversight Division, at recent TNT stakeholder meetings. In reply comments, Joint Commenters and Reliant said these alternatives were preferable to CSM.

As a general matter, Austin Energy, Joint Commenters, LCRA, Reliant, Tractabel, Texas Genco, and TXU opposed CSM and preferred the ERCOT white paper approach, while consumers BP, DFW Coalition, OPC, STEC, TCE, and TIEC favored CSM and said the white paper approach would be inadequate. OPC and TIEC stated that implementation of proposed subsection (i) should not wait until 2006, while ARM opposed the provision.

Few commenters offered any comparison with New York's Automatic Mitigation Procedure (AMP) or other mitigation approaches used in other electricity markets, although Reliant said that monitoring by an IMM as proposed in the ERCOT white paper was preferable to AMP. TXU, on the other hand, commented that the use of selective mitigation (which is one of the main features of AMP) is one of the preferred methods of regulation, and has precedent in power market regulation. TCE recommended a modification to the proposed CSM methodology based on mitigation in the PJM Interconnection (PJM): capping the offer prices of pivotal suppliers at 10% over their verifiable costs, rather than setting a system-wide price cap applicable to all suppliers.

Joint Commenters recommended as an alternative to CSM limiting the slope of the portion of any offer curve above $300 or below -$300. Any offer that failed the screen would be rejected and therefore would not set any market price. Joint Commenters stated that such a screen would address the problem of hockey stick pricing identified in the preamble to the proposed rule. In its reply comments, however, TIEC criticized the bid slope screen, because it would be easy to circumvent and would not prevent a supplier from bidding up the nodal price to an unjustified level in a constrained area. TIEC stated that CSM is activated when a pivotal supplier exists and when supply margins fall below a specified threshold, providing appropriate consumer protections against market power abuse and ensuring that mitigation is applied only when market conditions warrant such measures.

Most specific comments in opposition to CSM fell into four general categories: 1) The merits of ex-post mitigation over ex-ante mitigation; 2) The need for scarcity pricing and the benefits of price volatility; 3) Problems with how CSM would be implemented, including its applicability to congestion revenue rights (CRRs) and day-ahead markets; and 4) The commission's legal authority to mitigate prices.

Ex post versus ex ante. Austin Energy commented that while ex-ante mitigation is quick and automatic, it risks being overly broad, and that when applied injudiciously can suppress market activity and limit price signals to suppliers. On the other hand, while ex-post mitigation may require more resources, it can be applied very specifically to instances in which it is demonstrated that a market participant committed an actionable violation, and thus will have less impact on market activity and price signals.

Austin Energy favored the mitigation approach contained in the market white paper authored by the TNT Market Mitigation Concept Group (TNT-MMCG), stating that ex-ante measures should be reserved for situations in which case-by-case review of market participant behavior would be difficult to undertake and hard to identify, and where the risk from failure to act to protect the market from abuse is extremely high. Austin Energy stated that hockey stick pricing is easily identified and that under the TNT approach, the IMM may simply discard the hockey stick offers.

LCRA and Reliant stated that market power mitigation as related to bidding behavior should emphasize physical withholding, which Reliant further noted is a prohibited activity under P.U.C. Substantive Rule §25.503(g)(7). The TNT-MMCG approach is expected to detect such behaviors in the current TNT framework, Reliant and LCRA stated.

Scarcity pricing. Austin Energy, Joint Commenters, Reliant, Texas Genco, and TXU expressed concern that CSM would result in over-mitigation that would suppress prices to such an extent that it would provide a disincentive for new generation. Texas Genco stated that an offer that may appear to be a "hockey stick" may be the result of a generation entity's actual costs and associated risks of running at high generation levels. TXU opined that because CSM automatically mitigates bids every time there is less than 101% of the supply needed in the real-time energy market, or less than 105% of the supply needed in the ancillary services markets or day-ahead markets, legitimate scarcity pricing would be eliminated under CSM. Joint Commenters stated that the undesirable effects would be particularly magnified when combined with ERCOT's lack of a forward resource adequacy requirement.

TXU also stated that CSM would make it very difficult for potential generation investors or transmission and distribution utilities to see the legitimate local scarcity pricing signals that would induce economically efficient generation and transmission investment at locations where it is needed.

Austin Energy opined that the need for CSM has not been demonstrated, and that mitigating price spikes could deprive the market of necessary short-term incentives to bring more supply to the market. Austin Energy referred to an April 30, 2002 price spike in the market for non-spinning reserve service cited in the preamble to the proposed rule, and stated that the increase in offers for the two weeks following the spike could plausibly be attributed to the spike. Commission staff had estimated the impact of the April 30 price spike to be approximately $6 million, but Austin Energy concluded that the price spike may also have reduced the cost of non-spin in subsequent weeks. According to Austin Energy, the additional supply induced into the market by the price spike plausibly lowered the price for NSRS. ARM and Austin Energy recommended that prior to adopting CSM, the commission conduct a study of how the current application of CSM in the balancing energy market has affected supply.

BP cautioned that mitigation measures should not employ mechanisms that are focused only on achieving low prices in the short run, and that do not allow for appropriate returns on invested capital located in transmission constrained areas. BP generally supported CSM for generation resources, but added that the process ultimately adopted by the commission should be more transparent than what was represented in the proposed rule. According to BP, CSM should be designed so that it does not remove competitive economic offers, and should not be triggered if the market clearing price of energy (MCPE) is set by a load acting as a resource.

Implementation. Reliant stated that it was unclear whether CSM's pivotal supplier test was to be applied to the entire energy market, or to the incremental amount needed to ensure system sufficiency. Reliant stated that the proper approach would be to test whether the additional energy needed from one interval to the next could be provided by the market, without any one supplier being pivotal. Over-mitigation could result, Reliant stated, if one or two major suppliers were pivotal in meeting all load obligations, but were not pivotal in meeting any incremental change between intervals.

Pursuant to its comment that mitigation should focus on withholding, Reliant stated that CSM's supply test should first calculate the generation available for security-constrained economic dispatch (SCED) in the real-time market (all remaining bids in the real-time market, plus all megawatts currently loaded as resources), plus awards and self-provision of ancillary capacity services. This sum would then be compared to the total on-line capability of all resources as currently reported in the operating plan. If total on-line capability exceeds the total available generation for the SCED (including ancillary services) by a set threshold, then CSM would apply. Reliant said that if the benchmark were not exceeded, there would be no effective withholding and CSM should not apply.

Reliant also questioned how CSM would deal with virtual bidding in a day-ahead market, and stated that if transmission congestion were not cleared day-ahead, it would be inappropriate to apply CSM to the day-ahead market because there would be no link between financial and physical arrangements. Reliant cautioned, however, that at this time TNT stakeholders are carefully considering comments by economic experts recommending that congestion be cleared day-ahead. Reliant stated that if TNT stakeholders agree to that suggestion, CSM may be a viable day-ahead mitigation measure if Reliant's recommended changes were made. LCRA also stated that CSM may be appropriate in a non-voluntary day-ahead market if CSM is also applied to the real-time market, but stated that if the day-ahead market were voluntary as currently contemplated in the TNT design, mitigation would not be necessary.

TXU stated that if CSM were adopted, the commission should clearly define each market to which the tests would be applied; replace the quantity test with a more direct measure of physical withholding; modify the pivotal supplier test to account for long-term obligations and inflexible plants; exclude small suppliers (ones with less than 5.0% of the market) from the definition of pivotal supplier; apply the cap only to suppliers who fail the pivotal supplier test; and base the proxy price on a historical benchmark rather than an arbitrary 50% adder.

Commission authority. Austin Energy, Joint Commenters, and Tractebel asserted that the commission does not have authority to mitigate prices as proposed under CSM. In particular, Joint Commenters stated that PURA §39.001(a) expressly finds that competition in wholesale power markets exists such that wholesale prices should not be set by regulation. Joint Commenters also cited PURA §35.004(e), concluding that the process by which market participants sell electricity to ERCOT is by statute deemed not to be unreasonably preferential, prejudicial, discriminatory, predatory, or anticompetitive.

Austin Energy stated that the commission's authority to pursue any type of market mitigation is, under PURA, predicated on the existence of market power. As CSM does not include a demonstration of market power abuse or even a finding of market power, Austin Energy stated that restricting prices through CSM is not

within the commission's regulatory authority. Austin Energy further stated that the commission's rulemaking to define market power was too late to be relied on in the current rulemaking. Joint Commenters stated that even when market power is found to exist, mitigation through price restrictions is not a remedy that is permitted by PURA. Tractebel stated that price mitigation cannot artificially limit a generator's recovery to its short-term marginal cost, and that under the 5th and 14th Amendments of the United States Constitution, the "due course of law" provision of the Texas Constitution, and PURA, any price cap or mitigation must protect generators' ability to achieve market-based returns.

In reply comments, OPC and STEC disagreed with Joint Commenters, Austin Energy, and Tractebel, stating that the legislature gave the commission authority to protect the market from abusive pricing. CSM does not set a rate certain, OPC said, and does not even address rates that are outside of the pricing of congestion resulting from transmission constraints and the pricing of ancillary services. STEC and OPC stated that PURA gives the commission authority to establish terms and conditions for ERCOT's dispatch functions after the introduction of customer choice. OPC further replied that Joint Commenters erred in their interpretation of PURA §35.004(e), in that the statute applies assuming that ancillary services are provided on a non-discriminatory basis. OPC stated that the nature of hockey stick bidding discriminates against buyers in favor of sellers, and is not based on competitive pricing. Joint Commenters' argument only has merit if competition is truly functional and no structural discrimination exists, OPC stated.

Commission response

The commission agrees that adopting CSM in this rulemaking would be premature given the on-going discussions at ERCOT with respect to market design. At the same time, however, it would also be premature to withdraw CSM from consideration.

The commission reminds all commenters that CSM was designed to address two problems: "hockey stick" pricing (offers that include a small quantity priced extraordinarily high) and market distortions caused by pivotal suppliers. Unless both problems are adequately addressed, CSM will remain an option for a future rulemaking.

Regarding the call by OPC and TIEC to implement CSM immediately rather than waiting until 2006, the commission notes that a form of CSM is already in place, pursuant to the commission's final order in Docket Number 24770. This mechanism has been activated a number of times since August 2004, after a long period during which it was triggered very seldom. Commission staff is at this time investigating the causes of the price excursions that have triggered this modified version of CSM, but that inquiry will not be completed within the timeframe of this rulemaking. The commission finds that although the concerns raised by OPC and TIEC are valid, commission staff's analysis of the recent price spikes is needed in determining specifically how the current mitigation mechanism should be revised. The commission therefore declines to use this rulemaking to change the current implementation of CSM.

Proposed subsection (i) includes an offer cap of $1,000/MWh or $1,000/MW/h. No comments were made on this offer cap. This offer cap codifies prior commission orders, and is necessary to help ensure reasonable ancillary service prices. Consequently, the commission has retained this offer cap in the rule.

Issue 2: Offers Priced Above System-Wide Cap

The system-wide mitigation approved by the commission in Docket Number 24770 allows mitigated offers to be paid at their offer price if selected, but prevents them from setting any market clearing price. By contrast, the proposed rule would preserve such treatment only for loads acting as resources, and would pay all other offers at the greater of the system-wide offer cap or their verifiable costs. An alternative approach would be to adopt the offer cap contained in the TNT Market Mitigation White Paper, which is intended to address local market power only. The TNT approach for mitigating local market power would cap offers at the greater of verifiable costs plus an adder based on the unit's historical capacity factor, or a general fixed heat rate equivalent. If the system-wide offer cap in subsection (i) is ultimately adopted by the commission, what is the best way to treat offers that are priced above that cap?

Austin Energy stated that if the commission were to proceed with CSM, loads acting as resources (LAARs) should be treated as all other resources to the greatest extent feasible. In this instance, Austin Energy said, an offer from a LAAR that is priced above the system-wide offer cap should simply be deleted from the offer stack, as described in the TNT-MMCG white paper.

BP favored paying as bid for selected generation offers priced above the CSM cap if the supplier could demonstrate that the offer was economically legitimate. However, BP also said CSM should not apply at all to prices set by LAARs.

LCRA said that any scheme to pay verifiable costs that did not also let such costs set nodal prices would necessarily lead to uplift. LCRA favored using the approach endorsed by TNT for local market power: capping offers at the greater of the systemwide offer cap or the unit's pre-approved verifiable cost plus a specified adder. Texas Genco expressed a similar preference, although reiterating its recommendation that CSM not be adopted at all.

Joint Commenters stated that the current method of paying any above-cap selected offer as bid was preferable to paying only LAARs as bid, adding that such a distinction would constitute classic discrimination. Joint Commenters further stated that recovery above the system-wide offer cap would need to provide for recovery of verifiable costs and an adder that in total allows recovery of all costs, including capital costs and a return of and on investment. Reliant agreed that no distinction should be made between generation resources and LAARs, and that both should be paid their offer prices.

STEC agreed with paying LAARs as bid, but added that it would be reasonable to pay all other selected resources priced above the system-wide cap the greater of the cap or their verifiable costs, including recovery of capital costs over and above expenses.

OPC stated that selected offers priced above the system-wide cap should be paid as bid.

TIEC stated that selected offers priced above the system-wide cap should receive no more than their verifiable short-run costs plus a reasonable fixed adder.

Commission response

Withdrawal of CSM for the reasons previously stated makes it unnecessary to decide at this time how to treat selected offers that are priced above a system-wide mitigated offer cap.

Issue 3: Congestion Revenue Rights

Market participants that own both resources and CRRs under certain circumstances can use the combination to enhance profits associated with causing congestion. The white paper directs the market monitor to review the interaction between ownership of CRRs and generation and take the appropriate remedial action, but imposes no pre-determined ownership limits. Subsection (k) of the proposed rule presents a specific, pre-determined approach to CRR holdings consistent with the general guidelines mentioned in the white paper, except that it establishes certain limitations on CRR holdings. Please compare the specific, pre-determined approach to CRR holdings in the rule to the ad hoc approach in the white paper, and explain why one is preferable over the other.

BP supports proposed paragraph (k)(1), because expedited disclosure should facilitate more liquid and competitive secondary markets. Joint Commenters stated that the commission should clarify in proposed paragraph (k)(1) the information that would be published and needs to define the term "beneficiaries." Joint Commenters stated that public disclosure of specific quantities of CRRs on a point-to-point basis or identifying loads could reveal trade secrets and competitively sensitive information. The Joint Commenters suggested that publishing the names of CRR owners and the total percentage of flowgate CRRs owned would be acceptable.

BP, Brazos, LCRA, OPC, and Texas Genco were concerned that the proposed CRR limits in proposed paragraph (k)(2) are unduly restrictive or difficult to implement. Brazos was concerned that proposed paragraph (k)(2) is an arbitrary approach to resolve a potential market power problem, and could limit ownership or control of resources in a constrained area to address a potential, rather than real, problem. BP stated that the paragraph would be unnecessary to prevent gaming and would needlessly degrade efficiency and competition in retail and wholesale markets. BP believes that not allowing market participants to be long on CRRs will inhibit the ability of load-serving entities (LSEs) and power marketers to compete for legitimate business in a load pocket. BP averred that the holding of CRRs and the purchase of contracts need to be decoupled for an active and liquid secondary market in delivered energy. OPC stated that a limit on CRR holdings may limit the ability of some market players to hedge themselves.

BP suggested that the commission establish limits on CRR holdings such that an entity is not allowed to hold more than 25% of the capacity on a constraint above its demonstrable load minus controlled generation on the importing side of a transmission constraint. BP stated that NYMEX imposes similar limitations on speculative holdings in its futures markets. Brazos prefers event-specific limitations rather than using pre-determined limitations on CRRs. LCRA does not see a need to impose CRR ownership limits on non-competitive constraints, since any attempt to manipulate prices is mitigated automatically by the proposed TNT-MMCG local market power mitigation process. Therefore, according to LCRA, the rule needs to focus on competitive constraints. LCRA suggested that as an alternative, ERCOT should pay a CRR holder that owns more than 25% of a particular competitive constraint the lesser of the shadow price of the impacted constraint or the greatest shadow price of the constraint in all previous CRR auctions that included the relevant time interval, for the quantity above the 25% limit, if the CRR holder controls a significant amount of generation resources on the importing side of the constraint.

TIEC supported limits on CRR holdings, stating that there is no valid reason for a supplier to hold CRRs for a constraint in excess of those needed to fully cover its local load requirements. The DFW Coalition and OPC stated that limits on CRR ownership was an acceptable alternative. STEC supported limitations on CRR holdings comparable to those currently applicable within ERCOT.

The DFW Coalition and OPC preferred to mitigate CRRs by allocating CRRs to load rather than auctioning them to the highest bidder. According to OPC, the market will benefit in two ways. First, CRR allocation keeps CRRs out of the hands of entities that can benefit from causing congestion. Second, CRR allocation allows loads to hedge against some of the price risk of going to a locational marginal pricing system. TIEC supported restricting ownership of CRRs to loads.

CPS, Reliant, TIEC, and TXU stated that the commission needs to clearly define the term "local load." LCRA stated that in an unbundled ERCOT market, it is almost impossible to determine local load served by a qualified scheduling entity (QSE). ERCOT and TIEC stated that the commission would need to define in more detail the term "effective local resource capacity." TIEC also stated that the commission should establish the appropriate implementation details of proposed paragraph (k)(2). Reliant stated that the rule could be amended to consider all transmission import constraints into a load zone and the load obligations and effective load resource capacity that impact transfers into the load zone. TIEC rejected this approach, stating that the use of ERCOT load zones would mask constraints within the zone where CRR ownership restrictions would be appropriate.

Commission response

The commission notes that at this time, TNT stakeholders are still discussing market design options that may affect the need for proposed subsection (k). Therefore, as with CSM, the commission defers its decision on pricing safeguards related to CRRs. The commission will address this issue as part of its review of the draft protocols to be submitted pursuant to P.U.C. Substantive Rule §25.501.

Issue 4: Disclosure of Resources with High Offer Prices

Under the current market, ERCOT posts a list of all market participants who submit offers priced above $300 per megawatt-hour (MWh) for balancing energy service and $300 per megawatt per hour (MW/h) in the case of ancillary capacity services. The list is posted the following operating day. Subsection (d) of the rule continues this disclosure in the new market. In addition, any offer above $300 that actually causes a price to clear above $300 would also be identified as a price setter. Is extending the current disclosure practice an appropriate deterrent to hockey stick pricing?

A number of parties submitted responses in support of the disclosure requirements of proposed subsection (d). Of the parties supporting this proposed provision, ARM, Brazos, DFW Coalition, OPC, Reliant Energy, Texas Genco, and TIEC did so without qualification, and noted the positive effects that disclosure of certain prices has had on the market to date.

ARM supported the proposed subsection, and stated that it does not believe that the proposed subsection's requirements regarding disclosure of offer prices will hamper the nodal market development process. Likewise, Brazos was in support of proposed subsection (d) and noted the beneficial effect of the rule in creating "peer pressure" on market participants to maintain pricing

below $300. Brazos also contended that the current disclosure practice provides an adequate deterrent to hockey stick pricing.

The DFW Coalition joined in support of the proposed subsection. The DFW Coalition observed that the highest cost generator in ERCOT would likely operate in the $80-$90 per MWh range under normal market conditions.

OPC noted the success of the current disclosure practice, and argued that it should be extended. OPC stated that as the commission has ordered the disclosure of offers above a given threshold, bids have converged to a level just below the disclosure price. According to OPC, ERCOT's disclosure requirement is a best practice, and so OPC supported the adoption of proposed subsection (d).

TIEC supported extension of the current disclosure practice as described in proposed subsection (d). This disclosure, in TIEC's view, generates transparency and allows regulators to identify bad actors in the marketplace. TIEC supported proposed subsection (d) regardless of whether ERCOT establishes a nodal market.

Reliant stated that self-policing has been an effective deterrent against abusive bidding behaviors, and so contended that the disclosure requirements of proposed subsection (d) should be extended into the new market design. Texas Genco stated that the current disclosure process has been an effective mitigation measure and supported extending the current process to the new market.

Several of the commenters supported the general principle of disclosure as embodied in proposed subsection (d), but proposed modifications. Austin Energy, ERCOT, TCE, and TXU suggested several potential changes to proposed subsection (d). Austin Energy did not object to proposed subsection (d), but stated that proposed subsection (d)(3) is not necessary if the commission adopts its recommendations with respect to Issue No. 2, offers prices above the system-wide cap.

ERCOT affirmed that its systems currently support the disclosure process, but observed that supporting disclosure as required by the proposed rule might increase ERCOT's workload, as it would have to review additional bids under the rule. This is because ERCOT will operate the security-constrained, day-ahead energy market, and bidding will be resource-specific rather than portfolio-based. ERCOT also requested two business days, rather than one market day, to make the disclosure posting.

TCE noted the effectiveness of disclosure as a market mitigation measure, but suggested that lowering the threshold for triggering a disclosure obligation would be even more effective. Specifically, TCE proposed that a company be required to identify itself if it bids in excess of 20 MMBtu/MWh x Fuel Index Price. Furthermore, if a company bids in excess of 30 MMBtu/MWh x Fuel Index Price, TCE would have that company's entire bid curve posted on ERCOT's website and require the company to identify which unit is the basis for its highest offer price. TCE noted generally the usefulness of more information to market participants.

TXU recommended deletion proposed subsection (d)(3), which requires that the identity of any resource that is paid more than the system-wide offer cap be published. TXU argued that this provision is not necessary, because any resource that is paid above the system-wide offer cap will already have been identified under proposed subsection (d)(1). Additionally, TXU noted that any resource that is paid above the system-wide offer cap will not be permitted to set the market price, under proposed subsection (i)(3). In TXU's view, this is sufficient, and any additional disclosure is merely additional stigmatization. If the resource can provide verifiable costs above the system-wide offer cap, TXU stated, there is no reason to stigmatize the resource at all.

Other commenters did not support the adoption of proposed subsection (d) at this time. BP argued that extending the current ERCOT disclosure practice will provide no additional deterrent to hockey stick pricing compared to what will be provided by the proposed CSM-IMM processes. BP argued that if the commission adopts CSM as proposed, hockey stick pricing will be mitigated ex ante. As a result, BP concluded that implementing both CSM and a new disclosure requirement would not provide an additional benefit equal to the cost of maintaining two concurrent and redundant systems. BP asserted that the proposed disclosure regime may be ceased with the elimination of "as bid" pricing for generation offers which exceed the CSM derived price cap in proposed subsection (i).

AEP argued that there is no additional benefit to expanding the current disclosure requirements. AEP stated that it is relatively easy to determine the identity of the entity setting market clearing prices above $300 under the current disclosure requirement, and that the new disclosure requirement contained in proposed subsection (d) imposes additional administrative processing and posting burdens on the ERCOT staff.

Commission response

Like CSM itself, this provision is intended to deter excessive offer prices. TIEC stated that the disclosure regime embodied in proposed subsection (d) would be beneficial in the current market. The commission agrees and has amended the subsection to clarify that it applies to the current market as well as to any future market. The identity of the entity will be disclosed, along with the corresponding settlement interval and market location (*e.g.*, congestion management zone in the current system or a node in a nodal market design), and the commission has defined the term "market location." The commission's amendments to this subsection reflect the value of disclosure to promote fair competition, irrespective of other changes to the market.

The commission rejects AEP's suggestion that there is no additional benefit to the new disclosure requirements set forth in proposed subsection (d). The new requirement in the proposed subsection, that a resource be identified as the price setter if its offer sets a price higher than $300, is intended to single out the price setter from lower-priced offers when prices exceed $300. For example, if gas prices force a number of suppliers to offer energy or capacity slightly above $300, and a lone hockey stick offer causes the price to clear at $990, the market (and the public) will be able to correctly identify the entity responsible for the $990 price, instead of indiscriminately blaming all the suppliers who offer slightly above $300 but were nowhere near $990.

The commission understands the additional burden that proposed subsection (d) and other subsections of this rule may present to ERCOT, and appreciates ERCOT's statement that it is prepared to accept the additional administrative burden of reviewing offers under the rule as proposed. However, the commission does not believe that requiring posting within two business days, as recommended by ERCOT, is appropriate for paragraphs (d)(1) and (2). By setting the posting deadline in terms of business days, ERCOT's proposal would at times lead to several days' delay in posting offers qualifying under the rule. The commission believes that it is important for the market to have this information quickly, and therefore declines

to set the posting deadline in terms of business days. However, the commission finds that publishing the information by noon the next day (rather than 8 a.m. as originally proposed) will not seriously compromise the benefits of disclosure.

The commission acknowledges that disclosure of the information required by paragraph (d)(3) is dependent on the calculation of the corrected market clearing price. This provision is therefore amended to require disclosure concurrent with the publication of the corrected market clearing price.

Issue 5: Safe Harbor

Subsection (j) would provide market participants with a limited safe harbor against enforcement actions dealing with certain kinds of market power abuse. Please comment on the appropriateness and effectiveness of such a safe harbor.

Several commenters opposed the inclusion of proposed subsection (j), and the remaining commenters voiced reservations about certain aspects of the proposed subsection.

Asserting that proposed subsection (j) is flawed on two counts, Austin Energy recommended its deletion. Austin Energy criticized the phrase "worked as intended" as vague and raising the specter of arbitrary enforcement; at the least, the commission's interpretation of the phrase should be precisely specified. In addition, Austin Energy condemned proposed subsection (j) as being inconsistent with basic principles of economics in suggesting that market power could be non-persistent. According to Austin Energy, market power by definition requires the ability to raise and sustain uncompetitively high prices. Austin Energy maintained that any other interpretation of market power should be thoroughly debated in the upcoming rulemaking on market power.

Texas Genco also favored deleting proposed subsection (j), asserting that its provisions constitute less a safe harbor for market participants than a safety net that would allow the commission to mitigate prices even if the proposals in subsections (h) and (i) fail to work.

In reply comments, Joint Commenters agreed with Texas Genco's remarks, and recommended deleting proposed subsection (j), or at a minimum, proposed paragraph (j)(3). They asserted that the language "work as intended" is unconstitutionally vague; that the rule is unconstitutionally retroactive and exceeds the commission's authority; and that it denies market participants contract certainty and creates unworkably high risk. In addition, Joint Commenters objected to the term "persistent market power," noting that appropriate definitions of "market power" have not been explored; they also agreed with Austin Energy that "market power," properly defined, requires persistent power.

TCE recommended deleting proposed subsection (j) for a different reason. It stated that it is unclear if there currently is any venue for a consumer hurt by market-power abuse to seek remedy, and that if the commission is the only venue in which such victims can seek relief, the safe-harbor provision is inappropriate. Rather, TCE opined, the commission should expand its tools to remedy market-power abuses, which can have consequences much greater than just excessive costs in specific intervals.

Reliant also favored deleting proposed subsection (j). Its key criticism was that it is inappropriate for the commission to require the disgorgement by all market participants of profits received from prices that resulted from market-power abuse that was not satisfactorily mitigated. It contended that this provision would have serious adverse commercial effects. Load could be discouraged from acting as a resource in the market, because of increased uncertainty as to the price it would receive for interruption. Higher LAAR offers would also likely result as loads incorporate higher risk premiums in their offers. In addition, retail electric providers (REPs) that structured retail products based on the MCPE would also be affected by resettlement. Reliant also noted that the Federal Energy Regulatory Commission (FERC) has rejected the "make the market whole" approach in its Order Amending Market Based Tariffs and Authorizations; instead, FERC opted to consider potential disgorgement on a transaction-specific basis. Finally, Reliant asserted that the subsection would authorize the commission to take action beyond the authority granted by PURA §39.157, which does not authorize the commission to disgorge profits via a resettlement of the entire market.

TIEC advocated deferring consideration of safe-harbor provisions, contending that the commission should first implement the proposed rule's price protections and allow a reasonable time for them to be tested in the market. Additionally, TIEC complained that such key terms in proposed subsection (j) as "market power abuse," "persistent market power," and "worked as intended" seem undefined, and recommended developing precise definitions for them.

In reply comments, STEC agreed with TIEC that it is premature to implement a safe-harbor provision. It recommended first allowing enough time to evaluate the effect of the rule's price protections.

TXU submitted comments on all three paragraphs in proposed subsection (j). In proposed paragraph (j)(1), TXU proposed replacing "lowest prices" with "highest prices," saying that the change addresses the improper and inefficient incentives created by paying a supplier the lower prices. TXU asserted that if a supplier is limited to the lower noncompetitive-constraint-mitigated price, it would have no incentive to supply power to the greater ERCOT market for a higher price, so that system-wide prices would tend to remain high. If, however, the supplier is limited to the system-wide mitigated price because it is lower than the noncompetitive-constraint-mitigated price, it is receiving less than what it really costs to clear congestion at that constraint.

Joint Commenters expressed agreement with TXU's rationale and its recommended change to proposed paragraph (j)(1).

In its reply comments, TIEC, after reiterating its view that implementing any safe-harbor provision is premature, opposed TXU's suggestion. It stated that if a safe-harbor provision is adopted, the mitigated price should be set at the lower of the system-wide cap and the mitigated price at the constraint. Because system-wide mitigation may be infrequent, TXU's proposal could result in a mitigated price that defaults to the $1,000/MWh system-wide cap in most intervals, even if CSM is adopted. Particularly for locations suffering from persistent congestion, that is an inappropriate result, TIEC asserted.

TXU proposed deleting the language "by an entity that did not have persistent market power" from proposed paragraph (j)(2). TXU stated that its recommended revision is based on the need for ex ante mitigation measures that offer safe harbor to all market participants, not just those lacking "persistent market power." It opined that properly designed ex-ante measures should lead to appropriate prices, thus making further disgorgement actions

unnecessary. TXU further observed that the rule does not define "persistent market power," and that the commission still has not defined "market power." TXU contended that proposed paragraph (j)(2) fails to inform market participants of what conduct is needed to achieve the safe harbor, and hence risks being voided for vagueness in violation of the federal and state due-process clauses.

Joint Commenters, in their reply comments, supported TXU's recommended revision to proposed paragraph (j)(2).

TXU denounced proposed paragraph (j)(3) on several grounds. First, it stated that it would create significant regulatory and business uncertainty, and would be impossible to implement properly because it improperly assumes the ability to project an alternative market outcome (*e.g.*, ultimate prices had proposed subsections (h) and (i) "worked as intended"). Thus, some market participants would be paid too much, and others would be paid too little. Second, it declared that proposed paragraph (j)(3) is unconstitutionally retroactive, as it fails the three-pronged test required to render retroactive statutes constitutional. Specifically, TXU charged that this provision fails to advance the public interest; will defeat the reasonable expectations of market participants; and will cause unnecessary surprise to market participants that must rely on posted market-clearing prices in ERCOT-operated markets to manage risks and enter into bilateral contracts. To support its claim of unconstitutional, retroactive application, TXU cited an appellate court ruling prohibiting the commission from setting rates to allow a utility to recoup losses or to refund excess profits to consumers. Finally, TXU claimed that proposed subsection (j)(3) is unconstitutionally vague, especially because it encourages arbitrary and discriminatory enforcement, as the commission has not defined its intent for proposed subsections (h) and (i).

OPC disputed TXU's claim that proposed paragraph (j)(3) is unconstitutionally vague, asserting that the paragraph's regulatory goal is clear and its wording is not vague. OPC went further, stating that the limits that the provision imposes on the commission's enforcement authority are unnecessary. It recommended that proposed paragraph (j)(3) be revised to read as follows: "Notwithstanding this rule, the commission shall monitor market power. Market participants shall be subject to the investigatory and enforcement powers of the commission under PURA §39.157."

Like TXU, San Antonio recommended deleting paragraph (j)(3). It stated that proposed paragraph (h) and (i) contain mitigation mechanisms that will require further definition in the ERCOT Protocols. If an entity believes that these protocols fail to represent the intent or requirements of those subsections, it should challenge such protocols. Otherwise, San Antonio opined, the requirements of subsection (h) and (i) will, by definition, work as intended.

AEP averred that proposed subsection (j) does not necessarily provide a safe harbor against enforcement. It stated that the rule should be clear about the commission's intent in proposed subsections (i) and (j), so that the latter would be rendered moot; as an alternative, the commission should at least clarify whether proposed subsection (j) is intended to provide a safe harbor from further punitive actions (beyond profit disgorgement).

Like AEP, Brazos contended that proposed subsection (j) is not a true safe-harbor provision. It voiced fear that the application of the subsection will produce almost endless controversy and litigation, as the commission and suppliers dispute whether proposed subsections (h) and (i) work as intended.

Although it believed that including a safe-harbor provision in the rule is appropriate, BP expressed concern that the proposed provision includes terms that are insufficiently defined and could create significant uncertainty as to their application. As an example, BP cited the phrase "worked as intended" as potentially leading to subjective, after-the-fact evaluations of a market participant's offers. It also voiced concerns involving the lack of a definition of "persistent market power," and how a market participant with non-persistent market power could become aware of its status. Accordingly, BP suggested that the commission delineate as clearly as possible, with reference to the code-of-conduct rulemaking, what types of conduct would come under the safe-harbor provision, leaving room for participants to submit offers that reflect scarcity and other legitimate economic costs. Finally, BP opined that a well designed market-power mitigation plan itself would constitute a safe harbor.

DFW Coalition stated that restitution is not an adequate deterrent to market-power abuse, and expressed concern that such consumer safeguards as the ability to file a federal antitrust case could be removed. In the absence of such recourse, DFW Coalition suggested the ability to impose triple damages and a methodology for refunding monies to load-serving entities and their customers.

In their reply comments, Joint Commenters urged rejection of DFW Coalition's recommendation. They claimed that the commission lacks authority to award damages. They further stated that PURA §39.157(a) refers to its not affecting application of state and federal antitrust laws, and that PURA §15.032 makes clear that penalties accumulated under PURA are cumulative of any other penalty.

DFW Coalition agreed with Joint Commenters that the commission lacks authority to award damages, but stated that they saw no reason to provide a safe harbor to violators. To buttress this resistance to a safe-harbor provision, the Joint Commenters reported that victims of market abuse now lack remedies once available under federal and state antitrust law, due to courts' common invocation of the "filed-rate doctrine" which, in the view of Joint Commenters, provides a shield for regulated firms against antitrust claims. As an example, they cited the June 24, 2004 dismissal by the federal 5th Circuit district court of the case, *Texas Commercial Energy v. TXU Energy, Inc., et al.* (U.S. District Court - Southern District of Texas (Corpus Christi), Cause No. 03-CV-249).

Commission response

Proposed subsection (j) was dependent on the adoption of comprehensive price mitigation procedures. With the deletion of CSM, that will not occur in this rule. Therefore, the commission has deleted the subsection. The commission has also added a sentence to subsection (b) to make clear that the rule does not limit the commission's authority to ensure reasonable ancillary energy and capacity service prices and to address market power abuse.

Issue 6: Disgorgement of Windfall

Subsection (f) establishes a means by which the commission can correct any misallocation of costs or payments caused by flaws in ERCOT procedures. Please comment on the appropriateness of this subsection.

Brazos, DFW Coalition, OPC, STEC, TCE, and TIEC generally supported proposed subsection (f), while AEP, Austin Energy, AEP, BP, Joint Commenters, Reliant, Texas Genco, and TXU generally opposed it.

AEP, Austin Energy, Joint Commenters, Reliant, San Antonio, and TXU stated that the subsection would have a detrimental effect on the markets by increasing regulatory uncertainty. AEP, Texas Genco, and Joint Commenters stated that the regulatory uncertainty would discourage participation in the markets. Joint Commenters stated that the regulatory uncertainty would impose high risk premiums and raise prices. Reliant stated that the subsection would discourage loads from acting as resources by creating uncertainty in payment, and would affect REPs that have structured retail products based on the MCPE. Joint Commenters also expressed concern about the effects on market participants' certifications of their financial statements. Joint Commenters stated that the uncertainty created by the subsection would be substantially greater than the resettlements currently made by ERCOT, because the bases for such resettlements are addressed in the ERCOT Protocols.

TIEC stated that proposed subsection (f) is consistent with the commission's regulatory oversight of ERCOT. In contrast, Reliant stated that the subsection is beyond the commission's authority in PURA §39.157, which limits the remedies for market power abuse; the commission does not have the authority to require disgorgement of profits. Joint Commenters stated that market participants are required by PURA §39.151(j) to comply with ERCOT requirements, and PURA provides no authority for the commission to restate ERCOT requirements after the fact. Joint Commenters stated that the commission has no refund authority based on the commission's after-the-fact determination of what ERCOT procedures should have been.

Joint Commenters and TXU stated that proposed subsection (f) is unconstitutional because it is too vague. Joint Commenters also argued that subsection (f) is unconstitutional because it is retroactive.

Austin Energy, BP, Brazos, Joint Commenters, Reliant, San Antonio, and TXU stated that proposed subsection (f) is too vague. BP and San Antonio stated that the subsection should be either struck or precisely defined. Joint Commenters stated that a preferable procedure would be for ERCOT or the IMM to issue new rules that would apply prospectively, potentially on short notice like, for example, PJM does. BP stated that price adjustments because of a perceived flaw in the protocols or market design should be addressed expeditiously through an administrative process but prospectively only. TXU stated that a refund should be limited to a period beginning 60 days after the request for the refund is made, consistent with FERC's authority. TIEC opposed making a commission finding of a flaw in an ERCOT procedure prospective only, and stated that merely correcting the mistake without some sort of refund would not compensate consumers for their losses resulting from ERCOT's original error.

BP stated that clerical, administrative, programming, and data input errors might be properly subject to refunds or surcharges. TXU recommended replacing "flaw in ERCOT's procedures" with "market implementation error" and "emergency system condition." TXU defined a "market implementation error" as a "software flaw resulting in prices or payments that are inconsistent with ERCOT's procedures;" and an "emergency system condition" as "a situation in which a systematic equipment malfunction, including telecommunications, hardware, or software failures, prevents ERCOT from operating ERCOT-administered markets in accordance with ERCOT procedures, or where widespread electronic transmission or generation equipment outages prevent ERCOT from dispatching the system in accordance with ERCOT procedures." TXU stated that it believes that the definition of market implementation error would cover the high congestion costs experienced on the Farmersville-to-Royce transmission line in June and July 2003.

Reliant stated that FERC has rejected the "make the market whole" approach in proposed subsection (f), and instead limits the applicability of potential disgorgement of profits by considering any such action on a transaction-by-transaction basis. TXU stated that its proposal was consistent with the limited authority that FERC has granted the New York Independent System Operator (NYISO), PJM, and the Independent System Operator - New England (ISO-NE) to implement price corrections and resulting disgorgement. According to TXU, FERC has made it very clear that for markets that have moved beyond initial start-up, the limit of such price correction authority should be for "software implementation problems" or "emergency system conditions," with all other "market flaws" requiring amendments of the market rules, instead of price corrections. TXU stated that at the inception of the NYISO market in September 1999, FERC approved the request of NYISO to implement "Temporary Extraordinary Procedures" (TEP) that allowed NYISO for the next 90 days to correct prices that were the result of "market design flaws" or "transitional abnormalities." "Market design flaws" were defined as a "market structure, market design, or an implementation flaw which would result in market outcomes that would not be produced in a workably competitive market." A "transitional abnormality" was defined as "a situation in which systematic equipment malfunctions, including telecommunications failures or widespread and massive transmission or equipment outages, prevents the dispatch of the system as intended by market rules." The NYISO TEP stated that market design flaws and transitional abnormalities did not include situations in which "market outcomes are the product of relative scarcity or surplus." For market start-up purposes, FERC extended NYISO's TEP authority until October 25, 2001, when FERC ruled that such broad authority was no longer appropriate for a working market. TXU stated that, at the very least, the commission should place a time-limit on how long it will exercise broad refund authority.

Joint Commenters stated that the rule would permit refunds years after the fact, which would damage market participants' incentives to clarify or amend ERCOT's procedures. Joint Commenters stated that if the proposed approach is adopted, the deadline to initiate a proceeding should be 90 days from the relevant event, and the commission should process the proceeding in 90 days. TXU stated that if the commission adopted a refund period that follows the filing date of the corresponding refund request, the deadline for such a request should be 30 days after the occurrence complained of; and the refund proceeding should be limited to a 90-day timeframe. TXU stated that a 30-day deadline to file a refund request was reasonable, because under ERCOT's settlement system, market participants receive initial settlement statements 17 days after the operating day.

Texas Genco and Joint Commenters stated that any reallocation of funds should be limited to the purposes and processes addressed in existing ERCOT procedures. TIEC stated that the rule should clarify that the process leading to a commission enforcement action should be complaint-driven, and should be initiated after the aggrieved entity has utilized the dispute resolution procedures available to ERCOT. STEC stated that ERCOT

should also have the power to refund or surcharge to remedy flaws without commission action. Brazos, ERCOT, and OPC recommended that details of the procedure be added.

TCE argued that the commission's authority to order refunds should be expanded; refunds should not be limited to non-compliance with the intent of the ERCOT Protocols.

Commission response

The commission has deleted proposed subsection (f) from the rule. At this time, the commission intends to continue to address market design flaws and other flaws in ERCOT procedures on a case-by-case basis. The commission notes that, although an entity must ordinarily exhaust ERCOT processes before bringing a complaint concerning ERCOT procedures to the commission, P.U.C. Procedural Rule §22.251(c) does provide circumstances where those processes can be bypassed, and also provides that the commission staff and OPC have the right to bypass those processes in all circumstances. Thus, P.U.C. Procedural Rule §22.251 provides affected entities and the commission with the flexibility to act quickly to resolve major flaws in ERCOT procedures, if such flaws cannot be quickly and adequately resolved by ERCOT.

At this time, the commission intends to continue to consider on a case-by-case basis whether retroactive relief should be granted in addition to prospective relief. The spike in local congestion costs related to the Farmersville-to-Royse transmission line during May through July 2003 is an example of an occurrence where the plain language of the ERCOT Protocols appeared to have conflicted with the intent of the Protocols. Before May 2002, ERCOT issued out-of-merit-order instructions to non-offered generation resources (*i.e.*, generation resources for which an offer premium of $0/MWh was submitted to indicate that the generation entities did not want the resources to be deployed to clear local congestion) without knowledge of the flexibility of the resources to move up or down or the associated costs. In response to complaints concerning resources not easily moved up or down such as baseload resources and combined-cycle resources, ERCOT suggested in a market bulletin that resource entities offer in a manner that would indicate their resources' flexibility for being deployed for local balancing energy. Market Bulletin #6, issued by ERCOT in May 2002, indicated that a resource-specific premium of a high level (close to $999/MWh) would make it less likely that a resource would be instructed up, and that a very low offer ($-999/MWh) would make it less likely that a resource would be instructed down. Thus, the offer premium could be used to indicate that a resource entity did not want its resource to be moved. However, in a case where ERCOT had to issue an instruction for the resource to move anyway for reliability reasons, the offer premium was also used for settlement purposes if a Market Solution existed.

In late May 2003, Coral Energy began scheduling energy from the new Kiamichi resource into the ERCOT grid in northeast Texas. At about the same time, the Farmersville-to-Royse transmission line began experiencing frequent congestion. With four independent resources able to clear the congestion on the line and no particular resource essential for clearing the congestion, the definition of Market Solution was met. Resources belonging to Coral, FPL, the City of Garland, and TXU were deployed by ERCOT to resolve the congestion, and were settled on the basis of their offer premiums rather than at generic costs, because when a Market Solution existed, it was assumed that generation entities would offer competitively. However, three of the four resource entities involved continued to submit maximum offer premiums to indicate their desire not to be moved. This situation continued for 21 days in June and on July 1st, during which time the amount of payments to the four resource entities reached close to $60 million. ERCOT corrected the market design flaw on a prospective basis, and commission staff reached settlements that provided for refunds of excessive payments to the generation entities to resolve the congestion, and no commission action was necessary. However, in the future, the commission may be called on to quickly resolve market design flaws and, as noted above, has the procedural flexibility to do so.

Issue 7: Reliability-Must-Run (RMR) Resources

Subsection (g) is intended to ensure that a generation resource that ERCOT has determined is required for reliability remains in operation. In addition, it is intended to provide an orderly process to resolve a dispute between the supplier and ERCOT that prevents the signing of an RMR agreement. Finally, it is intended to ensure that the supplier receives reasonable compensation for providing RMR service. This issue was discussed in ERCOT's RMR Task Force and Protocol Revision Subcommittee in the context of Protocol Revision Request 507, but no consensus was achieved. A generation resource that ERCOT has determined is required for reliability has market power, because ERCOT must take the steps that are necessary to ensure that the generation resource remains in operation. This situation gives the generation resource owner bargaining power to demand excessive compensation from ERCOT to provide RMR service. Consequently, price protections are needed. The commission is addressing this issue at this time because ensuring that reliability is maintained is essential; addressing the issue involves the creation of wholesale price protections, which is the primary subject of this rule; the proposed subsection involves action taken by the commission; and there is considerable disagreement among Staff and a number of stakeholders concerning resolution of the issue. Please comment on the appropriateness of this subsection.

ARM, DFW Coalition, OPC, STEC, and TIEC supported proposed subsection (g). Austin Energy's comments on the subsection were limited to a statement that it supported the language recently approved by the ERCOT Board in Protocol Revision Request (PRR) 507. The remaining commenters offered specific suggestions concerning the subsection. The main issues raised in comments concerned the determination of proper compensation; whether the generation entity should solely have the burden of filing; and whether PRR 507 sufficiently addressed the issues covered by the subsection.

a. Proper Compensation

Several commenters made specific proposals concerning the standard that the commission should use to determine compensation to a generation entity if ERCOT determines that its generation resource is needed for reliability. Joint Commenters suggested that opportunity costs should be the standard for compensation. ARM suggested that compensation should include fixed and variable costs and a reasonable profit. TIEC proposed compensation for both the reservation and the deployment of an RMR resource. The reservation payment, according to TIEC, should not exceed the verifiable cost of maintaining the unit, plus a reasonable fixed adder, and a deployment payment should not exceed the verifiable, short-run variable cost plus a fixed adder.

According to TIEC, setting these maximum levels of compensation sets a standard for negotiations and assures that compensation will be cost-based. TIEC further argued that cost is the appropriate basis, because RMR resources possess local market power that must be mitigated to protect consumers. Texas Genco joined TIEC in noting that RMR is a regulatory rather than a competitive matter.

Brazos expressed concern about the delay in compensation that will result while the commission resolves the complaint. Additionally, Brazos was concerned about how ERCOT would settle payments if compensation determined by the commission is made retroactive to the 91st day following the date that ERCOT receives a generation entity's notification of the suspension of operations.

Joint Commenters requested that any compensation ordered by the commission pursuant to a complaint under the subsection become effective only upon the expiration of any existing RMR agreement.

ERCOT stated that it does not object to a strong commission role in determining compensation.

Commission response

The commission will not set specific compensation guidelines in this rule. Instead, the commission will address compensation disputes on a case-by-case basis, although it may institute a separate rulemaking at a later date to address this issue. The commission notes that the ERCOT Protocols contain compensation guidelines, and no entity challenged those guidelines within 35 days of their approval, pursuant to P.U.C. Procedural Rule §22.251(d).

The commission generally agrees with Joint Commenters that proposed subsection (g) is not meant to terminate any RMR agreement in force on the 91st day after ERCOT's receipt of a generation entity's notice. The commission, however, is authorized by PURA to review whether an existing RMR agreement remains in the public interest. In the event that the commission determines an existing RMR agreement is inconsistent with public policy, the commission could order offsetting or supplementing compensation to run concurrently with the term of the existing agreement, or other such compensation or terms. Accordingly, the commission amends proposed subsection (g) to clarify that the commission's ordered compensation becomes effective upon the expiration of any pre-existing RMR agreement, provided that the existing agreement continues to be in the public interest.

In response to Brazos' concerns about delay in receiving compensation pending a commission decision, the commission acknowledges that, absent settlement of a compensation dispute, there will be litigation delay. However, Brazos did not explain how the delay is harmful and did not propose any alternatives. The generation entity will receive compensation for out-of-merit-order dispatch during the pendency of the dispute, which compensates the entity for incremental costs plus a premium. *See* Protocols §6.8.2. The commission has clarified the part of proposed subsection (g) concerning availability for out-of-merit-order dispatch instruction. If Brazos' concern is the lost time-value of money, then a complainant can request compensation for such loss. As to Brazos' concern about ERCOT's settlement resulting from the commission's retroactive award of RMR compensation, the commission notes that ERCOT has resettled on numerous occasions and the commission has no reason to believe that resettlement for RMR compensation would pose any unusual concerns.

b. Burden of Filing and Burden of Proof on Appropriate Compensation

Proposed subsection (g) places the burden of filing the complaint on the generation entity. The subsection does not expressly assign the burden of proof on the issue of compensation. By requiring the generation entity to take the role of the complainant, however, by implication the subsection assigns the burden of production and the burden of persuasion (together, the burden of proof) to the generation entity.

Joint Commenters suggested that either party--the generation entity or ERCOT--should be permitted to file the complaint with the commission. They claimed that the requirement that the generation entity file the complaint might improperly result in the generation entity being assigned the burden of persuasion (as opposed to the burden to go forward by producing information that the commission might need to make its decision). Joint Commenters claimed that there is no basis for allocating the burden of persuasion to the generation entity and that there is no basis for the assumption that the generation entity has a stronger bargaining position.

TXU suggested that the subsection should place the burden of proof on ERCOT, because it is ERCOT that claims the need for the RMR services; as written, the rule puts ERCOT in a superior bargaining position; and requiring ERCOT to carry the burden of proof will appropriately balance the bargaining power between generation entities and ERCOT. Joint Commenters generally agreed with TXU that the commission has no basis to assume that ERCOT will make fair and reasonable offers or that the generation entity has a stronger bargaining position. In support of this claim, Joint Commenters stated that with respect to RMR services, ERCOT is a monopsonist.

Commission response

The commission finds that the generation entity should bear the burden of filing the complaint with the commission, and the burden of proving the proper level of compensation or any other issue in dispute. The commission has amended the subsection to explicitly assign the burden of proof to the generation entity. As a matter of policy, ERCOT is entitled to the presumption that its determination of the need and compensation for RMR service is correct. ERCOT has a statutory duty to ensure the reliability of the ERCOT network. Determining the need for RMR service is an integral part of this responsibility. In addition, the commission previously certified ERCOT as the independent organization for the ERCOT power region, pursuant to PURA §39.151(a) and (c). *Application of the ERCOT ISO for Certification as an Independent Organization to Perform Transmission and Distribution Access, Reliability, Information Exchange, and Settlement Functions*, Docket Number 22061, Final Order (Feb. 2, 2001). Therefore, pursuant to PURA §39.151(b), ERCOT has been found by the commission to be sufficiently independent of any producer or seller of electricity that its decisions will not be unduly influenced by any producer or seller. Furthermore, ERCOT has no financial incentive to underprice RMR service, because it allocates all costs and revenues from RMR contracts to market participants.

In response to TXU's and Joint Commenters' concerns about being disadvantaged in the RMR service determination process, the commission has amended proposed subsection (g) to make explicit that a complaint filed against ERCOT may include any issue pertaining to RMR service. In addition, pursuant to §22.251(f), the commission has amended proposed subsection (f) to require ERCOT to file a response to the generation entity's

complaint and include as part of the response all existing, non-privileged documents that support ERCOT's position on the issues identified by the generation entity pursuant to §22.251(d)(1)(C).

c. PRR 507

Austin Energy, Joint Commenters, and Texas Genco supported the recently approved PRR 507 concerning RMR, and generally asserted that PRR 507 already resolves the issues addressed in proposed subsection (g). Joint Commenters also suggested that the subsection should require a generation entity to provide RMR services no longer than nine months after submission of notice to cease operations.

Commission response

The above commenters failed to acknowledge that PRR 507 is insufficient to ensure the reliability of the ERCOT network. Under PRR 507, if negotiations fail between ERCOT and a generation entity, the generation entity may cease operations even though ERCOT needs the RMR resource to continue operation in order to ensure the reliability of the network. The commission also rejects, for the same reason, Joint Commenters' suggestion to limit any commission-ordered RMR agreement to nine months from the initial notice. Again, the generation entity would be free to cease operation despite ERCOT's continued need for the RMR resource. The commission finds that proposed subsection (g) is necessary to ensure that ERCOT will have the generation resources that it needs to ensure reliability.

d. Authority

ERCOT requested identification and clarification of the source or sources of the commission's and ERCOT's authority to require a generation entity to provide service when needed for reliability.

Commission response

The primary statutory authority for ERCOT and the commission to require a generation entity to provide service when needed for reliability is PURA §39.151. This section requires ERCOT to ensure reliability of the ERCOT network, and gives the commission oversight and review authority over ERCOT's implementation of this requirement.

e. Other Issues

Both AEP and Brazos requested clarification that a generation entity is not required to use the ERCOT alternative dispute resolution (ADR) process before filing a complaint with the commission under proposed subsection (g). In addition, Brazos and ERCOT questioned the use of the term "supplier" in the subsection. ERCOT proposed using the term, "generation resource owner" instead of "supplier," which is more consistent with the terms used in the ERCOT Protocols.

Brazos asked for clarification on the use and meaning of specific terms in proposed section (g). Brazos requested whether the use of the term "day," referred to calendar days, business days, or market days. Brazos also requested clarification of the use of the term, "finalized," in the phrase, "If, after 90 days following ERCOT's receipt of the supplier's notice, ERCOT and the supplier have not finalized a reliability must run (RMR) agreement …."

Joint Commenters suggested changing proposed subsection (g) so that a generation entity can transfer a RMR resource to an entity that does not have a Resource Agreement with ERCOT as part of a merger with or acquisition of the generation entity owning the RMR resource. The amendment, Joint Commenters suggested, would prevent unnecessary cost, uncertainty, and delay. ERCOT proposed to substitute in the rule its description of the procedure for transferring a generation resource that may be required for RMR.

BP stated its support for efforts to reinforce the reliability of the ERCOT network. However, it suggested that the most appropriate way to address the RMR issues is in a standard generation interconnect agreement. BP claimed that this will "permit ERCOT and generation owners to better tailor their expectations, reach appropriate RMR service agreements more efficiently, and ensure that resources necessary for reliability purposes will continue to be available."

Commission response

It is not the commission's intent to require any generation entity filing a complaint with the commission under proposed subsection (g) to go through ERCOT's ADR process before filing a complaint, because under the ERCOT Protocols, the 90-day notice period is intended to provide ERCOT an opportunity to determine whether the generation resource is need for reliability and, if it is, to negotiate an RMR contract with the generation entity. The commission also agrees that it is not clear from the proposed subsection (g) that ERCOT ADR is not required. Therefore, the commission agrees with AEP and Brazos and amends proposed subsection (g) as suggested. The commission has also replaced the term "supplier" with "generation entity," and defined this term as well as "resource" and "resource entity." Furthermore, the commission has split proposed subsection (g) into subparts to improve its readability. The commission has also made explicit that, unless otherwise ordered by the commission, the implementation of an RMR exit strategy pursuant to ERCOT protocols is not affected by the filing of a complaint pursuant to proposed subsection (g).

For clarity, the term "day" has been replaced with "calendar day." The term, "finalized" was intended to mean that negotiations have concluded and a binding agreement has been signed. The reference to "finalized" has been replaced with a reference to "signed." In response to ERCOT and Joint Commenters, the commission has amended the subsection to ensure an easy process to transfer a generation resource, but that also ensures that the requirements of the subsection cannot be evaded through transfers.

The commission agrees with BP that some RMR issues could be addressed in a standard interconnection agreement, provided that the terms of the agreement do not conflict with the requirements of proposed subsection (g). A commission rule is necessary in the event no agreement can be reached between a generation entity and ERCOT. Accordingly, the commission declines to amend the subsection in response to the comments by BP.

Joint Commenters also claimed the following points:

The subsection violates the Texas Constitution's prohibition against the impairment of contract. They also alleged that this provision is a "taking," and that the restrictions on the use of a RMR resource belonging to a generation entity are not justified. Texas Genco agreed that the rule creates a potential unconstitutional taking of assets.

The subsection is contrary to PURA §39.109. PURA §39.109 requires the owners of generation facilities transferred prior to the start of competition to maintain the same operating personnel

for two years after the transfer to ensure the continued safe and reliable operation of the facility.

The generation entity would be required to maintain the availability of the resource without ERCOT or commission analysis of the circumstances. They claimed that the generation entity would have to maintain availability even if it were no longer able to make the required representations found in the form RMR Agreement, or if the unit could no longer be operated safely or in conformance with environmental laws.

The subsection "places responsibility for reliability solely and permanently on the individual supplier" for reasons beyond the control or expectations of the supplier, and that this would be unfair and disincent market entry.

The time limits in the subsection are all one-sided against the generation entity and the requirement that the generation entity file the complaint is also one-sided and artificial.

In addition, Joint Commenters and Texas Genco claimed that the subsection will not increase reliability, because a generating unit can fail at any time.

Commission response

Joint Commenters provided no explanation or analysis of how proposed subsection (g) violates the Texas Constitution, nor did they indicate which part of proposed subsection (g) causes the alleged infirmity. Similarly, Joint Commenters failed to provide an explanation of how the subsection is contrary to PURA §39.109. Although Joint Commenters set forth the language of the statute in their comments, they did not state what they believe the Legislature intended, nor did they explain how the subsection is "contrary to legislative intent." Joint Commenters also did not explain why any additional cost, uncertainty, or delay would be unnecessary. By ensuring the continued operation of RMR generation resources, the subsection avoids unacceptable risks to reliability, including blackouts. As a result, any resulting additional cost, uncertainty, or delay is necessary.

Joint Commenters are incorrect in their claim that a generation entity would have to maintain availability even if the resource could no longer be operated safely or in conformance with environmental laws. Protocols §5.4.4(2) provides that an entity does not have to comply with a dispatch instruction if such compliance would create a threat to safety, and nothing in this rule or in a RMR agreement resulting from implementation of this rule is meant to contradict that Protocol. In addition, Protocols §22(F)(13)(L), which is part of the standard form RMR agreement, provides that in the event of a conflict between the agreement and a law, the law shall prevail.

Joint Commenters are incorrect in their assertion that neither ERCOT nor the commission would review the individual circumstances. Joint Commenters appear to have expressed a concern about the generation entity's ability to maintain the availability of the resource during the pendency of the dispute. As discussed above in response to a comment by Brazos, the generation entity will receive compensation for out of merit order dispatch during the pendency of the dispute, which compensates the entity for incremental costs plus a premium. *See* Protocols §6.8.2. If that is insufficient to meet the cash flow requirements of the generation resource, the generation entity can enter into an interim RMR agreement with ERCOT or obtain interim relief from the commission. The commission has amended proposed subsection (g) to make explicit the right to seek interim relief from the commission, as well as the right to seek an expedited schedule and identify any special circumstances pertaining to the generation resource at issue.

Joint Commenters' characterization that responsibility for reliability would be placed "solely and permanently on the individual supplier," is inaccurate. Joint Commenters ignored the fact that other market participants will be paying for the RMR service. Therefore, it is more accurate to say that all market participants will share the responsibility of maintaining RMR service in ERCOT. Joint Commenters also claimed that the subsection will "disincent market entry." Although the duties under the subsection may impose exit restrictions on a generation entity at some point in the future, under the subsection, the generation entity will receive reasonable compensation. Furthermore, Joint Commenters fail to note the offsetting positive incentive to entry that the operation of a more reliable network can offer a generation entity contemplating doing business in ERCOT.

Joint Commenters did not explain what they mean by "unfair" or "one-sided," nor did they explain how the time limit in the subsection, or the requirement that the generation entity file the complaint, is "one-sided." As discussed above, as the independent organization responsible for reliability of the network, it is appropriate to presume that ERCOT acted appropriately. Consequently, if there is a dispute, the generation entity should have the burden to complain to the commission.

Texas Genco essentially argued that ERCOT should not rely on RMR resources to ensure the reliable operation of the grid, because it is possible that a RMR resource could fail. Although this statement is true, it is also true that wires, transformers, and other transmission elements can fail. The reason for an RMR resource is to control the risks to reliability at an acceptable level.

Comments on Specific Sections of the Proposed Rule

Proposed Subsection (b), Applicability

Several parties recommended amendments to proposed subsection (b), which governs the applicability of the proposed rule. Brazos Electric suggested inserting the word "wholesale" into the first sentence of the subsection, such that the subsection would apply only to entities that buy or sell "at wholesale" energy, capacity, or any other wholesale electric service in a market operated by ERCOT. Joint Commenters and Reliant both proposed deleting from subsection (b), "Entities shall not circumvent the application of this section's requirements through agreements or other forms of cooperation." Joint Commenters contended that this sentence is unconstitutionally vague, and is in any event unnecessary, as the rule would apply to this conduct without it. Reliant similarly argued that this sentence is superfluous, because entities cannot circumvent the applicability of this rule through cooperation or agreement in any event, even without this sentence. Brazos asked whether examples could be provided of instances of "agreement" or "cooperation" in which entities attempted to circumvent the applicability of this rule.

Commission response

The commission agrees with Brazos that the addition of the word "wholesale" into the first sentence before the words "energy, capacity or any other wholesale electric service," appropriately clarifies the commission's intent that this rule apply only to wholesale transactions. The commission therefore has amended the rule accordingly. However, the commission declines to state, at this time, detailed examples of how entities might agree or cooperate towards the end of circumventing this rule, as suggested by Brazos. It is the commission's intent that

this rule apply to both the sole action of a market participant, and the collective action of more than one market participant. Describing examples of such conduct would be a hypothetical exercise only and many obvious examples could be provided, such as joint conduct between market participants based on a written contract that provides for actions that are clearly in violation of the rule.

Likewise, the Joint Commenters and Reliant focused on the same sentence in proposed subsection (b), but unlike Brazos, these commenters recommended deleting the sentence entirely. The commission intends that this rule apply to entities both acting alone or in concert. Inclusion of this sentence emphasizes this point, even if the sentence is not necessary for application of the rule to group conduct. Furthermore, the commission concludes that this sentence is not impermissibly vague. Rather than define specific conduct that is within the rule, this sentence makes the more limited point that the rule will not be held inapplicable simply because the alleged conduct involves more than one market participant. On this basis, the commission believes that the intent of this sentence is helpful in reinforcing the scope of the rule. However, the commission does not believe that it is necessary to state this requirement in a separate sentence, as is the case with the proposed rule. As a result, the commission deletes the second sentence of proposed subsection (b) and amends the first sentence of the subsection to begin, "This section applies to any entity, either acting alone or in cooperation with others, that buys or sells …."

Proposed Subsection (c), Definitions

A number of commenters recommended modifications to the definitions set forth in this subsection that related to proposed subsection (i) and CSM. Brazos stated that additional terms may require definition, such as ERCOT system-wide offer cap, control, effective local resource capacity, and local load. Brazos also suggested several points of clarification on the definition of "competitive offers" in proposed paragraph (c)(2), including the definition of "total offers," the proper distinction between "offers" and "parties," and whether a pivotal supplier may make multiple offers. Brazos also queried whether the rule should consider offers by affiliates as one offer.

In the definition of "pivotal supplier," Brazos stated that "it" appeared to refer to ERCOT. If this is the proper reading, Brazos stated, then only suppliers selling to ERCOT can be considered pivotal suppliers. Brazos Electric questioned whether this limitation was intended.

Joint Commenters opposed including definitions for "competitive offers," "95th percentile price," and "pivotal suppliers," as all of these definitions pertaining only to proposed subsection (i) (CSM), which Joint Commenters oppose. TXU also proposed to delete these definitions, arguing that they are not required if the commission accepts its proposal to delete proposed subsection (i). If the commission were to adopt proposed subsection (i), however, TXU proposed an alternative definition of pivotal supplier that accounts for demonstrably inflexible capacity and capacity that is committed under long-term sale contracts, or is required to serve load under regulated prices.

Joint Commenters recommended adding "hockey stick pricing" as a defined term, and drew its definition from the preamble to the proposed rule. Joint Commenters asserted that this definition is needed to distinguish hockey stick pricing from other forms of bidding that pose no concern. Joint Commenters proposed that the definition be stated as "Pricing that occurs when a supplier prices a small, economically expendable portion of its offer exorbitantly high."

Reliant recommended modifying the definition of "competitive offers" in proposed subsection (c)(2) to raise the percentage level at which a pivotal supplier may be considered to have made a competitive offer from 5.0% to 10%. Reliant suggested that the higher number is the equivalent of ten equally sized suppliers, and results in a Herfindahl-Hirschman Index (HHI) of 1,000, which is a more desirable level of competitiveness. In response, TIEC opposed Reliant's suggested amendment. In TIEC's view, HHI standards are not relevant if a supplier has already been determined to be pivotal. The 5.0% threshold permits pivotal suppliers only *de minimus* participation in the market before mitigation measures will apply, according to TIEC. If the threshold is increased, TIEC argued, a pivotal supplier might be able to make significant bids into the market and bid up prices while being immune from pricing safeguards.

Texas Genco recommended modifying the definition of "competitive offer" in proposed subsection (c)(2) to include those offers submitted by a pivotal supplier whose offers account for 15%, rather than 5.0% of the total offers.

Commission response

Withdrawal of CSM from this rulemaking for the reasons previously stated makes it unnecessary to define "competitive offers," "95th percentile price," and "pivotal supplier" at this time, and the commission has therefore deleted these definitions from the rule. The commission declines to add a definition of "hockey stick pricing," as it also is primarily relevant to CSM.

Texas Genco recommended changes to the definitions of competitive and non-competitive constraints. Texas Genco suggested modifying the definition of competitive constraint such that the first sentence would read, "A transmission element on which no supplier possesses local market power with respect to the price of electricity at or near that element." In addition, Texas Genco suggested amending the definition of noncompetitive constraint to include only a transmission element on which a supplier possesses local market power with respect to the price of electricity at or near the element. TXU proposed several changes to the definitions of competitive and non-competitive constraints. TXU suggested modifying the definitions of competitive restraint and noncompetitive constraint such that they do not include the term "local market power," which is not yet defined by the commission. TXU stated, however, that it agreed with the meaning of this proposed definition. Joint Commenters agreed with TXU's proposed amendments to the definition of competitive constraint and noncompetitive constraint, because TXU's proposals deleted market power definition concepts, which would require further exploration in the rule.

ERCOT stated that a number of terms that appear throughout the rule should be defined terms. ERCOT suggested that the following terms be defined: local market power, supplier, virtual offer, total requirements, persistent market power, effective local resource capacity. Brazos stated that several terms used in proposed subsection (d) require definition, such as "market day," "virtual offers," and "market intervals."

Commission response

Proposed subsection (h) directs ERCOT to develop procedures to mitigate the effects of local market power caused by congestion, and part of this task is to specify a method by which

noncompetitive constraints may be distinguished from competitive constraints. The commission believes that any refinement or interpretation of the definition of these terms (or terms contained within those terms) is appropriately undertaken in the stakeholder process required by proposed subsection (h). The commission does not wish to go beyond the basic definitions for those terms stated in the proposed rule before the process mandated by proposed subsection (h) has been completed. Nevertheless, the commission notes that the definition of local market power is the subject of another rulemaking project, Project Number 29042, making it inappropriate to define the term in this project. TXU's suggested revision to the definitions of competitive constraint and noncompetitive constraint to exclude "local market power" is reasonable, consistent with the commission's intent, and applicable to the work that has already taken place in the TNT process. The commission has therefore amended these two definitions accordingly.

The commission has also acted on Brazos' comments regarding a definition for "market intervals" as used in proposed paragraphs (d)(1) and (d)(2). The commission's intent was to reference ERCOT's settlement intervals. As a result, the commission has amended proposed paragraphs (d)(1) and (d)(2) to change the reference from market intervals to settlement intervals.

The commission notes that the term "effective local resource capacity" is a term defined immediately after it is used in proposed paragraph (k)(2), which states that "effective local resources capacity is the sum of each resource's capacity multiplied by its shift factor relative to the constraint." In any event, as discussed above, the commission has deleted proposed subsection (k).

Proposed Subsection (e), Control of Resources

ARM, in reply comments, observed that because the requirements of proposed subsections (d) and (e) do not impinge on the process of developing a nodal market, their inclusion in the rule is appropriate.

Joint Commenters recommended clarifying proposed subsection (e). They characterized as obscure the sentence, "A controlling entity has a substantial stake in the resource's profitable operation," and noted that the subsection does not address what happens if the definition of "controlling entity" seems to fit more than one entity, or if entities dispute who the controlling entity is. They also questioned why "a specified portion of a resource" was included in the next-to-last sentence. In addition, Joint Commenters observed that although the term "affiliate" is used in several places, the rule does not define the word. They stated that the definition in P.U.C. Substantive Rule §25.5 pertains to a utility affiliate, and hence does not fit precisely in this context. Joint Commenters further complained that the last sentence of the subsection increases potential confusion, and questioned why resources under common control would be considered affiliated for purposes of the subsection.

Reliant observed that the QSE may not be aware of the change in control of a resource prior to 14 days before the transfer. Consequently, it suggested inserting the following language after the second sentence in the subsection: "In the event the information is not known by the entity responsible for scheduling resources within the 14-day period, such notifications shall be made the earlier of the date on which the information is known or the date of the transfer of the control of the units." In their reply comments, Joint Commenters expressed support for Reliant's suggestion.

TIEC opined that although the subsection's definition of "control" is adequate for addressing resource control at the company level, the commission should focus not just on control by resource owners, but also should consider potential market abuse by QSEs. A resource-owning QSE can use its knowledge of offers and supply schedules to manipulate the market by adjusting its own offers or by colluding in bidding with other resource owners that schedule with the QSE. But even a non-resource-owning QSE can engage in manipulation strategies, TIEC contended, such as using information regarding offers and supply schedules of multiple resources with which the QSE has profit-sharing arrangements, perhaps even without the knowledge of the resource owners.

Texas Genco criticized the first sentence of the subsection as vague, and asked what kind of proof will be required to verify control of a resource.

TXU proposed modifying the subsection to read as follows:

(e) Control of resources. An entity registered as a resource with ERCOT shall inform ERCOT as to who controls the resource, and provide proof that is sufficient for ERCOT to verify control. In addition, any entity registered as a resource with ERCOT shall notify ERCOT of any change in control of the resource no later than seven business days after the date that the change in control takes effect. For purposes of this section, "control" means ultimate decision-making authority over how a resource is dispatched and priced, either by virtue of ownership or agreement, and a substantial financial stake in the resource's profitable operation. Any resource or specified portion of a resource shall be considered to have only one controlling entity. Resources under common control shall be considered affiliated.

TXU stated that the substituted wording for the "responsible for scheduling" language in the first sentence addresses the fact that QSEs are often not contractually privy to the detailed control structure of the resources that they represent; therefore, resource entities should be required to report their own control structure to ERCOT. TXU stated that its proposed timing change regarding notification of change in control is consistent with ERCOT Protocol §16.5.3. According to TXU, this change would still allow the commission's Market Oversight Division (MOD) and the IMM to monitor the exact point at which control was passed, but would avoid negative financial effects on market participants in situations where changes in control occur due to defaulting contractual parties. TXU reported that its substitution of the phrase "dispatched and priced" for "scheduled" is intended to comport proposed subsection (e) with the Texas Nodal structure, as well as with Federal Trade Commission and Department of Justice analyses of "control." Finally, TXU stated that its final change to the subsection recognizes the reality that a QSE must have a significant financial stake in the profitable operation of the resource to be considered an affiliate; merely representing a resource is insufficient to consider the QSE an affiliate of the resource. In reply comments, Joint Commenters supported TXU's recommended revisions to proposed subsection (e), as well as TXU's justifications for them.

Commission response

Concerning Texas Genco's comment about what proof is required to establish control of a resource, that detail is best left for ERCOT to address, because it is the entity that will need to determine control. The commission has also substantially accepted TXU's suggested language on the meaning of "control." In addition, in response to Joint Commenters' statements about joint control, the commission has deleted the requirement that a resource be considered to have only one controlling entity, and has added a requirement to inform ERCOT of the right to use

of an identified portion of the capacity of a jointly controlled resource. TIEC's comments about the potential for market abuse by QSEs apart from the control of resources, are beyond the scope of the subsection, which is limited to ascertaining the entities that control resources.

The commission acknowledges that the scheduling entity may lack the timely knowledge needed to comply with the requirement for advance notice of change in resource control. Substituting "resource entity" for "entity responsible for scheduling resources with ERCOT" eliminates this problem. In any event, advance notice of change in control is essential to effective market monitoring, as it alerts MOD to possible changes in market participant conduct and helps MOD quickly address any concerns that consequently arise. In addition, advance notice to ERCOT of changes in control may be necessary for use in the application of ex-ante price mitigation measures, to allow ERCOT sufficient time to reflect the changes in the ex-ante measures before they are applied to the periods after the changes in control occur. As to TXU's concern about a resource entity that obtains control of a resource due to its counterparty's default, the commission has added a provision that allows for notice as soon as possible in the event that the general notice deadline cannot be met.

Given the definition of "control" and the context provided by the rest of the amended subsection, the commission considers the meaning of "affiliate" to be clear.

Proposed Subsection (h), Local Market Power

Proposed subsection (h) provides that ERCOT, through its stakeholder process, shall develop and submit for commission approval procedures to mitigate the effects of local market power caused by congestion. Such procedures will specify a method by which noncompetitive constraints may be distinguished from competitive constraints. Brazos requested a clarification as to whether the referred procedures should be part of the protocols or part of the substantive rule.

Reliant suggested language change in proposed paragraphs (h)(1) and (h)(3) to clarify that ERCOT stakeholders should develop "protocols" rather than "procedures" to mitigate the effect of local market power, and that these protocols "shall be designed to ensure" rather than "shall ensure" that a noncompetitive constraint will not be treated as a competitive constraint.

In proposed paragraph (h)(2), Reliant wanted to specify that the designation of local constraints should be reviewed monthly, and that a constraint should be re-designated if it meets well defined criteria to show a change in the competitiveness from the annual designation. Reliant suggested deleting the proposed requirement for monthly criteria more stringent than the annual criteria on the grounds that this level of detail is unnecessary, and that it would make subsequent changes in the methodology difficult.

In proposed paragraph (h)(4), Reliant suggested that the "protocols," rather than the "procedures," be submitted to the commission for approval, and that subsequent changes to the protocols need not be submitted to the commission for formal approval, but instead should proceed through the Protocol revision process established in the Protocols. San Antonio concurred. TXU suggested deleting this entire subsection, stating that the Protocols, including protocols addressing noncompetitive constraints, are already required to be submitted to the commission for approval, and that the commission already has the authority to approve or reject future changes in the Protocols.

In reply comments, STEC disagreed with Reliant, San Antonio, and TXU, stating that it is critical that the procedures adopted by ERCOT through the stakeholder process be submitted to the commission for approval.

Brazos and ERCOT suggested that there should be a definition of "local market power." TXU suggested changing references to "local market power" to references to "noncompetitive constraints," and changing the subsection's title from "Local Market Power" to "Noncompetitive Constraints," stating that "local market power" is not defined in the proposed rule, and that "market power" is not defined anywhere by the commission. In reply comments, Joint Commenters proposed changes to the definitions for competitive constraint and noncompetitive constraint that would eliminate the reference to a "supplier who possesses local market power with respect to the price of electricity" and more simply define a competitive constraint as "a transmission element on which prices to relieve the constraint are moderated by the normal forces of competition between multiple, unaffiliated resources," while in the definition of a noncompetitive constraint, prices to relieve the constraint are not moderated by such forces.

In reply comments, Joint Commenters expressed a concern about proposals to define certain key terms by several commenters without a proposal for a definition that others can address in reply comments.

TXU suggested specifying that competitive and noncompetitive constraints should be designated one month prior to the annual auction of CRRs. In proposed paragraph (h)(3), TXU suggested simplifying the language to refer to "mitigation procedures" rather than to "procedures for mitigating local market power."

TIEC objected to proposed paragraph (h)(2) for prejudging certain aspects of the ERCOT process, and suggested deferring consideration of all aspects of ERCOT's local market power mitigation proposal to November 1. TIEC wanted to delete the entire subsection.

Joint Commenters suggested specifying that the procedures to be developed by ERCOT should provide for recovery of verifiable costs and an adder, which together would provide recovery of total costs including capital costs and a return of and on investment.

In reply comments, TIEC objected to the proposals by Reliant and Joint Commenters to incorporate details regarding local market power mitigation into the current draft rule, stating that such proposals are premature and should be raised in the ERCOT process. TIEC objected in particular to Joint Commenters' proposal that would guarantee that generators recover their long term operating costs, stating that cost recovery guarantees are inappropriate in competitive markets.

Commission response

The commission has changed "procedures" to "protocols," for two reasons. First, use of the term "protocols" is consistent with ERCOT's longstanding use of that term. Under ERCOT Protocols §1.1, the ERCOT Protocols "mean the document adopted by ERCOT, including any attachments or exhibits referenced in these Protocols, as amended from time to time that contain the scheduling, operating, planning, reliability, and settlement (including Customer registration) policies, rules, guidelines, procedures, standards, and criteria of ERCOT." Second, using the more specific term "protocols" recognizes that ERCOT need not

obtain commission oversight and review for detailed implementation procedures related to mitigation of noncompetitive constraints. In addition, the commission changed references to "approval" to "oversight and review," because the latter language is most consistent with the language in PURA §39.151(d) and the commission's recent modifications to P.U.C. Substantive Rule §25.501.

Under P.U.C. Procedural Rule §22.251, an affected entity may challenge ERCOT's adoption or amendment of a protocol. This process is appropriate for the large majority of protocols, because they concern detailed operational issues for which stakeholders usually share common interests. In contrast, mitigation protocols directly affect resource entities' profitability, and their short-term financial interests are directly in conflict with the entities that will be required to pay for the ancillary services that the resource entities provide ERCOT in order to manage the congestion on the noncompetitive constraints. In addition, mitigation protocols that address noncompetitive constraints have significant effects on the long-run viability of the ERCOT wholesale market, because the mitigation protocols affect the availability and siting of resources. Consequently, in proposed subsection (h), the commission has required that both new protocols and protocol amendments concerning mitigation for noncompetitive constraints be submitted to the commission for oversight and review. The commission has also amended the language of the subsection to make clear that the protocols developed pursuant to the subsection shall be submitted to the commission as part of the implementation of the requirements of P.U.C. Substantive Rule §25.501, so that the protocols will take effect as part of the wholesale market design required by that rule.

The commission agrees with Reliant's proposal to change "shall ensure…" to "shall be designed to ensure…," in order to recognize that mitigation protocols do not always work as intended.

The commission agrees with TIEC in reply comments that certain details are not necessary in the rule, and should first be addressed through the ERCOT stakeholder process. Among these details are Reliant's proposal that the designation of local constraints should be reviewed monthly; TXU's proposal that competitive and noncompetitive constraints should be designated one month prior to the annual auction of CRRs; and Joint Commenters' proposal regarding cost recovery when mitigation is applied. Similarly, the commission agrees with Reliant that the requirement for more stringent monthly designation criteria than annual designation criteria brings an unnecessary level of detail into the rule, and therefore has deleted this requirement from the rule. However, the commission disagrees with TIEC that the entire subsection should be deleted. The commission believes that it is important for the commission to specify by rule that the protocols for designating noncompetitive constraints must be submitted to the commission for approval, and cannot be changed through the stakeholder process without commission approval.

The commission agrees that the term "local market power" is not defined, and has adopted TXU's proposal to change references to "local market power" to references to "noncompetitive constraints," and has changed the title of the subsection accordingly. The commission has also changed the definition of competitive constraints and noncompetitive constraints to eliminate reference to "local market power," as suggested by Joint Commenters.

Proposed Subsection (k), Congestion Revenue Rights

Austin Energy stated that it does not object to proposed subsection (k). In contrast, San Antonio, Texas Genco, and TXU recommended the deletion of proposed paragraph (k)(2). TXU proposed deleting paragraph (k)(2) because according to TXU, it is inconsistent with the operation of generating units in a load pocket. TXU averred that proposed paragraph (k)(2) might force the operation of older, less efficient units that might not otherwise operate. The key issue, according to TXU, is the withholding of units to enhance the value of CRRs, which the market monitor can prevent without formal ownership limits. TXU stated that if the commission decides to impose limits on CRR holdings, then the details should be specified in the Texas Nodal Protocols for review by the commission. TXU stated that the use of shift factors in proposed paragraph (k)(2) is improper without a specified withdrawal bus, and the paragraph has no clear definition of "local load."

San Antonio objected to limitations on CRR holdings, especially because CRR deration, as stated in proposed paragraph (k)(4), would reduce the potential for market power abuse by eliminating the DEC game. Texas Genco asserted that CRR limits reduce the liquidity of the CRR market to the detriment of those bearing the embedded cost of the transmission system. Texas Genco also asserted that CRR auction prices should fully reflect the expected value of the transmission congestion.

TXU stated that the broad requirements for any CRR derating should be inserted into P.U.C. Substantive Rule §25.501, with implementation details left for the Texas Nodal Protocols. TXU recommended revisions of proposed paragraphs (k)(3) and (k)(4) in order to provide consistency with the point-to-point CRR design of the Texas Nodal Protocols.

In proposed paragraph (k)(1), Brazos asked for a definition of "beneficiary," "days," and "market days." In proposed paragraph (k)(2), Brazos asked what the difference in definitions was between "entity" and "supplier." In proposed subsection (k)(3), Brazos asked for the definitions of the following terms: point-to-point option, point-to-point obligation, portfolios, source point, and sink point. In proposed paragraph (k)(4), Brazos asked how ERCOT would determine shadow prices. San Antonio asked for specific definitions of "shift factors" and "constraint," as well as the context in which the commission defines them.

Commission response

The commission has deleted proposed subsection (k) in order to give ERCOT stakeholders the opportunity to address the issues in the subsection as they develop the Texas Nodal Protocols. The commission will again consider the issues addressed in the subsection as part of its review of the Texas Nodal Protocols after ERCOT has filed them with the commission.

Proposed Subsection (l), Independent Market Monitor

Reliant suggested adding language to ensure that information is kept confidential when the IMM communicates with MOD, and to clarify that the IMM must report to MOD once it has completed its communications with a market participant.

Brazos questioned whether the creation of an Independent Market Monitoring Committee (IMMC) comprising the independent Board members and the Director of MOD as an ex-officio nonvoting member means that the IMMC would have special powers that the ERCOT Board as a whole could not oversee, and asked whether this would result in a potential breach of the Board's fiduciary duties.

The proposed subsection would allow the IMM to be staffed with either ERCOT employees or consultants. Brazos suggested that, in light of the issues that surfaced in the spring of 2004 regarding the use of consultants by ERCOT, there should be a more definitive rule on how to staff the IMM. Joint Commenters opposed the IMM being staffed with ERCOT employees. Furthermore, Joint Commenters would require barring from eligibility a person that has served as an officer, director, owner, employee, partner, or legal representative of ERCOT, or of a market participant operating in ERCOT, or of an entity that supplied at least $10,000 of products or services to ERCOT, during the two years preceding IMM appointment; or a person that owned or controlled stocks or bonds with a value of $10,000 or more in any of the referred entities. In addition, Joint Commenters would bar a person that has served the IMM from employment with any of the referred entities for one year after leaving IMM service.

Brazos suggested that the IMMC should be involved along with the IMM and MOD in developing policies to ensure appropriate integration of IMM and commission oversight of the ERCOT market. Brazos also suggested that the ERCOT Board be involved in developing screens and indices for the IMM to monitor, along with the screens and indices provided by MOD or created by the IMM. Regarding the requirement for the IMM to report unusual offers and bids or other questionable activities to MOD, Brazos asked for a clarification as to what is considered "unusual" and "questionable." Regarding the provision that the IMM shall discuss all identified instances of harmful behavior with commission staff and ERCOT legal staff, Brazos suggested that the IMMC should also be included in these discussions.

Texas Genco and Joint Commenters proposed to eliminate the requirement for the IMM to inform MOD of unusual offers and bids or other questionable activities before contacting market participants to investigate the issue.

OPC recommended the inclusion of the member of the ERCOT Board that represents OPC as a member of the IMMC. Regarding the requirement that the IMM produce a "State of the Market Report" assessing the competitiveness of the ERCOT-operated markets, OPC recommended a requirement that a general summary of the information described in proposed paragraph (l)(6), relating to all identified instances of harmful behavior that cannot be resolved informally, be included in the report.

TIEC supported the creation of an IMM for ERCOT as provided in the proposed subsection, and urged the commission to implement the IMM as soon as the second quarter of 2005, rather than delaying implementation until April 2006. TIEC suggested two changes to the proposed subsection. First, TIEC recommended that the IMM be precluded from using ERCOT employees for its staff, in order to preserve the IMM's independence. This would not prevent the IMM from relying on ERCOT staff for support tasks. Second, TIEC recommended modifying proposed paragraph (l)(7) to clarify the timetable for the IMM reports, in order to ensure that the reports remain abreast of the changes in the ERCOT markets.

In reply comments, TIEC addressed Reliant's proposal that would require MOD to keep the IMM's findings of market abuse confidential. TIEC opined that, while there are good reasons to keep questionable market behavior confidential during an investigation, the investigation findings should be made public if it is found that market abuse occurred, in order to deter further abuses.

ERCOT supported the creation of an IMM as proposed.

The Joint Commenters recommended language to ensure that the IMM and commission staff coordinate in an effort to avoid duplicative or inconsistent requirements or proceedings. The Joint Commenters suggested adding a materiality standard to the provision that the IMM should discuss with the commission staff and with ERCOT legal staff identified instances of harmful behavior. In reply comments, Joint Commenters opposed OPC's proposal that the OPC member on the ERCOT Board be a voting member on the IMMC, stating that the IMMC would no longer be independent. In support of their position, Joint Commenters stated that OPC is not independent, because it has a statutory obligation to represent a particular market sector, and added that the legislature has not given OPC any oversight authority that would entitle it to special status of the type OPC sought.

In reply comments, STEC expressed concerns about the establishment of an IMM at ERCOT to monitor the real-time market, stating that ERCOT's reputation for discerning market abuses is dismal. STEC stated that consumers and small stakeholders had previously expressed a preference that real-time market monitoring be done by MOD, provided that sufficient financial resources be made available to MOD. STEC opined that the IMMC could not do as good a job as MOD. STEC added that the independent Board members could be influenced by the market stakeholders with whom they serve on the Board, and that an IMM at ERCOT may not restore consumer confidence in ERCOT or in a competitive market. At a minimum, STEC supported the inclusion of the representative from OPC on the ERCOT Board in the IMMC.

Commission response

The commission has deleted proposed subsection (l), because the issue of a market monitor will be considered by the Legislature in its upcoming session. Since the publication of the proposed rule, the Sunset Commission has made the following recommendations to the Legislature concerning market monitoring: (1) require ERCOT to contract with, fund, and support the operations of a private company to perform market monitoring; (2) require the commission to select the monitoring company, define the company's monitoring responsibilities, and set standards for funding, staff qualifications, and ethical conduct; (3) require the market monitoring company to report potential violations of commission or ERCOT rules or other potential market manipulations to the commission; and (4) require the market monitoring company to submit an annual report to the commission and ERCOT identifying market design flaws and recommending methods to fix the flaws. *Sunset Commission Decisions, Public Utility Commission of Texas* (September 2004) at 11-13. In response to a recommendation from a member of the public that the market monitor report directly to the three independent members of the ERCOT Board, the Sunset Commission staff responded that such a reporting structure may have the unintended consequence of tying the monitors too closely to the ERCOT Board. Sunset Commission staff instead recommended that the market monitor directly report to the three members of the commission. The Sunset Commission adopted this recommendation. In addition, the Sunset Commission Decisions report states that the monitoring staff would have unrestricted authority to communicate with commission staff. The commission supports the Sunset Commission's recommendations to the Legislature, and looks forward to the discussion of market monitoring

in the upcoming legislative session. The commission will reconsider a rule on this issue after the upcoming legislative session has ended.

Proposed Subsection (m)

CPS and the Joint Commenters suggested that the commission clarify which subsections are to be implemented under the current market design and which subsections are to be implemented as part of any future nodal market design. TIEC suggested that the following aspects of the rule should be implemented as soon as possible: CSM, expansion of disclosure requirements for resource offers, regulations pertaining to RMR resources, and the creation of an IMM.

Commission response

As a result of other amendments made to the proposed rule, the commission finds that subsection (m) is no longer necessary and therefore has deleted it. Only proposed subsection (h) is dependent on the new market design, and that subsection specifies its own implementation requirements. All other provisions of the rule shall become effective as soon as possible under the Administrative Procedure Act.

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting this section, the commission makes other minor modifications not discussed above for the purpose of clarifying its intent.

This rule is adopted pursuant to the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998 & Supplement 2005) (PURA), which provides the commission with the authority to adopt and enforce rules reasonably required in the exercise of its powers and jurisdiction; §35.004(e), which requires that the commission ensure that ancillary services necessary to facilitate the transmission of electric energy are available at reasonable prices with terms and conditions that are not unreasonably preferential, prejudicial, discriminatory, predatory, or anticompetitive; §39.001(d), which requires the commission to order competitive rather than regulatory methods to achieve the goals of PURA Chapter 39 to the greatest extent feasible; §39.151(a)(1), which requires that ERCOT ensure access to the transmission and distribution systems for all buyers and sellers of electricity on nondiscriminatory terms; §39.151(a)(2), which requires that ERCOT ensure the reliability and adequacy of the regional electrical network; §39.151(a)(4), which requires that ERCOT ensure that electricity production and delivery are accurately accounted for among generators and wholesale buyers in the ERCOT power region; §39.151(c), under which the commission certified ERCOT to perform the functions prescribed by §39.151 for the ERCOT power region; §39.151(d), which requires ERCOT to establish and enforce procedures, consistent with PURA and the commission's rules, relating to the reliability of the regional electrical network and accounting for the production and delivery of electricity among generators and all other market participants, and which makes these ERCOT procedures subject to commission oversight and review; §39.151(i), which permits the commission to delegate authority to ERCOT to enforce operating standards within the ERCOT regional electrical network and to establish and oversee transaction settlement procedures, and which permits the commission to establish the terms and conditions for ERCOT's authority to oversee utility dispatch functions after the introduction of customer choice; and §39.151(j), which requires a retail electric provider, municipally owned utility, electric cooperative, power marketer, transmission and distribution utility, or power generation company to observe all scheduling, operating, planning, reliability, and settlement policies, rules, guidelines, and procedures established by ERCOT.

Cross Reference to Statutes: PURA §§14.002, 35.004(e), 39.001(d), and 39.151.

§25.502. Pricing Safeguards in Markets Operated by the Electric Reliability Council of Texas.

(a) Purpose. The purpose of this section is to protect the public from harm when wholesale electricity prices in markets operated by the Electric Reliability Council of Texas (ERCOT) in the ERCOT power region are not determined by the normal forces of competition.

(b) Applicability. This section applies to any entity, either acting alone or in cooperation with others, that buys or sells at wholesale energy, capacity, or any other wholesale electric service in a market operated by ERCOT in the ERCOT power region; any agent that represents such an entity in such activities; and ERCOT. This section does not limit the commission's authority to ensure reasonable ancillary energy and capacity service prices and to address market power abuse.

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

(1) Competitive constraint--A transmission element on which prices to relieve congestion are moderated by the normal forces of competition between multiple, unaffiliated resources.

(2) Generation entity--an entity that owns or controls a generation resource.

(3) Market location--the location for purposes of financial settlement of a service (*e.g.*, congestion management zone in a zonal market design or a node in a nodal market design).

(4) Noncompetitive constraint--A transmission element on which prices to relieve congestion are not moderated by the normal forces of competition between multiple, unaffiliated resources.

(5) Resource--a generation resource, or a load capable of complying with ERCOT instructions to reduce or increase the need for electrical energy or to provide an ancillary service (*i.e.*, a "load acting as a resource").

(6) Resource entity--an entity that owns or controls a resource.

(d) Disclosure of offer prices. ERCOT shall publish on its market information system:

(1) no later than noon of the following calendar day, the identities of all entities submitting offers for which the energy offer price was $300 per megawatt-hour (MWh) or higher, or the capacity offer price was $300 per megawatt per hour (MW/h) or higher, and the corresponding settlement intervals and market locations;

(2) no later than noon of the following calendar day, the identity of any entity whose offer sets a price for energy above $300/MWh (along with the corresponding settlement interval and market location) and the identity of any entity whose offer sets a price for capacity above $300/MW/h (along with the corresponding settlement interval and market location); and

(3) concurrent with the publication of a corrected market clearing price, the identity of any entity who is paid more than the market clearing price for the service and the corresponding settlement interval and market location.

(e) Control of resources. Each resource entity shall inform ERCOT as to each resource that it controls, and provide proof that is

sufficient for ERCOT to verify control. In addition, the resource entity shall notify ERCOT of any change in control of a resource that it controls no later than 14 calendar days prior to the date that the change in control takes effect, or as soon as possible in a situation where the resource entity cannot meet the 14 calendar day notice requirement. For purposes of this section, "control" means ultimate decision-making authority over how a resource is dispatched and priced, either by virtue of ownership or agreement, and a substantial financial stake in the resource's profitable operation. If a resource is jointly controlled, the resource entities shall inform ERCOT of any right to use an identified portion of the capacity of the resource. Resources under common control shall be considered affiliated.

(f) Reliability-must-run resources. Except for the occurrence of a forced outage, a generation entity shall notify ERCOT in writing no later than 90 calendar days prior to the date on which it intends to cease or suspend operation of a generation resource for a period of greater than 180 calendar days. Unless ERCOT has determined that a generation entity's generation resource is not required for ERCOT reliability, the generation entity shall not terminate its registration of the generation resource with ERCOT unless it has transferred the generation resource to a generation entity that has a current resource entity agreement with ERCOT and the transferee registers that generation resource with ERCOT at the time of the transfer.

(1) Complaint with the commission. If, after 90 calendar days following ERCOT's receipt of the generation entity's notice, either ERCOT has not informed the generation entity that the generation resource is not needed for ERCOT reliability or both parties have not signed a reliability-must-run (RMR) agreement for the generation resource, then the generation entity may file a complaint with the commission against ERCOT, pursuant to §22.251 of this title (relating to Review of Electric Reliability Council of Texas (ERCOT) conduct).

(A) The generation entity shall have the burden of proof.

(B) Pursuant to §22.251(d) of this title, absent a showing of good cause to the commission to justify a later deadline, the generation entity's deadline to file the complaint is 35 calendar days after the 90th calendar day following ERCOT's receipt of the notice.

(C) The dispute underlying the complaint is not subject to ERCOT's alternative dispute resolution procedures.

(D) In its complaint, the generation entity may request interim relief pursuant to §22.125 of this title (relating to Interim Relief), an expedited procedural schedule, and identify any special circumstances pertaining to the generation resource at issue.

(E) Pursuant to §22.251(f) of this title, ERCOT shall file a response to the generation entity's complaint and shall include as part of the response all existing, non-privileged documents that support ERCOT's position on the issues identified by the generation entity pursuant to §22.251(d)(1)(C) of this title.

(F) The scope of the complaint may include the need for the RMR service; the reasonable compensation and other terms for the RMR service; the length of the RMR service, including any appropriate RMR exit options; and any other issue pertaining to the RMR service.

(G) Any compensation ordered by the commission shall be effective the 91st calendar day after ERCOT's receipt of the notice. If there is a pre-existing RMR agreement concerning the generation resource, the compensation ordered by the commission shall not become effective until the termination of the pre-existing agreement, unless the commission finds that the pre-existing RMR agreement is not in the public interest.

(H) If the generation entity does not file a complaint with the commission, the generation entity shall be deemed to have accepted ERCOT's most recent offer as of the 115th calendar day after ERCOT's receipt of the notice.

(2) Out-of-merit-order dispatch. The generation entity shall maintain the generation resource so that it is available for out-of-merit-order dispatch instruction by ERCOT until:

(A) ERCOT determines that the generation resource is not required for ERCOT reliability;

(B) any RMR agreement takes effect;

(C) the commission determines that the generation resource is not required for ERCOT reliability; or

(D) a commission order requiring the generation entity to provide RMR service takes effect.

(3) RMR exit strategy. Unless otherwise ordered by the commission, the implementation of an RMR exit strategy pursuant to ERCOT protocols is not affected by the filing of a complaint pursuant to this subsection.

(g) Noncompetitive constraints. ERCOT, through its stakeholder process, shall develop and submit for commission oversight and review protocols to mitigate the price effects of congestion on noncompetitive constraints.

(1) The protocols shall specify a method by which noncompetitive constraints may be distinguished from competitive constraints.

(2) Competitive constraints and noncompetitive constraints shall be designated annually prior to the corresponding auction of annual congestion revenue rights. A constraint may be redesignated on an interim basis.

(3) The protocols shall be designed to ensure that a noncompetitive constraint will not be treated as a competitive constraint.

(4) The protocols shall not take effect until after the commission has exercised its oversight and review authority over these protocols as part of the implementation of the requirements of §25.501 of this title, so that these protocols shall take effect as part of the wholesale market design required by that section. Any subsequent amendment to these protocols shall also be submitted to the commission for oversight and review, and shall not take effect unless ordered by the commission.

(h) System-wide offer cap. A supply offer shall not exceed $1,000/MWh or $1,000/MW/h.

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 December 20, 2004.

TRD-200407391
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Effective date: January 9, 2005
Proposal publication date: June 25, 2004
For further information, please call: (512) 936-7223

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 30. ADMINISTRATION SUBCHAPTER BB. COMMISSIONER OF EDUCATION: PURCHASING AND CONTRACTS

19 TAC §30.2001, §30.2002

The Texas Education Agency (TEA) adopts new §30.2001 and §30.2002, concerning the historically underutilized business (HUB) program and procedures relating to protests for purchasing issues and dispute resolution in accordance with Texas Government Code requirements. The new sections are adopted without changes to the proposed text as published in the October 22, 2004, issue of the *Texas Register* (29 TexReg 9783) and will not be republished. New §30.2001 adopts provisions related to the HUB program. New §30.2002 adopts procedures for protests, dispute resolution, and appeals relating to purchasing and contract issues.

Agency legal counsel has determined that the commissioner of education should take formal rulemaking action to place into the *Texas Administrative Code* (TAC) rules for the HUB program, protest procedures for purchasing issues, and procedures for dispute resolution as required by statute. Adopted new 19 TAC Chapter 30, Subchapter BB, implements these requirements.

Texas Government Code, §2161.003, directs a state agency to adopt the HUB rules of the Texas Building and Procurement Commission (TBPC) as its own rules. Those rules apply to state agency construction projects and purchases of goods and services paid for with appropriated money. Adopted new 19 TAC §30.2001, Historically Underutilized Business (HUB) Program, adopts by reference the TBPC rules concerning the HUB program.

Texas Government Code, §2155.076, requires that each state agency by rule develop and adopt protest procedures for resolving vendor protests relating to purchasing issues. Agency rules must be consistent with the TBPC rules and include standards for maintaining documentation about the purchasing process to be used in the event of a protest. In addition, Texas Government Code, Chapter 2260, requires each unit of state government with rulemaking authority to develop rules to govern the negotiation and mediation of a claim. Adopted new 19 TAC §30.2002, Procedures for Protests, Dispute Resolution, and Appeals Relating to Purchasing and Contract Issues, establishes that any person interested in protesting an award must do so by filing a written formal protest petition and provides the specifications that must be addressed in the protest petition. The new rule also specifies the mediation procedures for resolution of a formal protest and sets forth guidelines to appeal a protest determination.

No comments were received regarding adoption of the new sections.

The new sections are adopted under the Texas Government Code, §2161.003, §2155.076, and Chapter 2260, which authorize the Texas Education Agency to adopt the HUB rules of the TBPC as its own rules and to adopt protest procedures for resolving vendor protests relating to purchasing issues and rules for negotiation and mediation.

The new sections implement the Texas Government Code, §§2161.002, 2161.003, and 2155.076, and Chapter 2260.

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 December 17, 2004.

TRD-200407370
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Effective date: January 6, 2005
Proposal publication date: October 22, 2004
For further information, please call: (512) 475-1497

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TITLE 22. EXAMINING BOARDS

PART 4. TEXAS COSMETOLOGY COMMISSION

CHAPTER 83. SANITARY RULINGS

22 TAC §§83.3 - 83.5, 83.10, 83.13, 83.14, 83.17, 83.23, 83.25, 83.27, 83.30

The Texas Cosmetology Commission adopts amendments to §83 Sanitary Rulings without changes to the proposed text as published in the September 10, 2004 issue of the *Texas Register* (29 TexReg 8743). The adopted amendments involve the following sections: §83.3, concerning Proper Quarters; §83.4, concerning Toilet/Bathrooms; §83.5, concerning Waste and Refuse; §83.10, concerning Towels; §83.13, concerning Implements, Combs, Brushes, and Rollers; §83.14, concerning Disinfection Practices and Procedures; §83.17 , concerning Prohibited Medical Practices; §83.23 , concerning Personal Hygiene; §83.25, concerning Arresting Bleeding; §83.27, concerning Dispensary and Storage Area; and §83.30, concerning Proper Labeling.

The adopted amendments further specify the way all licensees and students must implement and maintain the sanitary rules in an establishment.

No public comments were received regarding the amendments as published.

The amendments are 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 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 December 13, 2004.

TRD-200407301

Antoinette Humphrey
Executive Director
Texas Cosmetology Commission
Effective date: January 2, 2005
Proposal publication date: September 10, 2004
For further information, please call: (512) 380-7691

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CHAPTER 89. GENERAL RULES AND REGULATIONS

22 TAC §89.1

The Texas Cosmetology Commission adopts amendments to §89.1 concerning Schedule of Fines. The amendments were proposed and published on September 10, 2004 issue of the *Texas Register* (29 TexReg 8744).

The adopted amendment updates the administrative penalty amounts assessed for each violation.

No public comments were received regarding the amendments as published.

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

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 December 13, 2004.

TRD-200407303
Antoinette Humphrey
Executive Director
Texas Cosmetology Commission
Effective date: January 2, 2005
Proposal publication date: September 10, 2004
For further information, please call: (512) 380-7691

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PART 9. TEXAS STATE BOARD OF MEDICAL EXAMINERS

CHAPTER 162. SUPERVISION OF MEDICAL SCHOOL STUDENTS

22 TAC §162.1, §162.2

The Texas State Board of Medical Examiners adopts an amendment to §162.1 and new §162.2, concerning Supervision of Medical School Students. Section 162.1 is adopted with changes to the proposed text as published in the October 29, 2004 issue of the *Texas Register* (29 TexReg 9969). The text of the rule will be republished. Section 162.2 is adopted without changes to the proposed text as published in the October 29, 2004, issue of the *Texas Register* (29 TexReg 9969) and will not be republished.

The amendment to §162.1 deletes the requirement that the supervising physician hold a clinical faculty appointment, and new §162.2 adds the provisions of Chapter 186, Supervision of Physician Assistant Students.

Elsewhere in this issue of the *Texas Register*, the Texas State Board of Medical Examiners contemporaneously adopts the repeal of §186.1. Section 162.2 replaces the requirements of §186.1.

One comment was received from the Texas Medical Association in support of the rules. TMA did suggest a change to §162.1 to allow VA and military physicians to continue in the role of preceptors to medical students without requiring a Texas medical license.

Response: The Board will reconsider this issue at a later time.

Section 162.1 is adopted with a minor change. The word "only" was added at the beginning of the rule.

The amendment and new section are adopted under the authority of the Texas Occupations Code Annotated, §157.001 and §157.006 which provides the Texas State Board of Medical Examiners to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

§162.1. Supervision of Medical Students.

Only a physician with a current and unrestricted Texas medical license may supervise a medical student if the medical student meets the following criteria:

(1) is enrolled at a Texas medical school;

(2) is a student at a medical school located outside Texas and is enrolled as a visiting student at a Texas medical school; or

(3) will receive supervised medical education in a Texas hospital or teaching institution sponsoring or participating in a program of graduate medical education accredited by the Accrediting Council for Graduate Medical Education, the American Osteopathic Association, or the Texas State Board of Medical Examiners in the same subject as the medical or osteopathic medical education in which the hospital or teaching institution has an agreement with the applicant's school.

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 December 20, 2004.

TRD-200407427
Donald W. Patrick, MD, JD
Executive Director
Texas State Board of Medical Examiners
Effective date: January 9, 2005
Proposal publication date: October 29, 2004
For further information, please call: (512) 305-7016

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CHAPTER 166. PHYSICIAN REGISTRATION

22 TAC §166.1

The Texas State Board of Medical Examiners adopts an amendment to §166.1, concerning Physician Registration, without changes to the proposed text as published in the October 29,

2004, issue of the *Texas Register* (29 TexReg 9969) and will not be republished.

The amendment relates to licensees notifying the board of changes in professional names.

Elsewhere in this issue of the *Texas Register*, the Texas State Board of Medical Examiners adopts the rule review of Chapter 166 which was proposed in the November 12, 2004, issue of the *Texas Register* (29 TexReg 10589)

No comments were received regarding adoption of the rule.

The amendment is adopted under the authority of the Texas Occupations Code Annotated, §§156.001, 154.002 and 154.006 which provides the Texas State Board of Medical Examiners to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

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 December 20, 2004.

TRD-200407428
Donald W. Patrick, MD, JD
Executive Director
Texas State Board of Medical Examiners
Effective date: January 9, 2005
Proposal publication date: October 29, 2004
For further information, please call: (512) 305-7016

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CHAPTER 172. TEMPORARY LICENSES

22 TAC §172.10

The Texas State Board of Medical Examiners adopts new §172.10, concerning Department of State Health Services Medically Underserved Area (DSHS-MUA) Temporary License, without changes to the proposed text as published in the October 29, 2004, issue of the *Texas Register* (29 TexReg 9970) and will not be republished.

The new section is necessary to establish fees and rules relating to the granting of temporary licenses.

No comments were received regarding adoption of the rule.

The new section is adopted under the authority of the Texas Occupations Code Annotated, §153.001 and §155.104 which provides the Texas State Board of Medical Examiners to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

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 December 20, 2004.

TRD-200407429
Donald W. Patrick, MD, JD
Executive Director
Texas State Board of Medical Examiners
Effective date: January 9, 2005
Proposal publication date: October 29, 2004
For further information, please call: (512) 305-7016

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CHAPTER 175. FEES, PENALTIES AND APPLICATIONS

22 TAC §175.1

The Texas State Board of Medical Examiners proposes an amendment to §175.1, concerning fees for physician-in-training permits, without changes to the proposed text as published in the October 29, 2004, issue of the *Texas Register* (29 TexReg 9970) and will not be republished.

The amendment is necessary to establish fees in the rules relating to physician-in-training permits.

Elsewhere in this issue of the *Texas Register*, the Texas State Board of Medical Examiners contemporaneously adopts the rule review of Chapter 175.

No comments were received regarding adoption of the rule.

The amendment is adopted under the authority of the Texas Occupations Code Annotated, §156.007 which provides the Texas State Board of Medical Examiners to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

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 December 20, 2004.

TRD-200407430
Donald W. Patrick, MD, JD
Executive Director
Texas State Board of Medical Examiners
Effective date: January 9, 2005
Proposal publication date: October 29, 2004
For further information, please call: (512) 305-7016

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CHAPTER 183. ACUPUNCTURE

22 TAC §183.2

The Texas State Board of Medical Examiners adopts an amendment to §183.2, concerning Acupuncture, without changes to the proposed text as published in the September 24, 2004, issue of the *Texas Register* (29 TexReg 9161) and will not be republished.

The amendment is necessary because the National Certification Commission for Acupuncture and Oriental Medicine (NCCAOM) examination has been reformatted and these changes recognize that reformatting.

No comments were received regarding adoption of the rule.

The amendment is adopted under the authority of the Occupations Code Annotated, §205.203 which provides the Texas State Board of Medical Examiners to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

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 December 20, 2004.

TRD-200407431
Donald W. Patrick, MD, JD
Executive Director
Texas State Board of Medical Examiners
Effective date: January 9, 2005
Proposal publication date: September 24, 2004
For further information, please call: (512) 305-7016

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CHAPTER 186. SUPERVISION OF PHYSICIAN ASSISTANT STUDENTS

22 TAC §186.1

The Texas State Board of Medical Examiners adopts the repeal of §186.1, concerning Supervision of Physician Assistant Students, without changes to the proposed text as published in the October 29, 2004, issue of the *Texas Register* (29 TexReg 9971) and will not be republished.

The repeal is necessary as this section has been incorporated into §162.2.

Elsewhere in this issue of the *Texas Register*, the Texas State Board of Medical Examiners contemporaneously adopts new §162.2. Section 162.2 replaces the requirements of §186.1.

No comments were received regarding adoption of the rule.

The repeal is adopted under the authority of the Texas Occupations Code Annotated, §§153.001; 155.001; 155.002; 155.105 which provides the Texas State Board of Medical Examiners to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to supervision of physician assistant students.

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 December 21, 2004.

TRD-200407432
Donald W. Patrick, MD, JD
Executive Director
Texas State Board of Medical Examiners
Effective date: January 9, 2005
Proposal publication date: October 29, 2004
For further information, please call: (512) 305-7016

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CHAPTER 193. STANDING DELEGATION ORDERS

22 TAC §193.6

The Texas State Board of Medical Examiners adopts an amendment to §193.6, concerning Standing Delegation Orders, without changes to the proposed text as published in the October 29, 2004, issue of the *Texas Register* (29 TexReg 9972) and will not be republished.

The amendment concerns delegation of the carrying out or signing of prescription drug orders to physician assistants and advanced practice nurses to make the procedure for registering alternate delegating physicians consistent with the registration procedure required under Chapter 185 on physician assistants.

Comments were received at the public hearing from the Texas Nurses Association and the Coalition for Nurses in Advanced Practice expressing concerns that the rule implies TSBME has regulatory authority over advanced practice nurses. The Texas Nurses Association also provided a similar written comment.

Response: The revised Board rule does not impose any greater authority over advanced practice nurses, but only simplifies the current registration process for alternate physician supervision.

Comment: Clarification was requested regarding log requirements referenced in 193.6(g).

Response: The discussion of the Board's use of the log satisfied the concerns voiced in the comments.

The amendment is adopted under the authority of the Texas Occupations Code Annotated, §§153.001, 157.0511, 157.052-054 and 157.0541 which provides the Texas State Board of Medical Examiners to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to standing delegation orders.

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 December 20, 2004.

TRD-200407433
Donald W. Patrick, MD, JD
Executive Director
Texas State Board of Medical Examiners
Effective date: January 9, 2005
Proposal publication date: October 29, 2004
For further information, please call: (512) 305-7016

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PART 11. BOARD OF NURSE EXAMINERS

CHAPTER 215. NURSE EDUCATION

22 TAC §§215.1 - 215.13

The Board of Nurse Examiners adopts without changes the repeal of Chapter 215 concerning Nurse Education, §§215.1 - 215.13. The proposed repeal was published in the November 12, 2004, issue of the *Texas Register* (29 TexReg 10344). Effective February 1, 2004, the Board of Nurse Examiners and the Board of Vocational Nurse Examiners were merged into one agency, the Board of Nurse Examiners. The Board of Vocational Nurse Examiners ceased to exist as an agency. House Bill 1483, passed by the 78th Regular Legislative Session, was the legislative action that implemented the consolidation. Concurrent with this adopted repeal is the adoption of a new chapter 215 (Professional Nursing Education). This repeal is for the purpose of preventing conflicting rules and providing consistency in the education rules applicable to all nurses.

No comments were received in response to this proposal.

The adopted repeal of this chapter is pursuant to the authority of Texas Occupations Code §§301.151 and 301.152 which authorizes the Board of Nurse Examiners to adopt, enforce, and repeal rules consistent with its legislative authority under the Nursing Practice Act. The adoption of the repeal will not affect any existing statute.

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 December 20, 2004.

TRD-200407389
Katherine Thomas
Executive Director
Board of Nurse Examiners
Effective date: January 9, 2005
Proposal publication date: November 12, 2004
For further information, please call: (512) 305-6823

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CHAPTER 215. PROFESSIONAL NURSING EDUCATION

22 TAC §§215.1 - 215.13

The Board of Nurse Examiners (Board) adopts a new Chapter 215, §§215.1 - 215.13, concerning Professional Nursing Education. Section 215.2 is adopted with changes to the text as published in the November 12, 2004, issue of the *Texas Register* (29 TexReg 10345). Sections 215.1, 215.3 - 215.13 are adopted without changes and will not be republished.

Effective February 1, 2004, the Board of Nurse Examiners and the Board of Vocational Nurse Examiners were merged into one agency, the Board of Nurse Examiners. The Board of Vocational Nurse Examiners ceased to exist as an agency. House Bill 1483, passed by the 78th Regular Legislative Session, was the legislative action that implemented the consolidation. HB 1483 changed the Board's function of "accrediting" nursing education programs to "approving" nursing education programs and this new chapter clarifies this process. Concurrent with this adoption is the repeal of the existing Chapter 215 (Nurse Education). A new education rule applicable to vocational nursing has also been proposed (Chapter 214).

No comments were received in response to this proposal.

The new sections are adopted pursuant to the authority of Texas Occupations Code §301.151 and §301.152 which authorize the Board of Nurse Examiners to adopt, enforce, and repeal rules consistent with its legislative authority under the Nursing Practice Act. The adoption of this chapter will not affect any existing statute.

§215.2. Definitions.

Words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise:

(1) Accredited nursing education program--a professional nursing education program having voluntary accreditation by a Board-approved nursing accrediting body (i.e. NLNAC, CCNE).

(2) Affiliating Agency or Clinical Facility--a health care facility or agency which provides learning experiences for students.

(3) Alternative practice settings--settings which provide opportunities for clinical learning experiences although their primary function is not the delivery of health care.

(4) Annual Report--a document required by the Board to be submitted at a specified time by the nursing education program dean or director that serves as verification of the program's adherence to chapter 215, Professional Nursing Education.

(5) Approved professional nursing education program--a professional nursing education program approved by the Board of Nurse Examiners for the State of Texas.

(6) Articulation--a planned process between two or more educational systems to assist students to make a smooth transition from one level of education to another without duplication in learning.

(7) Board--the Board of Nurse Examiners for the State of Texas composed of members appointed by the Governor for the State of Texas.

(8) Clinical learning experiences--faculty-planned and guided learning activities designed to assist students to meet stated program and course outcomes and to safely apply knowledge and skills when providing nursing care to clients across the life span as appropriate to the role expectations of the graduates. These experiences occur in nursing skills and computer laboratories; in simulated clinical settings; in a variety of affiliating agencies or clinical practice settings including, but not limited to: acute care facilities, extended care facilities, clients' residences, and community agencies; and in associated clinical conferences.

(9) Clinical preceptor--a registered nurse or other licensed health professional who meets the minimum requirements in §215.10(f)(5) of this chapter (relating to Management of Clinical Learning Experiences and Resources), not paid as a faculty member by the governing institution, and who directly supervises a student's clinical learning experience. A clinical preceptor facilitates student learning in a manner prescribed by a signed written agreement between the educational institution, preceptor, and affiliating agency (as applicable).

(10) Clinical teaching assistant--a registered nurse licensed in Texas, who is employed to assist in the clinical area and work under the supervision of a Master's or Doctorally prepared nursing faculty member and who meets the minimum requirements in §215.10(g)(4) of this chapter.

(11) Conceptual Framework--theories or concepts giving structure to the curriculum and enabling faculty to make consistent decisions about all aspects of curriculum development, implementation, and evaluation.

(12) Course--organized subject content and related activities, which may include didactic, laboratory and/or clinical experiences, planned to achieve specific objectives within a given time period.

(13) Curriculum--course offerings, which in aggregate, make up the total learning activities in a program of study.

(14) Dean or Director--a registered nurse who is accountable for administering one or more of the following: a pre-licensure nursing education program or a post-licensure baccalaureate or higher degree program for registered nurses, who meets the requirements as stated in §215.6(f) of this chapter (relating to Administration and Organization), and who is approved by the Board.

(15) Differentiated Entry Level Competencies--the expected educational outcomes to be demonstrated by nursing students at the time of graduation as published in *Differentiated Entry Level Compentencies of Graduates of Texas Nursing Programs, Vocational (VN), Diploma/Associate Degree (Dip/ADN), Baccalaureate (BSN), September 2002*.

(16) Examination year--the period beginning October 1 and ending September 30 used for the purposes of determining programs' NCLEX-RN examination pass rates.

(17) Extension Program--instruction provided by an approved professional nursing education program providing a variety of instructional methods to any location(s) other than the program's main campus and where students are required to attend activities such as testing, group conferences, and/or campus laboratory. An extension program may offer the entire identical curriculum or may offer a single course or multiple courses.

(A) Complete program--provides the entire program of study at a site other than the program's main campus.

(B) Partial program--provides a course, or courses, from the program of study at a site other than the program's main campus.

(18) Faculty member--an individual employed to teach in the professional nursing education program who meets the requirements as stated in §215.7 of this chapter (relating to Faculty Qualifications and Faculty Organization).

(19) Faculty waiver--a waiver granted by the Board to an individual who has a baccalaureate degree in nursing and is currently licensed in Texas, or has a privilege to practice, to be employed as a faculty member for a specified period of time.

(20) Governing institution--an accredited college, university, or hospital responsible for the administration and operation of a Board-approved nursing program.

(21) Health care professional--an individual other than a RN who holds at least a bachelor's degree in the health care field, including, but not limited to: respiratory therapists, physical therapists, occupational therapists, dieticians, pharmacists, physicians, social workers and psychologists.

(22) Mobility--the ability to advance without educational barriers.

(23) Non-Nursing Faculty--instructors who teach non-nursing theory courses such as pharmacology, pathophysiology, research, management and statistics, and who have educational preparation appropriate to the assigned teaching responsibilities.

(24) Objectives/Outcomes--clear statements of expected behaviors that are attainable and measurable.

(A) Program Objectives/Outcomes--broad statements used to direct the overall student learning toward the achievement of expected program outcomes.

(B) Clinical Objectives/Outcomes--statements describing expected student behaviors throughout the curriculum and which represent progression of students' cognitive, affective and psychomotor achievement in clinical practice across the curriculum.

(C) Course Objectives/Outcomes--statements describing expected behavioral changes in the learner upon successful completion of specific curriculum content and which serve as the mechanism for evaluation of student progression.

(25) Observational experience--an assignment to a facility or unit where students observe activities within the facility and/or the role of nursing within the facility, but where students do not participate in patient/client care.

(26) Pass rate--the percentage of first-time candidates within one examination year who pass the National Council Licensure Examination for Registered Nurses (NCLEX-RN).

(27) Philosophy/Mission--statement of concepts expressing fundamental values and beliefs regarding human nature as they apply to nursing education and practice and upon which the curriculum is based.

(28) Professional Nursing Education Programs.

(A) Pre-licensure nursing education program--an educational entity that offers the courses and learning experiences that prepares graduates who are competent to practice safely and who are eligible to take the NCLEX-RN examination. Types of programs:

(i) Associate degree nursing education program--a program leading to an associate degree in nursing conducted by an educational unit in nursing within the structure of a college or university.

(ii) Baccalaureate degree nursing education program--a program leading to a bachelor's degree in nursing conducted by an educational unit in nursing which is a part of a senior college or university.

(iii) Master's degree nursing education program--a program leading to a master's degree, which is an individual's first professional degree in nursing, and conducted by an educational unit in nursing within the structure of a senior college or university.

(iv) Diploma nursing education program--a program leading to a diploma in nursing conducted by a single purpose school usually under the control of a hospital.

(v) MEEP--a Multiple Entry-Exit Program which allows students to challenge the NCLEX-PN examination when they have completed sufficient course work in a professional nursing program that will meet all requirements for the examination.

(B) Post-Licensure nursing education program--an educational unit the purpose of which is to provide mobility options for registered nurses to attain undergraduate academic degrees in nursing. Post-licensure programs may be components of educational units within pre-licensure nursing education programs or independent baccalaureate degree programs for registered nurses as defined in this section.

(29) Program of study--the courses and learning experiences that constitute the requirements for completion of a pre-licensure nursing education program (associate degree nursing education program, baccalaureate degree nursing education program, master's

degree nursing education program, or diploma nursing education program) or a post-licensure nursing education program.

(30) Recommendation--a suggestion based upon program assessment indirectly related to the rules to which the program must respond but in a method of their choosing.

(31) Requirement--mandatory criterion based upon program assessment directly related to the rules that must be addressed in the manner prescribed.

(32) Shall--denotes mandatory requirements.

(33) Staff--employees of the Board of Nurse Examiners.

(34) Supervision--immediate availability of a faculty member, clinical preceptor, or clinical teaching assistant to coordinate, direct, and observe first hand the practice of students.

(35) Survey Visit--an on-site visit to a professional nursing education program by a Board representative. The purpose of the visit is to evaluate the program of learning by gathering data to determine whether the program is meeting the Board's requirements as specified in §§215.2 - 215.13 of this chapter.

(36) Systematic Approach--the organized process in nursing which provides individualized, goal-directed nursing care by performing comprehensive nursing assessments regarding the health status of the client, making nursing diagnoses that serve as the basis for the strategy of care, developing a plan of care based on the assessment and nursing diagnosis, implementing nursing care, and evaluating the client's responses to nursing interventions.

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 December 20, 2004.

TRD-200407390
Katherine Thomas
Executive Director
Board of Nurse Examiners
Effective date: January 9, 2005
Proposal publication date: November 12, 2004
For further information, please call: (512) 305-6823

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PART 31. TEXAS STATE BOARD OF EXAMINERS OF DIETITIANS

CHAPTER 711. DIETITIANS

22 TAC §§711.1 - 711.22

The Texas State Board of Examiners of Dietitians (board) adopts amendments to §§711.1 - 711.22, concerning the licensing and regulation of dietitians. Section 711.2 was adopted with changes to the proposed text as published in the August 20, 2004, issue of the *Texas Register* (29 TexReg 8061). Sections 711.1, 711.3 - 711.22 were adopted without changes and the sections will not be republished.

Specifically, the amendments cover definitions, additional fees collected, application requirements, examination time frame, bi-annual renewals, and emergency suspension. The amended §711.14(e)-(f) covers Senate Bill 161, 78th Legislature, 2003, which amends Occupations Code, Chapter 701, relating to emergency suspensions and administrative penalties. The licensing fee amendments are required as a result of revisions to the Health and Safety Code, Chapter 12, §§12.0111 and 12.0112, pursuant to House Bill 2292, 78th Legislature, 2003.

House Bill 2985, 78th Legislature, 2003, which added Occupations Code, §§101.301-101.307, requires the Texas State Board of Examiners of Dietitians to assess and collect fees to fund the Office of Patient Protection within the Texas Health Professions Council. Wording is added that clarifies the Board's authority to collect these fees. Senate Bill 1152, 78th Legislature, Regular Session, which amends Government Code, Chapter 2054, directs all department administered licensing programs to participate in Texas Online, an electronic fee payment system developed and maintained by the Texas Online Authority. Wording is added that clarifies the Board's authority to collect subscription and convenience fees, in amounts to be determined by the Texas Online Authority, to recover costs associated with application and renewal application processing.

There were no public comments received on the proposal. However, staff comments were received and the following changes were made to the rule text.

Change: Concerning §711.2(r) fees, the fee amounts were corrected to show the fees due without the additional fee for Texas Online and the Office of Patient Protection fees added.

The amendments are adopted under Texas Occupations Code, Chapter 701, which provides the Texas State Board of Examiners of Dietitians with the authority to adopt rules concerning the licensure of dietitians that are reasonably necessary to properly perform its duties under this Act.

§711.2. The Board's Operation.

(a) Officers.

(1) Chair.

(A) The chair shall preside at all board meetings at which he or she is in attendance and perform all duties prescribed by law or board rules.

(B) The chair is authorized by the board to make day-to-day minor decisions regarding board activities in order to facilitate the responsiveness and effectiveness of the board.

(C) The chair shall serve as an ex officio member of all committees except the complaint committee.

(2) Vice-chair.

(A) The vice-chair shall perform the duties of the chair in case of the absence or disability of the chair.

(B) In case the office of chair becomes vacant, the vice-chair shall serve until a successor is elected.

(b) Meetings.

(1) The board shall hold at least two regular meetings and additional meetings as necessary during each year beginning on September 1, at such designated date, place, and time as may be determined by the chair.

(2) Special meetings may be called by the chair at such times, dates, and places as become necessary for the transaction of board business.

(3) Meetings shall be announced and conducted under the provisions of the Open Meetings Act, Texas Government Code, Chapter 551.

(c) Quorum. A quorum of the board necessary to conduct official business is five members.

(d) Transaction of official business.

(1) The board may transact official business only when in a legally constituted meeting with a quorum present.

(2) The board shall not be bound in any way by any statement or action on the part of any board or staff member except when a statement or action is in pursuance of specific instructions of the board.

(3) Board action shall require a majority vote of those members present and voting.

(e) Policy against discrimination. The board shall make decisions in the discharge of its statutory authority without discrimination based on any person's race, creed, gender, genetic information, religion, national origin, geographical distribution, age, physical condition, or economic status.

(f) Impartiality. Any board member who is unable to be impartial in any proceeding before the board, such as that pertaining to an applicant's eligibility for licensure or a complaint against or a violation by a licensee, shall so declare this to the board and shall not participate in any board proceedings involving that individual.

(g) Attendance.

(1) The policy of the board is that members shall attend regular and committee meetings as scheduled.

(2) The board may report to the governor and the Texas Sunset Advisory Commission the attendance records of members.

(3) Except in case of emergency, board members shall notify the executive secretary at least 48 hours prior to the scheduled meeting if unable to be present.

(4) Except in case of emergency, the executive secretary shall notify the chair at least 48 hours prior to the scheduled meeting if unable to be present.

(h) Reimbursement for expense.

(1) A board member is entitled to a per diem payment at the rate set by the legislature for state employees in the latest General Appropriations Act passed by the Texas Legislature.

(2) A board member is entitled to compensation for transportation expenses as provided by the latest General Appropriations Act passed by the Texas Legislature.

(3) Payment to board members of per diem and transportation expenses shall be requested on official state travel vouchers which have been approved by the executive secretary.

(4) Board travel must conform to existing policies of the department.

(5) Attendance at conventions, meetings, and seminars must be clearly related to the performance of board duties and show a benefit to the state.

(i) Rules of order. The latest edition of Roberts Rules of Order shall be the basis of parliamentary decisions except where otherwise provided by these board rules.

(j) Agendas.

(1) The executive secretary shall prepare and submit to each member of the board, prior to each meeting, an agenda which includes items requested by members, items required by law, unfinished business, and other matters of board business, which have been approved for discussion by the chair.

(2) The official agenda of a meeting shall be filed with the Texas secretary of state in accordance with the Texas Open Meetings Act, Texas Government Code, Chapter 551.

(k) Minutes.

(1) Drafts of the minutes of each meeting shall be forwarded to each member of the board for review and comments prior to approval by the board.

(2) After approval by the board, the minutes of any board meeting are official only when affixed with the original signatures of the chair and the executive secretary.

(3) The official minutes of board meetings shall be kept in the office of the executive secretary and shall be available to any person desiring to examine them during regular office hours.

(l) Official records.

(1) All official records of the board including application materials, except files containing information considered confidential under the provisions of the Texas Open Records Act, Texas Government Code, Chapter 552, and the Family Educational Rights and Privacy Act of 1974, 20 United States Code, §1232g, shall be open for inspection during regular office hours.

(2) A person desiring to examine official records shall be required to identify himself and sign statements listing the records requested and examined.

(3) Official records may not be taken from board offices; however, persons may obtain photocopies of files upon written request and by paying the cost per page set by the department. Payment shall be made prior to release of the records.

(m) Elections.

(1) At the meeting held after August 31 of each odd-numbered year, the board shall elect by a majority vote of those members present and voting, a chair and a vice-chair. When the Governor appoints new board members to replace those currently serving as chair or vice chair, an election will be held not later than the 30th day after the date the governor makes the appointment in accordance with the Act, §701.057.

(2) A vacancy which occurs in the offices of chair and vice-chair shall be filled, for the duration of the unexpired term, by a majority vote of those members present and voting at the next board meeting.

(3) A board member shall not serve more than two consecutive terms in the office of chair or vice-chair.

(n) Committees.

(1) The board or the chair with the approval of the board may establish committees deemed necessary to assist the board in carrying out its duties and responsibilities.

(2) The chair may appoint the members of the board to serve on committees and may designate the committee chair.

(3) The chair of the board may appoint nonboard members to serve as consultants to a committee on a voluntary basis, subject to board approval.

(4) Committee chairs shall make regular reports to the board in interim written reports and/or at regular meetings, as needed.

(5) Committees shall direct all reports or other materials to the executive secretary for distribution.

(6) Committees shall meet when called by the chair of the committee or when so directed by the board.

(7) The following standing committees shall be appointed by the newly elected chair each odd-numbered year to serve a term of two years.

(A) The rules committee shall be composed of two board members who are licensed dietitians and one public member of the board. The committee shall review all board rules at least once annually to ensure that the rules are current in relation to dietetic practice, and may recommend and propose adoption of rules to the board. The committee shall consider all petitions for adoption of rules and shall recommend disposition of these petitions to the board in accordance with subsection (v) of this section.

(B) The program approval committee shall be composed of three board members who are licensed dietitians. The committee shall review all applications for internship and preplanned professional experience programs received by the board and shall either approve or deny the applications. Determinations made by the committee are subject to ratification at the next regular meeting of the board.

(C) The consumer information committee shall be composed of two board members who are licensed dietitians and one public member of the board. The committee shall recommend to the executive secretary the publication of consumer information related to the board and shall guide the preparation of all consumer information related publications. The committee shall recommend to the board action to be taken regarding proposed publications.

(D) The complaint committee shall be composed of a person(s) appointed by the chair. The committee may review complaints received by the board and shall recommend action to be taken on complaints in accordance with §711.14 of this title (relating to Violations, Complaints, and Subsequent Board Actions).

(o) Official seal. The official seal of the board shall consist of two concentric circles with the words "Texas State Board of Examiners of Dietitians" circularly arranged about the inner edge of the outermost circle, and in the center of the innermost circle there shall be a five-pointed star, surrounded by the live oak and olive branches common to official state seals.

(p) Registry.

(1) Each year the executive secretary shall publish a registry of current licensees.

(2) The registry shall include, but not be limited to, the name, preferred mailing address, and telephone number of current licensees.

(3) The registry will be available on the board's Internet web site at www.tdh.state.tx.us/hcqs/plc/diet.htm.

(q) Consumer information. The executive secretary with the approval of the board shall publish information of consumer interest which describes the regulatory functions of the board, board procedures to handle and resolve consumer complaints, and the profession of dietetics.

(r) Fees.

(1) Schedule of fees for licensure as a dietitian:

(A) application (includes two year initial license) fee--$108;

(B) license fee for upgrade of provisional licensed dietitian--$20;

(C) renewal fee:

(i) for license issued for a one-year term--$45;

(ii) for license issued for a two-year term--$90;

(D) late renewal fee for license issued for a one-year term:

(i) $107.50 when renewed on or within 90 days of expiration;

(ii) $170.00 when renewed later than 90 days but less than one year;

(E) late renewal fee for license issued for a two-year term:

(i) $152.50 when renewed on or within 90 days of expiration;

(ii) $215.00 when renewed later than 90 days but less than one year.

(2) Schedule of fees for licensure as a temporary licensed dietitian:

(A) application (includes initial license) fee--$54;

(B) license certificate and identification card replacement fee--$20;

(3) Schedule of fees for licensure as a provisional licensed dietitian:

(A) application (includes initial license) fee--$54;

(B) renewal fee for license issued for a one-year term--$45;

(C) late renewal fee;

(D) $107.50 when renewed on or within 90 days of expiration;

(E) $170.00 when renewed later than 90 days but less than one year;

(4) Additional fees for licensure as a dietitian, temporary licensed dietitian, and a provisional licensed dietitian:

(A) application processing fee for preplanned professional experience approval--$300;

(B) inactive status fee--$20;

(C) license reinstatement fee following suspension under the Family Code--$80;

(D) written verification of licensure fee--$25; and

(E) returned check fee--$25.

(5) For all application and renewal application, the board is authorized to collect subscription and convenience fees, in amounts determined by the Texas Online Authority, to recover costs associated with application and renewal application processing through Texas Online.

(6) For all applications and renewal applications, the board is authorized to collect fees to fund the Office of Patient Protection, Health Professions Council, as mandated by law.

(7) An applicant whose check for the application fee is returned marked insufficient funds, account closed, or payment stopped shall be allowed to reinstate the application by remitting to the board a money order or check for guaranteed funds in the amount of the application fee plus the returned check fee within 30 days of the date of receipt of the board's notice. An application will be considered incomplete until the fee has been received and cleared through the appropriate financial institution.

(8) An approved applicant whose check for the license fee is returned marked insufficient funds, account closed or payment stopped shall remit to the board a money order or check for guaranteed funds in the amount of the license fee plus the returned check fee within 30 days of the date of receipt of the board's notice. Otherwise, the application and the approval shall be invalid.

(9) A licensee whose check for the renewal fee is returned marked insufficient funds, account closed or payment stopped shall remit to the board a money order or check for guaranteed funds in the amount of the renewal fee plus the returned check fee within 30 days of the date of receipt of the board's notice. Otherwise, the license shall not be renewed. If a renewal card has already been issued, it shall be invalid.

(10) Fees paid to the board by applicants and licensees are not refundable.

(11) Any remittance submitted to the board in payment of a required fee must be in the form of a personal check, certified check, or money order.

(12) The board shall make periodic reviews of its fee schedule and make any adjustments necessary to provide funds to meet its expenses without creating an unnecessary surplus. Such adjustments shall be through rule amendments.

(s) Petition for adoption of a rule.

(1) Submission of the petition.

(A) Any person may petition the board to adopt a rule.

(B) The petition shall be in writing, shall contain the petitioner's name and address, and shall describe the rule and the reason for it; however, if the executive secretary determines that further information is necessary to assist the board in reaching a decision, the executive secretary may require that the petitioner resubmit the petition and that it contain:

(i) a brief explanation of the proposed rule;

(ii) the text of the proposed rule prepared in a manner to indicate the words to be added or deleted from the current text, if any;

(iii) a statement of the statutory or other authority under which the rule is to be promulgated; and

(iv) the public benefits anticipated as a result of adopting the rule or the anticipated injury or inequity which would result from the failure to adopt the proposed rule.

(C) The board may deny a petition which does not contain the information in subparagraph (B) of this paragraph or the information in subparagraph (B)(i)-(iv) of this paragraph if the executive secretary determines that the latter is necessary.

(D) The petition shall be mailed or delivered to the executive secretary, Texas State Board of Examiners of Dietitians, 1100 West 49th Street, Austin, Texas 78756-3183.

(2) Consideration and disposition of the petition.

(A) The executive secretary shall submit a completed petition to the board for its consideration.

(B) Within 60 days after receipt of the petition by the executive secretary, or within 60 days after receipt of a resubmitted petition in accordance with paragraph (2)(B)(i)-(iv) of this subsection, the board shall either:

(i) deny the petition;

(ii) initiate rule-making procedures; or

(iii) deny the petition, but refer the petition to the rules committee for its recommendation. The committee shall report its recommendations to the board at its next regular meeting.

(C) The board may deny parts of the petition and/or institute rule making procedures on parts of the petition.

(D) If the board denies the petition, the executive secretary shall give the petitioner written notice of the board's denial, including the reason(s) for the denial.

(E) If the board initiates rule-making procedures, the version of the rule which the board proposes may differ from the version proposed by the petitioner.

(3) Subsequent petitions to adopt the same or similar rules. All initial petitions for the adoption of a rule shall be presented to and decided by the board in accordance with the provisions of paragraphs (1) and (2) of this subsection. The board may refuse to consider any subsequent petition for the adoption of the same or similar rule submitted within six months after the date of the initial petition.

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 December 15, 2004.

TRD-200407351
Patricia Mayers Krug
Chair
Texas State Board of Examiners of Dietitians
Effective date: January 4, 2005
Proposal publication date: August 20, 2004
For further information, please call: (512) 458-7236

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 210. USE OF RECLAIMED WATER

SUBCHAPTER F. USE OF GRAYWATER SYSTEMS

30 TAC §§210.81 - 210.85

The Texas Commission on Environmental Quality (commission or TCEQ) adopts new §§210.81 - 210.85. Sections 210.83, 210.84, and 210.85 are adopted *with changes* to the proposed text as published in the August 13, 2004 issue of the *Texas Register* (29 TexReg 7865). Sections 210.81 and 210.82 are adopted *without changes* and the text will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

The legislature passed House Bill 346 in 1993 which required rules to be developed by the commission and the Texas State Board of Plumbing Examiners for graywater use in Texas. The commission adopted rules under 30 TAC Chapter 285, On-Site Sewage Facilities, in June 2001 that allow water from clothes-washing machines as the only graywater to be discharged without going through an on-site sewage facility (OSSF). Water from other sources in a residence was not included in the use of graywater.

In 2003, the 78th Legislature passed House Bill 2661 which amended Texas Water Code (TWC), §26.0311, and Texas Health and Safety Code (THSC), §341.039 and §366.012. These amendments modify the definition of graywater and require the commission to adopt and implement standards for the use of graywater and to address the separation of graywater in a residence served by publicly or privately owned treatment works. Additionally, this legislation directs the commission to address the use of graywater for commercial, industrial, irrigation, and other agricultural purposes.

To implement this legislation, the commission concurrently amended Chapter 210; Chapter 285; and 30 TAC Chapter 317; Design Criteria for Sewerage Systems. Adopted amendments to Chapter 285 and Chapter 317 are also published in the Adopted Rules section of this issue of the *Texas Register*.

SECTION BY SECTION DISCUSSION

TWC, §26.0311(b), requires the commission to adopt and implement minimum standards for the use of graywater. TWC, §26.0311(b)(2), requires that the minimum standards for the domestic use of graywater be consistent with THSC, §341.039. Therefore, the commission creates a new Subchapter F, Use of Graywater Systems, to include the requirements for graywater to implement TWC, §26.0311 and THSC, §341.039 and §366.012.

Adopted §210.81, Applicability, specifies that this subchapter applies to individuals who use graywater for: irrigation and other agricultural purposes; domestic use; commercial purposes; industrial purposes; and institutional purposes. This section also specifies that reclaimed water is regulated under Subchapters A - E of this chapter. The commission created an applicability section for new Subchapter F to be consistent with the structure of the other subchapters in this chapter and to ensure the consistency of the term "Site."

Adopted §210.82, General Requirements, provides the general requirements for graywater use. These criteria implement TWC, §26.0311, and THSC, §341.039.

Adopted §210.82(a) defines graywater as wastewater from clothes-washing machines; showers; bathtubs; handwashing lavatories; sinks that are not used for disposal of hazardous or toxic ingredients; and sinks not used for food preparation or disposal. This definition is from THSC, §341.039(e), and TWC, §26.0311(a), as amended by House Bill 2661.

Adopted §210.82(b) excludes from the definition of graywater wastewater from the washing of material, including diapers, soiled with human excreta, and wastewater that has come in contact with toilet waste. This definition is from THSC, §341.039(e), and TWC, §26.0311(a), as amended by House Bill 2661.

Adopted §210.82(c) requires that construction of a graywater system, including the storage and disposal systems, comply with Chapter 210 and any requirements of the local permitting authority. The commission is adopting this provision to provide notice that local permitting authorities may have additional requirements, such as a plumbing code, to those in this rule.

Adopted §210.83, Criteria for the Domestic Use of Graywater, provides the criteria for use of graywater. The criteria are incorporated from TWC, §26.0311, and THSC, §341.039, as amended by House Bill 2661.

Adopted §210.83(a) specifies that a person using less than 400 gallons of graywater each day does not need an authorization if the graywater originates from a private residence and if the graywater system is designed so that 100% of the graywater can be diverted to an organized wastewater collection system during periods of non-use of the graywater system. New subsection (a) would also specify that the discharge from the graywater system must enter the organized wastewater system through two backwater valves or backwater preventers. The commission includes two backwater valves or backwater preventers to prevent cross-contamination between the graywater system and the organized wastewater system. This will help ensure that toilet waste or other types of wastewater that are not defined as graywater in TWC, §26.0311(a), do not commingle with the graywater system. Additionally, the graywater must be stored in tanks and the tanks must be clearly labeled as nonpotable water; must restrict access, especially to children; and eliminate habitat for mosquitoes and other vectors. These requirements are from THSC, §341.039(c).

While THSC, §341.039(c)(4), requires tanks, the statute is silent with regard to any tank specifications. However, TWC, §26.0311(b), requires the commission to adopt and implement minimum standards for the use of graywater and TWC, §26.0311(b)(2), requires that the domestic use of graywater be consistent with the requirements in THSC, §341.039. Both THSC, §341.039(b), and TWC, §26.0311(c), require that the use of graywater not be a nuisance and not damage the quality of surface water or groundwater in the state. Additionally, THSC, §341.039(c)(6) and (7) require that the graywater be used without the formation of ponds or pools and that graywater use does not create surface runoff across property lines or onto any paved surface. Thus, the commission is adopting two requirements that are not specifically enumerated in the statute to implement these statutory provisions: 1) that tanks are able to be cleaned; and 2) that the tanks meet certain structural requirements.

If the tanks cannot be cleaned, solid materials could clog the lines or increase the biomat buildup at the end of the line if graywater is discharged directly onto the ground. A clogged line could lead to a backup or overflow of the system, and a buildup of biomat could cause odor and prevent the graywater from soaking into the ground, causing ponding, pooling, or runoff. Furthermore, the commission adopts a provision that the tanks must meet the structural requirements of §210.25(i) to ensure the structural integrity of the tanks. All of these provisions will help to ensure that graywater use is not a nuisance and does not damage the quality of surface water or groundwater in the state as required by TWC, §26.0311(c), and THSC, §341.039(b).

Finally, adopted subsection (a) requires that a graywater system use piping that meets the purple piping requirements of §210.25; that the graywater be applied at a rate that will not result in ponding or pooling; that graywater use will not create runoff across

property lines or onto any paved surface; and that the graywater is not disposed of using a spray distribution system. These provisions are from THSC, §341.039.

Adopted §210.83(b) encourages builders of private residences to install plumbing in new housing to collect graywater from all allowable sources and design and install a subsurface graywater system around the foundation of new housing to minimize foundation movement or cracking. This provision is from THSC, §341.039(d).

Adopted §210.83(c) includes the allowable uses for graywater. This subsection specifies that the graywater system may only be used around the foundation of new housing to minimize foundation movement or cracking; for gardening; for composting; or for landscaping at the private residence. These requirements are from THSC, §341.039, and TWC, §26.0311.

Adopted §210.83(d) prohibits graywater use from creating a nuisance or damaging surface water or groundwater. This provision is from THSC, §341.039(b), and TWC, §26.0311(c).

Adopted §210.83(e) adds language to allow homeowners who dispose of wastewater from residential clothes-washing machines before the effective date of the adopted rules to continue to dispose directly onto the ground surface as long as the homeowners meet certain conditions. The commission adopts this provision to limit the impact that the adopted rules will have on homeowners who currently dispose of laundry graywater.

Adopted §210.83(f) specifies that graywater systems that are altered, create a nuisance, or discharge graywater from any source other than clothes-washing machines will not be authorized to discharge graywater under subsection (e) of this section. The commission adopts this provision to provide notice to homeowners that if they alter their system, allow their system to create a nuisance, or add an additional source of graywater to their system's discharge that they are no longer eligible to discharge graywater under subsection (e) of this section.

Adopted §210.84, Criteria for Use of Graywater for Industrial, Commercial, or Institutional Purposes, specifies the criteria that a person would need to follow to use graywater for industrial, commercial, or institutional purposes. New §210.84(a) specifies that graywater use for an industrial, commercial, or institutional purpose does not require authorization from the commission. If graywater is used in a closed-loop process, it is covered under Subchapter E of this chapter and is not subject to these rules.

Adopted §210.84(b) requires that graywater systems used for industrial, institutional, or commercial purposes be designed so that 100% of the graywater can be diverted to an organized wastewater collection system during periods of non-use of the graywater system. This subsection also requires that the discharge from the graywater system enter the organized wastewater system through two backwater valves or backwater preventers. The commission includes two backwater valves or backwater preventers to prevent cross-contamination between the graywater system and the organized wastewater system. This will help ensure that toilet waste or other types of wastewater that are not defined as graywater in TWC, §26.0311(a), do not commingle with the graywater system.

Adopted §210.84(c) specifies the allowable uses for graywater for commercial, institutional, or industrial purposes. Graywater may be used as process water, for landscape maintenance, for dust control, for toilet flushing, and for other similar uses. This subsection also allows graywater to be treated for use in an operational process and specifies that the treatment does not require authorization from the agency. The commission adopts these requirements to be consistent with §210.52(d). Under this adopted section, graywater that is used for landscape maintenance, dust control, toilet flushing, and similar uses must meet certain levels for fecal coliform, as determined by the potential for public contact with the graywater. The commission adopts these requirements to be consistent with §210.33(a)(2). Additionally, for toilet flushing that uses graywater the commission adopts a provision that all exposed piping and piping within a building must be either purple pipe or painted purple; all buried piping installed after the effective date of these rules must be either manufactured in purple, painted purple, taped with purple metallic tape, or bagged in purple; and all exposed piping must be stenciled in white with a warning reading "NON-POTABLE WATER." The commission adopts these requirements to be consistent with §210.25(g)(2).

Adopted §210.84(d) requires that graywater used for commercial, industrial, or institutional purposes be monitored for fecal coliform at least monthly in areas where the public may come into contact with graywater. These records must be readily available for inspection by the commission for a minimum of five years. The commission adopts this requirement to be consistent with §210.57(b)(2)(B).

Adopted §210.85, Criteria for Use of Graywater for Irrigation and for Other Agricultural Purposes, specifies the criteria for the use of graywater for irrigation and other agricultural purposes.

Adopted §210.85(a) specifies that graywater used for irrigation and for other agricultural purposes does not require authorization from the commission.

Adopted §210.85(b) requires that graywater systems used for irrigation and other agricultural purposes be designed so that 100% of the graywater can be diverted to an organized wastewater collection system during periods of non-use of the graywater system. This subsection also requires that the discharge from the graywater system enter the organized wastewater system through two backwater valves or backwater preventers. The commission includes two backwater valves or backwater preventers to prevent cross-contamination between the graywater system and the organized wastewater system. This will help ensure that toilet waste or other types of wastewater that are not defined as graywater in TWC, §26.0311(a), do not commingle with the graywater system.

Adopted §210.85(c) lists the allowable uses for graywater. Graywater can be used for process water, landscape maintenance, dust control, irrigation for fields, and other uses. This subsection also allows graywater to be treated for use in an operational process and specifies that the treatment does not require authorization from the agency. The commission adopts these treatments to be consistent with §210.51(d). Under this adopted section, graywater that is used for landscape maintenance, irrigation for fields where edible crops are grown or fields that are pastures for milking animals, and other uses must meet certain levels for fecal coliform, as determined by the potential for public contact with the graywater. The commission adopts these requirements to be consistent with §210.33(a)(2).

Adopted §210.85(d) requires that graywater used for irrigation and for other agricultural purposes be monitored at least monthly in areas where the public may come into contact with graywater. These records must be readily available for inspection by the

commission for a minimum of five years. The commission adopts this requirement to be consistent with §210.57(b)(2)(B).

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed this rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" in that statute. Major environmental rule means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The intent of this rulemaking is to implement legislative amendments that modify the definition of graywater and require the commission to adopt and implement standards for the use of graywater and to address the separation of graywater in a residence served by publicly or privately owned treatment works. New Subchapter F, entitled "Use of Graywater Systems," applies to individuals who use graywater for: irrigation and other agricultural practices; domestic use, to the extent consistent with §210.83(c); commercial purposes; institutional purposes; and industrial purposes. This new subchapter also sets out specific standards and installation requirements for graywater systems. The adopted graywater rules do not adversely affect, in a material way, the economy, a section of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

In addition, the adopted rules are not subject to Texas Government Code, §2001.0225, because they do not meet any of the four criteria specified in §2001.0225(a). Texas Government Code, §2001.0225(a), applies to a rule adopted by an agency, 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 adopted revisions to Chapter 210 do not meet any of these requirements. First, these revisions do not exceed a standard set by federal law as there are no federal requirements for these rules. As a result, there are no applicable standards set by federal law that could be exceeded by these rules. Second, these revisions do not exceed an express requirement of state law, but are being adopted to implement state law, including the requirement that graywater use not be a nuisance and not damage the quality of surface water or groundwater in the state. Therefore, the rulemaking does not exceed an express requirement of state law. Third, the commission is not a party to a delegation agreement with the federal government concerning a state and federal program that would be applicable to requirements set forth in these rules. Therefore, there are no delegation agreement requirements that could be exceeded by these rules. Fourth, the adopted rules were not developed solely under the commission's general powers, but rather were developed to implement the specific requirements of House Bill 2661, amending TWC, §26.0311, and THSC, §341.039 and §366.012. Therefore, the commission does not adopt these rules solely under the commission's general powers. Thus, the commission concludes that a regulatory analysis is not required in this instance because the adopted rules do not meet any of the criteria of a major environmental rule as defined by Texas Government Code, §2001.0225.

TAKINGS IMPACT ASSESSMENT

The commission performed an assessment of these rules in accordance with Texas Government Code, §2007.043. The intent of the adopted rules is to implement legislative amendments that modify the definition of graywater and require the commission to adopt and implement standards for the use of graywater and to address the separation of graywater in a residence served by publicly or privately owned treatment works. The adopted graywater rules are voluntary. Thus, the commission's assessment indicates that Texas Government Code, Chapter 2007, does not apply to this rulemaking because the promulgation and enforcement of these rules will not create a burden on private real property.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rulemaking and found that the rules are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, nor will they affect any action/authorization identified in §505.11. Therefore, the adopted rules are not subject to the Texas Coastal Management Program.

PUBLIC COMMENT

A public hearing was held in Austin on September 8, 2004. The comment period closed at 5:00 p.m. on September 13, 2004. The commission received written and/or oral comments from: City of Austin, Austin Water Utility (COA Utility); Lower Colorado River Authority (LCRA); San Antonio Water System (SAWS), Texas Cooperative Extension (TCE), and two individuals.

COA Utility, LCRA, SAWS, and TCE generally supported the proposed rules but raised issues or suggested changes to the rules as specified in the RESPONSE TO COMMENTS section of this preamble.

The two individuals generally did not support the proposed rules and raised issues or suggested changes to the rules as specified in the RESPONSE TO COMMENTS section of this preamble.

RESPONSE TO COMMENTS

General

One individual commented that allowing construction of graywater disposal systems with no requirement for permit, no design criteria, and no inspection is a very bad idea. This individual stated that it is impossible to eliminate the introduction of many potentially dangerous pathogens into graywater. To safeguard public health and to protect the environment, the management of water containing pathogens clearly should be regulated.

The commission responds that THSC, §341.039, and TWC, §26.0311 do not allow the commission to require a permit for the domestic use of less than 400 gallons of graywater each day if the graywater use meets the requirements in THSC, §341.039, and TWC, 26.0311. Additionally, the commission responds that THSC, §341.039, and TWC, §26.0311, do not require treatment for graywater. The commission did not include treatment requirements because the statutes do not provide for any treatment requirements; therefore, to include these provisions in the rules would be inconsistent with statutory

requirements. The commission made no change to the rules based on this comment.

LCRA suggested that graywater systems be required to operate using a minimum vertical separation of at least two feet from the point of graywater application to the top of the seasonally high groundwater table. LCRA stated that this is consistent with the separation distance from wastewaters to a seasonally high groundwater table under the existing Chapter 285 rules.

The commission proposed the amendments to Chapter 285 to implement the changes in THSC, §341.039. The revisions to this section of the THSC do not specify a minimum vertical separation distance between the point of graywater application and the top of the seasonally high groundwater table. Additionally, the original legislation for graywater in the 78th legislative session specified that the graywater be collected using a system that maintained a certain vertical distance between the system and the highest seasonal water table. This requirement, however, was dropped from the final legislation and, therefore, the commission did not include a similar requirement in its proposed rules. The commission made no change to the rules based on this comment.

One individual commented that these rules should not encourage the use of graywater systems "to minimize foundation movement or cracking" for two reasons: 1) not all foundations can benefit from the addition of moisture to the perimeter of the foundation; and 2) foundations placed on high shrink/swell soils may not benefit from, and could actually be damaged, by the application of moisture to the perimeter of the foundation.

The commission responds that THSC, §341.039, requires that the commission, by rule, incorporate this provision into the rule. The commission made no change to the rules based on this comment. *General: Tanks*

SAWS commented that storage tanks should be optional and not a required component of graywater systems. Additionally, SAWS commented that the language in House Bill 2661 that references tanks does so to establish standards that ensure such tanks will not pose a threat to public safety and should not be construed as a mandate that graywater must be stored in tanks.

The commission disagrees that the mention of tanks in THSC, §341.039(c)(4), is solely to establish requirements to eliminate threats to public safety. While THSC, §341.039(c)(4), does establish requirements to protect public safety, it also establishes tanks as one of the requirements that a domestic user of less than 400 gallons of graywater per day must meet to avoid obtaining a permit for graywater use from the commission. THSC, §341.039(c)(4), expressly prohibits the commission from requiring a permit for the "domestic use of less than 400 gallons of graywater each day *if* the graywater is *stored* in tanks that. . .." (Emphasis added.) Since THSC, §341.039(c)(4), expressly requires storing graywater in a tank as an element that domestic users of less than 400 gallons of graywater per day must meet if they want to use their graywater without a permit from the commission, the commission has included this as a requirement in its proposed rules. The commission made no change to the rules based on this comment.

SAWS commented that the proposed rules should enumerate the tank standards that relate to specific material and/or operational criteria rather than referring to the American Water Works Association (AWWA) standards for homeowners who elect to use tanks in their graywater system. Specifically, SAWS commented that if a tank is included in a graywater system the tank should be constructed of non-metallic material because metallic tanks are prone to corrosion and rust.

The commission responds that the reference to the AWWA standards allows graywater users flexibility in selecting a tank for their graywater system. The commission has not developed standards for tanks but instead uses standards set by the industry since standards can vary based on many elements related to tank design, including the type of material used to construct the tank; the location of installation; size of the tank; and the type of natural elements to which the tank is exposed. Additionally, the commission disagrees that tanks for graywater systems should be constructed of non-metallic material. For example, a steel tank would be acceptable for a graywater system if the tank meets AWWA standards. The commission made no change to the rules based on this comment.

One individual asked how the use of a tank that meets the AWWA standards will be monitored. One individual asked how the requirement in §285.81(a)(5) that does not allow ponding or pooling is going to be monitored. Additionally, this individual asked what criteria will be used to determine the loading rate.

The commission responds that THSC §341.039, and TWC, §26.0311, do not allow the commission to require a permit for the domestic use of less than 400 gallons of graywater each day if the graywater use meets the requirements in THSC, §341.039, and TWC, 26.0311.

The commission did not include monitoring requirements or loading rate requirements because the statute does not provide for any monitoring procedures or loading rate requirements; therefore, to include these provision in the rules would be inconsistent with statutory requirements

The commission anticipates that the users of graywater will follow the requirements as laid out in the commission's rules. However, if the requirements are not followed, one of the means of monitoring these rules will come in the form of citizen complaints to the commission regarding the inappropriate use of graywater. The commission made no change to the rules based on this comment.

General: Backflow Prevention

SAWS commented that the requirements for backflow prevention as proposed do not seem appropriate because an airgap on the line leading to an OSSF or sewer main will potentially create an odor problem. SAWS suggested a backwater valve designed to withstand the harsh environment created by sewage would provide a better and more reliable safety measure. COA Utility commented that the term "backflow preventer" should be replaced by "backwater valve" throughout Chapter 210 and Chapter 285. TCE commented that "backflow preventer" should be replaced with a "check valve" or something similar to avoid confusion which could arise between a plumbing inspector and another type of inspector.

The commission agrees that an airgap could potentially create an odor problem and, therefore, did not include an airgap as part of its backflow prevention requirements in the proposed rules.

The commission responds that to avoid confusion with plumbing codes the commission agrees to change the term "backflow preventer" to "backwater valve or backwater preventer" in §§210.83(a), 210.84(b), 210.85(b), and 285.81(a)(2)(B). A check valve is a type of backwater valve; however, the commission decided to use the term "backwater valve" or "backwater preventer" to allow maximum flexibility for the graywater systems.

General: Purple Pipe

SAWS commented that the commission should consider allowing identification of graywater system piping by a means other than the use of the color purple. SAWS stated that the system requirements and treatment methods are different for Type I and Type II reclaimed water versus graywater. SAWS commented that color-coding both types of systems using purple can create confusion. SAWS suggested that other standards of identification exist.

The commission responds that THSC, §341.039(c)(5), establishes purple pipe, purple tape, or similar markings for graywater as one of the requirements that a domestic user of less than 400 gallons of graywater per day must meet to avoid the requirement of a permit for graywater use from the commission. THSC, §341.039(c)(5), expressly prohibits the commission from requiring a permit for the "domestic use of less than 400 gallons of graywater each day *if* the graywater uses piping clearly identified as a nonpotable water conduit, including identification through the use of *purple pipe, purple tape, or similar markings*. . .." (Emphasis added.) Since THSC, §341.039(c)(5), expressly requires purple pipe, purple tape, or similar markings as an element that domestic users of less than 400 gallons of graywater per day must meet if they want to use their graywater without a permit from the commission, the commission has included this as a requirement in its proposed rules. The commission made no change to the rules based on this comment.

COA Utility commented to reduce confusion between reclaimed water and graywater that the proposed rules should refer to the Uniform Plumbing Code, Appendix G, which states that graywater pipes should have "continuous tape stating: Danger, Unsafe Water."

The commission proposed the amendments to Chapter 210 and Chapter 285 to implement the changes in THSC, §341.039, and TWC, §26.0311. The revisions to these sections of the THSC and the TWC do not reference the Uniform Plumbing Code, Appendix G, as an option for identifying pipes that carry graywater. THSC, §341.039(c)(5), expressly prohibits the commission from requiring a permit for the "domestic use of less than 400 gallons of graywater each day *if* the graywater uses piping clearly identified as a nonpotable water conduit, including identification through the use of purple pipe, purple tape, or similar markings. . .." (Emphasis added.) Since THSC, §341.039(c)(5), expressly requires purple pipe, purple tape, or similar markings as an element that domestic users of less than 400 gallons of graywater per day must meet if they want to use their graywater without a permit from the commission, the commission has included this as a requirement in its proposed rules. The commission made no change to the rules based on this comment.

One individual asked how anyone will know if purple pipe is not used since no permit, inspection, or oversight is required.

The commission responds that THSC, §341.039, and TWC, §26.0311, do not allow the commission to require a permit for the domestic use of less than 400 gallons of graywater each day if the graywater use meets the requirements in THSC, §341.039, and TWC, §26.0311. The commission did not include an inspection or oversight requirement because the statutes do not provide for any inspection or oversight procedures; therefore, to include these provisions in the rules would be inconsistent with statutory requirements. The commission made no change to the rules based on this comment.

General: Guidance

LCRA encouraged the commission to conduct an extensive public education program regarding these new graywater rules.

The commission responds that agency staff has provided educational presentations on the proposed graywater rules in Austin, Dallas, Kingsville, Round Rock, San Antonio, and Waco. Additionally, agency staff has been working with industry associations regarding these rules. The commission made no change to the rules based on this comment.

COA Utility commented that the commission should develop a guidance document for non- permitted systems using less than 400 gallons per day. Additionally, COA Utility commented that §210.83(b) and §285.81(c) and (h)(7) "should be removed from the statute and placed in the guidance document."

The commission responds that it declines, at this time, to develop a guidance document for these rules. As long as users of less than 400 gallons of domestic graywater meet the requirements in Chapter 210 and Chapter 285, they have flexibility to meet the requirements in whatever manner is most cost-effective. Additionally, if domestic graywater users have questions about the manner in which they have chosen to meet the graywater requirements, agency staff is available to respond to their questions.

The commission declines to remove §210.83(b) and §285.81(c) from the rule language. These rule sections implement TWC, §26.0311(b)(2), and THSC, §341.039(d), which encourage builders "to install plumbing in a manner that provides the capacity to collect graywater from all allowable sources and to design and install a subsurface graywater system around the foundation of new housing in a way that minimizes foundation movement or cracking." TWC, §26.0311(b), and THSC, §341.039(a), require that "the commission *by rule*. . ." implement the provisions found in TWC, §26.0311(b)(2), and THSC, §341.039(d). (Emphasis added.)

The commission declines to remove §285.81(h)(7) and place in a guidance document since no guidance document is being developed at this time. The commission made no change to the rules based on this comment.

Chapter 210

One individual commented that §210.82(a) and §210.80(b) are mutually exclusive and therefore nonsensical.

The commission responds that the rules do not contain §210.80(b). The commission assumes that the commenter meant to refer to the requirements in §210.82(a) and §210.82(b). These requirements are from THSC, §341.039(e), and TWC, §26.0311(a). The commission declines to change this definition because to alter this definition in the rules would be inconsistent with statutory requirements. The commission made no change to the rules based on this comment.

One individual commented that §210.83(a) is not enforceable and, as such, should be eliminated. Since there is no permit, no plan review, no inspection, nor any continuing monitoring, there will rarely be time where a flow in excess of 400 gallons per day is noted and corrected.

The commission declines to delete §210.83(a). The commission responds that THSC, §341.039, and TWC, §26.0311 do not allow the commission to require a permit for the domestic use of less than 400 gallons of graywater each day if the graywater use meets the requirements in THSC, §341.039, and TWC,

§26.0311. The commission anticipates that the users of graywater will follow the requirements as laid out in the commission's rules. However, if the requirements are not followed, one of the means of monitoring this rule is citizen complaints to the commission regarding the inappropriate use of graywater. The commission made no change to the rules based on this comment.

One individual commented that §210.83(a)(3)(C) must have much more guidance provided. The individual also stated that at this time we are either breeding or harboring mosquitoes at an alarming rate in the pump tanks following aerobic treatment units. With that as a given, what will be required, that is not being required in OSSFs, to prevent a habitat for mosquitoes? Whatever will eliminate the habitat must be specifically identified to be followed.

The commission responds that in the OSSF system described by the commenter the tanks should be sealed, thereby, preventing a mosquito habitat. For graywater systems, §210.83(a)(3)(C) requires that "the graywater is stored in tanks and the tanks eliminate habitat for mosquitoes and other vectors. . .." Additionally, §210.83(a)(5)(A) and (B) require that the graywater not pond or pool, or cause runoff across the property lines or onto any paved surface. As long as users of less than 400 gallons of domestic graywater meet the requirements in Chapter 210, they have flexibility to meet the requirements in whatever manner is most cost-effective. Further, if domestic graywater users have questions about the manner in which they have chosen to meet the graywater requirements, agency staff is available to respond to their questions. The commission made no change to the rules based on this comment.

SAWS commented that in §210.83(a)(4) and §210.84(c)(4)(B) the use of the word "piping" is ambiguous. SAWS asked whether piping includes fittings that become an integral part of pipe on installation of such systems. SAWS stated that a clear regulatory definition of what is included within "piping" is essential to avoid inadvertent regulatory violations and to permit a thorough understanding of what the construction of such systems will require.

The commission responds that the term "piping" includes fittings and appurtenances. Because the statute does not define "piping," to include this definition in the rules would be inconsistent with statutory requirements. Therefore, the commission has made no change to the rules based on this comment.

Chapter 285

SAWS commented that the conditions for the use of laundry graywater should remain as they are in existing Chapter 285, Subchapter H. SAWS stated that it is without benefit to add a storage tank requirement for laundry graywater use.

The commission responds that THSC, §341.039(e), defines graywater as "wastewater from clothes-washing machines, showers, bathtubs, hand-washing lavatories, and sinks that are not used for disposal of hazardous or toxic ingredients." THSC, §341.039(c), subjects graywater use to additional requirements and does not exempt laundry graywater from the new requirements; therefore, the commission has included wastewater from clothes-washing machines in the types of graywater subject to the proposed requirements.

However, §285.81(h) and (i) allow people currently using laundry graywater to continue their use of graywater without subjecting them to the new provisions unless the graywater system is altered, creates a nuisance, or discharges graywater from any other source than a clothes-washing machine.

The commission responds that THSC, §341.039(c)(4), establishes tanks as one of the requirements that a domestic user of less than 400 gallons of graywater per day must meet to avoid the necessity of obtaining a permit for graywater use from the commission. THSC, §341.039(c)(4), expressly prohibits the commission from requiring a permit for the "domestic use of less than 400 gallons of graywater each day *if* the graywater is *stored* in tanks that. . .." (Emphasis added.) Since THSC, §341.039(c)(4), expressly requires storing graywater in a tank as an element that domestic users of less than 400 gallons of graywater per day must meet if they want to use their graywater without a permit from the commission, and because the statute defines wastewater from clothes-washing machines as graywater, the commission has included a tank as part of the requirements in its proposed rules. The commission made no change to the rules based on this comment.

TCE commented that the commission should add process water to the definition of graywater in §285.80.

The commission responds that it has taken the definition of graywater directly from THSC, §341.039, and to alter this definition in the rules would be inconsistent with statutory requirements. The commission made no change to the rules based on this comment.

One individual commented that the definition of graywater in §285.80(a) and §285.80(b) does not work. This individual stated that water that is used to wash hands, bodies, and undergarments will contain fecal material.

The commission agrees that in some instances water used to wash hands, bodies, and undergarments could contain fecal material. However, the definition of graywater in TWC, §26.0311(a)(1) and (2), and THSC, §341.039(e)(1) and (2), specifies that graywater does not include wastewater that has come in contact with toilet waste or from the washing of material, including diapers, soiled with human excreta. The commission made no change to the rules based on this comment.

Referencing §285.81(a), COA Utility commented that the commission should require residents who install a graywater system producing less than 400 gallons of graywater per day to provide written notification to the local authorized agent.

The commission responds that the amendments to Chapter 285 implement the changes in THSC, §341.039. THSC, §341.039(c), specifically states that "the commission may not require a permit for the domestic use of less than 400 gallons of graywater each day. . .." None of the amendments to the THSC from House Bill 2661 authorize the commission to require written notification to the local authorized agent for the use of less than 400 gallons of graywater each day. Because the statute does not provide for written authorizations to the local authorized agents, to include these provisions in the rules would be inconsistent with statutory requirements. Therefore, the commission made no change to the rules based on this comment.

However, §285.80(c) states that the construction of a graywater system must comply with any requirements of the local permitting authority. THSC, §366.032, states that if a local governmental entity's order, ordinance, or resolution adopts more stringent standards for on-site sewage disposal systems than this chapter or the commission's standards and provides greater public health and safety protection, the authorized agent's order or resolution prevails over this chapter or the standards. Therefore, if properly adopted, a local permitting authority may adopt more stringent requirements, such as a requirement that graywater

users notify their local permitting authority in writing of their graywater use.

One individual asked how the 400 gallons per day limit in §285.81(a) is going to be monitored.

The commission anticipates that the users of graywater will follow the requirements as laid out in the commission's rules. However, if the requirements are not followed, one of the means of monitoring this rule is citizen complaints to the commission regarding the inappropriate use of graywater. The commission made no change to the rules based on this comment.

One individual asked how the requirement in §285.81(a)(2) that requires the graywater system to be designed so that 100% of the graywater can be diverted to the owner's OSSF during periods of non-use and that the system may only be connected to an OSSF under certain requirements will be monitored. Additionally, the individual asked if a provision has been made to notify the buyer of the property that this system is only allowed under certain circumstances.

The commission anticipates that the users of graywater will follow the requirements as laid out in the commission's rules. However, if the requirements are not followed, one of the means of monitoring this rule is citizen complaints to the commission regarding the inappropriate use of graywater. The commission made no change to the rules based on this comment.

The commission responds that THSC, §341.039, does not require that notification be given to a buyer that the graywater system is located on the property. The commission did not include a requirement for notification to the buyer regarding the graywater system because the statute does not provide for this; therefore, to include this provision in the rules would be inconsistent with statutory requirements.

One individual stated that §285.81(a)(2)(B) requires the discharge from a graywater system to enter the OSSF through two backflow preventers. This individual asked how a problem can be detected before it occurs if a permit and inspection are not required.

The commission responds that THSC, §341.039, does not allow the commission to require a permit for the domestic use of less than 400 gallons of graywater each day if the graywater use meets the requirements in THSC, §341.039.

The commission did not include an inspection requirement because the statutes do not provide for any inspection procedures; therefore, to include these provisions in the rules would be inconsistent with statutory requirements. The commission made no change to the rules based on this comment.

One individual stated that §285.81(a)(5) does not allow graywater to create a nuisance or damage the quality of surface or groundwater. This individual asked how a violation could be detected before it occurs since no permit, inspection, or oversight is required.

The commission responds that THSC, §341.039, does not allow the commission to require a permit for the domestic use of less than 400 gallons of graywater each day if the graywater use meets the requirements in THSC, §341.039. The commission did not include an inspection or oversight requirement because the statute does not provide for inspection or oversight; therefore, to include a provision regarding inspection or oversight in the rules would be inconsistent with statutory requirements. The commission made no change to the rules based on this comment.

One individual asked how §285.81(d)(2), which requires that graywater only be used for gardening except on the edible parts of crops intended for human consumption, will be monitored.

The commission responds that in §285.81(d)(2), it has deleted the language "except that it may not be used such that the edible parts of crops intended for human consumption come into direct contact with graywater." Therefore, this is not a requirement that the commission will need to monitor. The commission made this change to more closely track the language in THSC, §341.039(c)(2).

The commission anticipates that the users of graywater will follow the requirements as laid out in the commission's rules. However, if the requirements are not followed, one of the means of monitoring this rule is citizen complaints to the commission regarding the inappropriate use of graywater. The commission made no change to the rules based on this comment.

One individual commented that a problem currently exists with graywater being discharged where the ground is wet. This individual stated that §285.81(h)(6) makes this worse because of the potential for untreated wastewater to be discharged to the ground's surface.

The commission responds that in the current rules §285.81 requires that the disposal area not create a public health nuisance; §285.81 requires that no ponding occur in the disposal area; and §285.81 requires that laundry graywater not be discharged if the soil is wet. The commission retained these requirements in the proposed §285.81(h) for current graywater users. Graywater use that begins after the effective date of these rules is subject to similar requirements in §285.81.

The commission did not include treatment requirements in the proposed rules because THSC, §341.039, does not provide for any treatment requirements; therefore, to include these provisions in the rules would be inconsistent with statutory requirements. The commission made no change to the rules based on this comment.

STATUTORY AUTHORITY

The new sections are adopted under the authority granted to the commission by the legislature in THSC, Chapter 366. The new sections implement THSC, §366.012(a)(1), which requires the commission to adopt rules consistent with the policy defined in TWC, §26.0311 and THSC, §341.039 and §366.012, relating to Standards for Control of Graywater, Graywater Standards, and Rules Concerning On-Site Disposal Systems. Specific statutory authorization derives from House Bill 2661, which amended TWC, §26.0311, and THSC, §341.039 and 366.012. The new sections are also adopted under the general authority granted in TWC, §5.013, which establishes the general jurisdiction of the commission over other areas of responsibility as assigned to the commission under the TWC and other laws of the state; TWC, §5.103 and §5.105, which authorize the commission to adopt rules and policies necessary to carry out its responsibilities and duties under TWC, §5.013(14)(b); and TWC, §7.002, which authorizes the commission to enforce provisions of the TWC and the THSC.

§210.83. Criteria for the Domestic Use of Graywater.

(a) An authorization is not required for the domestic use of less than 400 gallons of graywater each day if:

(1) the graywater originates from a private residence;

(2) the graywater system is designed so that 100% of the graywater can be diverted to an organized wastewater collection system during periods of non-use of the graywater system and the discharge from the graywater system must enter the organized wastewater system through two backwater valves or backwater preventers;

(3) the graywater is stored in tanks and the tanks:

(A) are clearly labeled as nonpotable water;

(B) must restrict access, especially to children;

(C) eliminate habitat for mosquitoes and other vectors;

(D) are able to be cleaned; and

(E) meet the structural requirements of §210.25(i) of this title (relating to Special Design Criteria for Reclaimed Water Systems);

(4) the graywater system uses piping that meets the piping requirement of §210.25 of this title;

(5) the graywater is applied at a rate that:

(A) will not result in ponding or pooling; or

(B) will not cause runoff across the property lines or onto any paved surface; and

(6) the graywater is not disposed of using a spray distribution system.

(b) Builders of private residences are encouraged to:

(1) install plumbing in new housing to collect graywater from all allowable sources; and

(2) design and install a subsurface graywater system around the foundation of new housing to minimize foundation movement or cracking.

(c) A graywater system as described in subsection (a) of this section may only be used:

(1) around the foundation of new housing to minimize foundation movement or cracking;

(2) for gardening;

(3) for composting; or

(4) for landscaping at the private residence.

(d) The graywater system must not create a nuisance or damage the quality of surface water or groundwater.

(e) Homeowners who have been disposing wastewater from residential clothes-washing machines, otherwise known as laundry graywater, directly onto the ground before the effective date of this rule may continue disposing under the following conditions.

(1) The disposal area must not create a public health nuisance.

(2) Surface ponding must not occur in the disposal area.

(3) The disposal area must support plant growth or be sodded with vegetative cover.

(4) The disposal area must have limited access and use by residents and pets.

(5) Laundry graywater that has been in contact with human or animal waste must not be disposed onto the ground surface.

(6) Laundry graywater must not be disposed to an area where the soil is wet.

(7) A lint trap must be affixed to the end of the discharge line.

(f) Graywater systems that are altered, create a nuisance, or discharge graywater from any source other than clothes-washing machines are not authorized to discharge graywater under subsection (e) of this section.

§210.84. Criteria for Use of Graywater for Industrial, Commercial, or Institutional Purposes.

(a) Authorization. If used in accordance with this subchapter, graywater used for an industrial, commercial, or institutional purpose does not require authorization from the commission.

(b) Graywater systems used for industrial, commercial, or institutional purposes must be designed so that 100% of the graywater can be diverted to an organized wastewater collection system during periods of non-use of the graywater system. The discharge from the graywater system must enter the organized wastewater system through two backwater valves or backwater preventers.

(c) Graywater, as defined in §210.82(a) of this title (relating to General Requirements), may be used for the following activities.

(1) Process water.

(A) Graywater used for industrial, commercial, or institutional purposes must be treated to a standard that allows the graywater to be used in operational processes.

(B) Treatment described in subparagraph (A) of this paragraph does not require an authorization from the agency.

(2) Landscape maintenance. If graywater is used for landscape maintenance, the graywater must meet the following standards.

(A) If the graywater will be applied in areas where the public may come into contact with the graywater, the graywater must meet the following standards:

(i) Fecal coliform, 20 colony forming units (CFU)/100 mililiters (ml), geometric mean; or

(ii) Fecal coliform (not to exceed), 75 CFU/100 ml, single grab sample.

(B) If the graywater will be applied in areas where the public is not present during the time when irrigation activities occur or disposed of for other uses where the public would not come into contact with the graywater, the graywater must meet the following standards:

(i) Fecal coliform, 200 CFU/100 ml, geometric mean; or

(ii) Fecal coliform (not to exceed), 800 CFU/100 ml, single grab sample.

(3) Dust control. If graywater is used for dust control, the graywater must meet the standards in paragraph (2)(B) of this subsection.

(4) Toilet flushing. If graywater is used for toilet flushing:

(A) the fecal coliform levels must meet the limits in paragraph (2)(A) of this subsection; and

(B) all exposed piping and piping carrying graywater within a building must be either purple pipe or painted purple; all buried piping installed after the effective date of these rules must be either manufactured in purple, painted purple, taped with purple metallic tape,

or bagged in purple; and all exposed piping must be stenciled in white with a warning reading "NON-POTABLE WATER."

(5) Other uses. If graywater is used for other similar activities where the potential for unintentional human exposure may occur, the graywater must meet the fecal coliform limits in paragraph (2)(A) of this subsection.

(d) Graywater used for commercial, industrial, or institutional purposes must be monitored for fecal coliform at least monthly in areas where the public may come into contact with graywater and these records must be maintained at the site. These records must be readily available for inspection by the commission for a minimum of five years.

§210.85. Criteria for Use of Graywater for Irrigation and for Other Agricultural Purposes.

(a) If used in accordance with this subchapter, graywater used for irrigation and other agricultural purposes does not require authorization from the commission.

(b) Graywater systems used for irrigation and other agricultural purposes must be designed so that 100% of the graywater can be diverted to an organized wastewater collection system during periods of non-use of the graywater system. The discharge from the graywater system must enter the organized wastewater system through two backwater valves or backwater preventers.

(c) Graywater, as defined in §210.82(a) of this title (relating to General Requirements), may be used for the following activities.

(1) Process water.

(A) Graywater used for irrigation and other agricultural purposes may be treated to a standard that allows the graywater to be used in operational processes.

(B) Treatment described in subparagraph (A) of this paragraph does not require an authorization from the commission.

(2) Landscape maintenance. If graywater is used for landscape maintenance, the graywater must meet the following standards.

(A) If the graywater will be applied in areas where the public may come into contact with the graywater, the graywater must meet the following standards:

(i) Fecal coliform, 20 colony forming units (CFU)/100 mililiters (ml), geometric mean; or

(ii) Fecal coliform (not to exceed), 75 CFU/100 ml, single grab sample.

(B) If the graywater will be applied in areas where the public is not present during the time when irrigation activities occur or disposed of for other uses where the public would not come into contact with the graywater, the graywater must meet the following standards:

(i) Fecal coliform, 200 CFU/100 ml, geometric mean; or

(ii) Fecal coliform, 800 CFU/100 ml, single grab sample.

(3) Dust control. If graywater is used for dust control, the graywater must meet the standards in paragraph (2)(B) of this subsection.

(4) Irrigation of fields. If graywater is used to irrigate fields where edible crops are grown or fields that are pastures for milking animals, the graywater must meet the standards in paragraph (2)(A) of this subsection.

(5) Other uses. If graywater is used for other similar activities where the potential for unintentional human exposure may occur, the graywater must meet the fecal coliform limits in paragraph (2)(A) of this subsection.

(d) Graywater used for irrigation and for other agricultural purposes must be monitored for fecal coliform at least monthly in areas where the public may come into contact with graywater and the records must be maintained at the site. These records must be readily available for inspection by the commission for a minimum period of five years.

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

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CHAPTER 285. ON-SITE SEWAGE FACILITIES
SUBCHAPTER H. DISPOSAL OF GRAYWATER

30 TAC §285.80, §285.81

The Texas Commission on Environmental Quality (commission or TCEQ) adopts amendments to §285.80 and §285.81. Section 285.81 is adopted *with change* to the proposed text as published in the August 13, 2004, issue of the *Texas Register* (29 TexReg 7871). Section 285.80 is adopted *without change* and the text will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The legislature passed House Bill 346 in 1993 which required rules to be developed by the commission and the Texas State Board of Plumbing Examiners for graywater use in Texas. The commission adopted rules under this chapter in June 2001 that allow water from clothes-washing machines as the only graywater to be discharged without going through an on-site sewage facility (OSSF). Water from other sources in a residence was not included in the use of graywater.

In 2003, the 78th Legislature passed House Bill 2661 which amended Texas Water Code (TWC), §26.0311, and Texas Health and Safety Code (THSC), §341.039 and §366.012. These amendments modify the definition of graywater and require the commission to adopt and implement standards for the use of graywater and to address the separation of graywater in a residence served by an OSSF system.

To implement this legislation, the commission concurrently amended 30 TAC Chapter 210, Use of Reclaimed Water; Chapter 285; and 30 TAC Chapter 317; Design Criteria for Sewerage Systems. Adopted amendments to Chapter 210 and

Chapter 317 are also published in the Adopted Rules section of this issue of the *Texas Register*.

SECTION BY SECTION DISCUSSION

House Bill 2661 amended THSC, §341.039, Graywater Standards. THSC, §341.039(a), requires the commission to adopt and implement minimum standards for the use and reuse of graywater. Currently, the commission's rules regarding graywater use and on-site sewage systems are in Chapter 285, Subchapter H. The commission modified Subchapter H to incorporate the amendments made to the THSC by House Bill 2661.

The commission changed the name of Subchapter H from "Treatment and Disposal of Greywater" to "Disposal of Graywater" to more accurately reflect the contents of the subchapter. Additionally, throughout the subchapter the commission changed the spelling of the word graywater from "greywater" to "graywater" to be consistent with the statutory spelling in House Bill 2661.

Adopted §285.80, General Requirements, provides the general requirements for installing or using a graywater system. These criteria are incorporated from THSC, §341.039, as amended by House Bill 2661. The commission changed the name of the section from "Treatment and Disposal of Greywater" to "General Requirements" to more accurately reflect the contents of the section. The current language in §285.80 is deleted because House Bill 2661 deleted the statutory provision that required the commission and the Texas State Board of Plumbing Examiners by rule to implement minimum standards for the use and reuse of graywater.

Adopted §285.80(a) defines graywater as wastewater from showers; bathtubs; hand washing lavatories; sinks that are not used for disposal of hazardous or toxic ingredients; sinks not used for food preparation or disposal; and clothes-washing machines. This definition is from THSC, §341.039(e), and TWC, §26.0311(a), as amended by House Bill 2661.

Adopted §285.80(b) excludes from the definition of graywater wastewater from the washing of material, including diapers, soiled with human excreta, or wastewater that has come into contact with toilet waste. This definition is from THSC, §341.039(e), and TWC, §26.0311(a), as amended by House Bill 2661.

Adopted §285.80(c) requires that construction of a graywater system, including the storage and disposal systems, comply with Chapter 285 and any requirements of the local permitting authority. THSC, §366.032, Order or Resolution; Requirements, states that if the local governmental entity's order or resolution adopts more stringent standards for on-site sewage disposal systems than this chapter or the commission's standards and provides greater public health and safety protection, the authorized agent's order or resolution prevails over this chapter or the standards. Subsection (c) also specifies that, for the purposes of this subchapter, a graywater system begins at the graywater stub-out of a single family dwelling. The commission adopts these amendments to be consistent with existing language in Chapter 285.

Adopted §285.81, Criteria for Disposal of Graywater, provides the criteria for use of graywater. The criteria are incorporated from THSC, §341.039, as amended by House Bill 2661. The commission changes the title of this section from "Criteria for Discharge of Laundry Greywater" to "Criteria for Disposal of Graywater" to more accurately reflect the contents of the section.

Adopted §285.81(a) specifies that an owner using less than 400 gallons of graywater each day does not need a permit or an inspection if the graywater originates from a single family dwelling and if the graywater system is designed so that 100% of the graywater can be diverted to the owner's OSSF system during periods of non-use of the graywater system. THSC, §341.039, as amended by House Bill 2661, refers to "private residence," not "single family dwelling." In the adopted rules, the commission uses the term "single family dwelling" in place of the term "private residence." "Single-family dwelling" is defined in §285.2(66) as: "A structure that is either built on or brought to a site, for use as a residence for one family. A single family dwelling includes all detached buildings located on the residential property and routinely used only by members of the household of the single family dwelling." The commission adopts this change to make clear that graywater from all buildings located on the residential property may be used under this section.

Adopted subsection (a) also specifies that a graywater system may only be connected to the OSSF system if the connection is in the line between the house stub-out for the OSSF and the OSSF treatment tank and the discharge from the graywater system enters the OSSF system through two backwater valves or backwater preventers. The commission includes backwater valves or backwater preventers to prevent contamination of the graywater system by the OSSF system. This will help ensure that toilet waste or other types of wastewater that are not defined as graywater in TWC, §26.0311(a), do not commingle with the graywater system. Additionally, the graywater must be stored in tanks and the tanks must be clearly labeled as nonpotable water; must restrict access, especially to children; and must eliminate habitat for mosquitoes and other vectors. These requirements are from THSC, §341.039(c).

While THSC, §341.039(c)(4), requires tanks, the statute is silent with regard to tank specifications. However, THSC, §341.039(a), requires the commission to adopt and implement minimum standards for the use and reuse of graywater. THSC, §341.039(b), and TWC, §26.0311(c), require that the domestic use of graywater not be a nuisance and not damage the quality of surface water or groundwater in the state. Additionally, THSC, §341.039(c)(6) and (7), require that the graywater be used without the formation of ponds or pools and that graywater not create surface runoff across the property lines or onto any paved surface. Thus, the commission is adopting two requirements that are not specifically enumerated in the statute to implement these statutory provisions. These requirements are: 1) the tanks are able to be cleaned; and 2) the tanks meet certain structural requirements.

If the tanks cannot be cleaned, solid materials could clog the lines or increase the biomat buildup at the end of the line if graywater is discharged directly onto the ground. A clogged line could lead to a backup or overflow of the system, and a buildup of biomat could cause odor and prevent the graywater from soaking into the ground, causing ponding, pooling, or runoff. Furthermore, the commission adopts that the tanks must meet the structural integrity requirements of current American Water Works Association (AWWA) standards to ensure the structural integrity of the tanks. These provisions will help to ensure that graywater use is not a nuisance and does not damage the quality of surface water or groundwater in the state as required by THSC, §341.039(b).

Finally, adopted subsection (a) would require that a graywater system use piping clearly identified as a nonpotable water conduit, including identification through the use of painted purple

pipe, purple pipe, pipe taped with purple metallic tape, or other methods approved by the executive director; that the graywater be applied at a rate that will not result in ponding or pooling or will not cause runoff; and that the graywater disposal system not be used as a spray distribution system. These provisions are from THSC, §341.039.

Adopted §285.81(b) specifies that no reduction in the size of the OSSF system will be allowed when using a graywater system. THSC, §341.039(c)(3), requires that graywater be collected using a system that overflows into an on-site wastewater treatment and disposal system. To meet this requirement, a full-sized OSSF system must be installed to contain the entire wastewater flow for the house; thus, no reduction in the size of an OSSF system is allowed under these adopted rules.

Adopted §285.81(c) encourages builders of single family dwellings to install plumbing in new housing to collect graywater from allowable sources, and design and install a subsurface graywater system around the foundation of new housing to minimize foundation movement or cracking. This provision is from THSC, §341.039(d).

Adopted §285.81(d) includes the allowable uses for graywater. This subsection specifies that the graywater system may only be used around the foundation of new housing to minimize foundation movement or cracking; for gardening; for composting; or for landscaping at a single family dwelling. These requirements are from THSC, §341.039.

Adopted §285.81(e) requires all aspects of the permitting, planning, construction, operation, and maintenance for any proposed graywater system that does not meet the requirements of subsection (a) of this section to meet the requirements of Chapter 285. The commission adopts this requirement because there are potentially graywater systems that will not be able to meet the requirements outlined in subsection (a); therefore, this provision provides notice that these graywater systems must meet the applicable requirements of Chapter 285.

Adopted §285.81(f) requires the installer of the graywater system to advise the owner of basic operating and maintenance procedures, including any effects on the OSSF system. Providing information to the owner about operating and maintenance procedures will help the owner prevent the graywater system and the OSSF system from failing or causing a nuisance. The commission adopts this requirement to implement THSC, §366.012(b).

Adopted §285.81(g) prohibits graywater use from creating a nuisance or damaging surface water or groundwater. Additionally, this subsection allows the permitting authority to take action under §285.71 if graywater use creates a nuisance or damages surface water or groundwater. The commission adopts this provision to implement THSC, §341.039(b), and to be consistent with the existing rule language in Chapter 285.

Adopted §285.81(h) modifies the language of the current §285.81 to allow homeowners who discharge wastewater from residential clothes-washing machines before the effective date of the adopted rules to continue to discharge directly onto the ground surface as long as the homeowners meet certain conditions. The commission adopts this provision to limit the impact that the adopted rules will have on homeowners who currently discharge laundry graywater.

Adopted §285.81(i) specifies that graywater systems that are altered, create a nuisance, or discharge graywater from any source other than clothes-washing machines will not be authorized to discharge graywater under subsection (h) of this section. The commission adopts this provision to provide notice to homeowners that if they alter their system, allow their system to create a nuisance, or add an additional source of graywater to their system's discharge they are no longer eligible to discharge graywater under subsection (h) of this section.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed this rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" in that statute. Major environmental rule means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The intent of this rulemaking is to implement legislative amendments that modify the definition of graywater and require the commission to adopt and implement standards for the use of graywater and to address the separation of graywater in a residence served by an OSSF system. The adopted amendments to §285.80 and §285.81 set out both the general requirements that an individual must follow when voluntarily installing or using a graywater system and the criteria for using graywater. The adopted amendments in this rulemaking do not adversely affect, in a material way, the economy, a section of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

In addition, the amendments are not subject to Texas Government Code, §2001.0225, because they do not meet the four criteria specified in §2001.0225(a). Texas Government Code, §2001.0225(a), applies to a rule adopted by an agency, 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 adopted amendments to Chapter 285 do not meet any of these requirements. First, these revisions do not exceed a standard set by federal law as there are no federal requirements for these rules. As a result, there are no applicable standards set by federal law that could be exceeded by these rules. Second, these revisions do not exceed an express requirement of state law, but are being adopted to implement state law, including the requirement that graywater use not be a nuisance and not damage the quality of surface water or groundwater in the state. Therefore, the rulemaking does not exceed an express requirement of state law. Third, the commission is not a party to a delegation agreement with the federal government concerning a state and federal program that would be applicable to requirements set forth in these rules. Therefore, there are no delegation agreement requirements that could be exceeded by these rules. Fourth, the rules were not developed solely under the commission's general powers, but rather were developed to implement the specific requirements of House Bill 2661, amending TWC, §26.0311, and THSC, §341.039 and §366.012. Therefore, the

commission does not adopt these rules solely under the commission's general powers. Thus, the commission concludes that a regulatory analysis is not required in this instance because the adopted rules do not meet the criteria of a major environmental rule as defined by Texas Government Code, §2001.0225.

TAKINGS IMPACT ASSESSMENT

The commission performed an assessment of these rules in accordance with Texas Government Code, §2007.043. The specific purpose of this rulemaking is to implement House Bill 2661 which amended TWC, §26.0311, and THSC, §341.039 and §366.012. These amendments modify the definition of graywater and require the commission to adopt and implement standards for the use of graywater and to address the separation of graywater in a residence served by an OSSF system. The adopted graywater rules are voluntary. Thus, the commission's assessment indicates that Texas Government Code, Chapter 2007, does not apply to this rulemaking because the promulgation and enforcement of these rules will not create a burden on private real property.

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 preliminary consistency determination for the adopted rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22 and found the rulemaking is consistent with the applicable CMP goals and policies.

The 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; to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone; to ensure and enhance planned public access to and enjoyment of the coastal zone in a manner that is compatible with private property rights and other uses of the coastal zone; and to balance these competing interests.

The specific CMP policy applicable to the adopted rules requires that rules governing OSSFs shall require those systems to be located, designed, operated, inspected, and maintained so as to prevent release of pollutants that may adversely affect coastal waters.

These adopted rules will protect coastal areas by setting minimum standards for graywater use and addressing the separation of graywater in residences served by an on-site sewage disposal system. These adopted rules define graywater as wastewater from clothes-washing machines, showers, bathtubs, handwashing lavatories, and sinks that are not used for the disposal of hazardous or toxic ingredients. The term "graywater" does not include wastewater that has come in contact with toilet waste; wastewater from the washing of material, including diapers, soiled with human excreta; or wastewater from sinks used for food preparation or disposal. These adopted rules are developed to reduce the possibility of contamination into coastal waters by ensuring that graywater use in all areas of the state, including coastal areas, does not create a nuisance and does not damage the quality of surface water or groundwater in this state.

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, because these rules do not create or have a direct or significant adverse effect on any coastal natural resource areas, and because the standards specified in the rules are intended to set uniform standards for the use of graywater regardless of location.

PUBLIC COMMENT

A public hearing was held in Austin on September 8, 2004. The comment period closed at 5:00 p.m. on September 13, 2004. The commission received written and/or oral comments from: City of Austin, Austin Water Utility (COA Utility); Lower Colorado River Authority (LCRA); San Antonio Water System (SAWS), Texas Cooperative Extension (TCE), and two individuals.

COA Utility, LCRA, SAWS, and TCE generally supported the proposed rules but raised issues or suggested changes to the rules as specified in the RESPONSE TO COMMENTS section of this preamble.

The two individuals generally did not support the proposed rules and raised issues or suggested changes to the rules as specified in the RESPONSE TO COMMENTS section of this preamble.

RESPONSE TO COMMENTS

General

One individual commented that allowing construction of graywater disposal systems with no requirement for permit, no design criteria, and no inspection is a very bad idea. This individual stated that it is impossible to eliminate the introduction of many potentially dangerous pathogens into graywater. To safeguard public health and to protect the environment, the management of water containing pathogens clearly should be regulated.

The commission responds that THSC, §341.039, and TWC, §26.0311 do not allow the commission to require a permit for the domestic use of less than 400 gallons of graywater each day if the graywater use meets the requirements in THSC, §341.039, and TWC, §26.0311. Additionally, the commission responds that THSC, §341.039, and TWC, §26.0311, do not require treatment for graywater. The commission did not include treatment requirements because the statutes do not provide for any treatment requirements; therefore, to include these provisions in the rules would be inconsistent with statutory requirements. The commission made no change to the rules based on this comment.

LCRA suggested that graywater systems be required to operate using a minimum vertical separation of at least two feet from the point of graywater application to the top of the seasonally high groundwater table. LCRA stated that this is consistent with the separation distance from wastewaters to a seasonally high groundwater table under the existing Chapter 285 rules.

The commission proposed the amendments to Chapter 285 to implement the changes in THSC, §341.039. The revisions to this section of the THSC do not specify a minimum vertical separation distance between the point of graywater application and the top of the seasonally high groundwater table. Additionally, the original legislation for graywater in the 78th legislative session specified that the graywater be collected using a system that maintained a certain vertical distance between the system and the highest seasonal water table. This requirement, however, was dropped from the final legislation and, therefore, the

commission did not include a similar requirement in its proposed rules. The commission made no change to the rules based on this comment.

One individual commented that these rules should not encourage the use of graywater systems "to minimize foundation movement or cracking" for two reasons: 1) not all foundations can benefit from the addition of moisture to the perimeter of the foundation; and 2) foundations placed on high shrink/swell soils may not benefit from, and could actually be damaged, by the application of moisture to the perimeter of the foundation.

The commission responds that THSC, §341.039, requires that the commission, by rule, incorporate this provision into the rule. The commission made no change to the rules based on this comment.

General: Tanks

SAWS commented that storage tanks should be optional and not a required component of graywater systems. Additionally, SAWS commented that the language in House Bill 2661 that references tanks does so to establish standards that ensure such tanks will not pose a threat to public safety and should not be construed as a mandate that graywater must be stored in tanks.

The commission disagrees that the mention of tanks in THSC, §341.039(c)(4), is solely to establish requirements to eliminate threats to public safety. While THSC, §341.039(c)(4), does establish requirements to protect public safety, it also establishes tanks as one of the requirements that a domestic user of less than 400 gallons of graywater per day must meet to avoid obtaining a permit for graywater use from the commission. THSC, §341.039(c)(4), expressly prohibits the commission from requiring a permit for the "domestic use of less than 400 gallons of graywater each day *if* the graywater is *stored* in tanks that...." (Emphasis added.) Since THSC, §341.039(c)(4), expressly requires storing graywater in a tank as an element that domestic users of less than 400 gallons of graywater per day must meet if they want to use their graywater without a permit from the commission, the commission has included this as a requirement in its proposed rules. The commission made no change to the rules based on this comment.

SAWS commented that the proposed rules should enumerate the tank standards that relate to specific material and/or operational criteria rather than referring to the AWWA standards for homeowners who elect to use tanks in their graywater system. Specifically, SAWS commented that if a tank is included in a graywater system the tank should be constructed of non-metallic material because metallic tanks are prone to corrosion and rust.

The commission responds that the reference to the AWWA standards allows graywater users flexibility in selecting a tank for their graywater system. The commission has not developed standards for tanks but instead uses standards set by the industry since standards can vary based on many elements related to tank design, including the type of material used to construct the tank; the location of installation; size of the tank; and the type of natural elements to which the tank is exposed. Additionally, the commission disagrees that tanks for graywater systems should be constructed of non-metallic material. For example, a steel tank would be acceptable for a graywater system if the tank meets AWWA standards. The commission made no change to the rules based on this comment.

One individual asked how the use of a tank that meets the AWWA standards will be monitored. One individual asked how the requirement in §285.81(a)(5) that does not allow ponding or pooling is going to be monitored. Additionally, this individual asked what criteria will be used to determine the loading rate.

The commission responds that THSC §341.039, and TWC, §26.0311, do not allow the commission to require a permit for the domestic use of less than 400 gallons of graywater each day if the graywater use meets the requirements in THSC, §341.039, and TWC, §26.0311.

The commission did not include monitoring requirements or loading rate requirements because the statute does not provide for any monitoring procedures or loading rate requirements; therefore, to include these provision in the rules would be inconsistent with statutory requirements.

The commission anticipates that the users of graywater will follow the requirements as laid out in the commission's rules. However, if the requirements are not followed, one of the means of monitoring these rules will come in the form of citizen complaints to the commission regarding the inappropriate use of graywater. The commission made no change to the rules based on this comment.

General: Backflow Prevention

SAWS commented that the requirements for backflow prevention as proposed do not seem appropriate because an airgap on the line leading to an OSSF or sewer main will potentially create an odor problem. SAWS suggested a backwater valve designed to withstand the harsh environment created by sewage would provide a better and more reliable safety measure. COA Utility commented that the term "backflow preventer" should be replaced by "backwater valve" throughout Chapter 210 and Chapter 285. TCE commented that "backflow preventer" should be replaced with a "check valve" or something similar to avoid confusion which could arise between a plumbing inspector and another type of inspector.

The commission agrees that an airgap could potentially create an odor problem and, therefore, did not include an airgap as part of its backflow prevention requirements in the proposed rules.

The commission responds that to avoid confusion with plumbing codes the commission agrees to change the term "backflow preventer" to "backwater valve or backwater preventer" in §§210.83(a), 210.84(b), 210.85(b), and 285.81(a)(2)(B). A check valve is a type of backwater valve; however, the commission decided to use the term backwater valve or backwater preventer to allow maximum flexibility for the graywater systems.

General: Purple Pipe

SAWS commented that the commission should consider allowing identification of graywater system piping by a means other than the use of the color purple. SAWS stated that the system requirements and treatment methods are different for Type I and Type II reclaimed water versus graywater. SAWS commented that color-coding both types of systems using purple can create confusion. SAWS suggested that other standards of identification exist.

The commission responds that THSC, §341.039(c)(5), establishes purple pipe, purple tape, or similar markings for graywater as one of the requirements that a domestic user of less than 400 gallons of graywater per day must meet to avoid the requirement of a permit for graywater use from the commission. THSC,

§341.039(c)(5), expressly prohibits the commission from requiring a permit for the "domestic use of less than 400 gallons of graywater each day *if* the graywater uses piping clearly identified as a nonpotable water conduit, including identification through the use of *purple pipe, purple tape, or similar markings*...." (Emphasis added.) Since THSC, §341.039(c)(5), expressly requires purple pipe, purple tape, or similar markings as an element that domestic users of less than 400 gallons of graywater per day must meet if they want to use their graywater without a permit from the commission, the commission has included this as a requirement in its proposed rules. The commission made no change to the rules based on this comment.

COA Utility commented to reduce confusion between reclaimed water and graywater that the proposed rules should refer to the Uniform Plumbing Code, Appendix G, which states that graywater pipes should have "continuous tape stating: Danger, Unsafe Water."

The commission proposed the amendments to Chapter 210 and Chapter 285 to implement the changes in THSC, §341.039, and TWC, §26.0311. The revisions to these sections of the THSC and the TWC do not reference the Uniform Plumbing Code, Appendix G, as an option for identifying pipes that carry graywater. THSC, §341.039(c)(5), expressly prohibits the commission from requiring a permit for the "domestic use of less than 400 gallons of graywater each day *if* the graywater uses piping clearly identified as a nonpotable water conduit, including identification through the use of purple pipe, purple tape, or similar markings...." (Emphasis added.) Since THSC, §341.039(c)(5), expressly requires purple pipe, purple tape, or similar markings as an element that domestic users of less than 400 gallons of graywater per day must meet if they want to use their graywater without a permit from the commission, the commission has included this as a requirement in its proposed rules. The commission made no change to the rules based on this comment.

One individual asked how anyone will know if purple pipe is not used since no permit, inspection, or oversight is required.

The commission responds that THSC, §341.039, and TWC, §26.0311, do not allow the commission to require a permit for the domestic use of less than 400 gallons of graywater each day if the graywater use meets the requirements in THSC, §341.039, and TWC, §26.0311. The commission did not include an inspection or oversight requirement because the statutes do not provide for any inspection or oversight procedures; therefore, to include these provisions in the rules would be inconsistent with statutory requirements. The commission made no change to the rules based on this comment.

General: Guidance

LCRA encouraged the commission to conduct an extensive public education program regarding these new graywater rules.

The commission responds that agency staff has provided educational presentations on the proposed graywater rules in Austin, Dallas, Kingsville, Round Rock, San Antonio, and Waco. Additionally, agency staff has been working with industry associations regarding these rules. The commission made no change to the rules based on this comment.

COA Utility commented that the commission should develop a guidance document for non-permitted systems using less than 400 gallons per day. Additionally, COA Utility commented that §210.83(b) and §285.81(c) and (h)(7) "should be removed from the statute and placed in the guidance document."

The commission responds that it declines, at this time, to develop a guidance document for these rules. As long as users of less than 400 gallons of domestic graywater meet the requirements in Chapter 210 and Chapter 285, they have flexibility to meet the requirements in whatever manner is most cost-effective. Additionally, if domestic graywater users have questions about the manner in which they have chosen to meet the graywater requirements, agency staff is available to respond to their questions.

The commission declines to remove §210.83(b) and §285.81(c) from the rule language. These rule sections implement TWC, §26.0311(b)(2), and THSC, §341.039(d), which encourage builders "to install plumbing in a manner that provides the capacity to collect graywater from all allowable sources and to design and install a subsurface graywater system around the foundation of new housing in a way that minimizes foundation movement or cracking." TWC, §26.0311(b), and THSC, §341.039(a), require that "the commission *by rule*..." implement the provisions found in TWC, §26.0311(b)(2), and THSC, §341.039(d). (Emphasis added.)

The commission declines to remove §285.81(h)(7) and place in a guidance document since no guidance document is being developed at this time. The commission made no change to the rules based on this comment.

Chapter 210

One individual commented that §210.82(a) and §210.80(b) are mutually exclusive and therefore nonsensical.

The commission responds that the rules do not contain §210.80(b). The commission assumes that the commenter meant to refer to the requirements in §210.82(a) and §210.82(b). These requirements are from THSC, §341.039(e), and TWC, §26.0311(a). The commission declines to change this definition because to alter this definition in the rules would be inconsistent with statutory requirements. The commission made no change to the rules based on this comment.

One individual commented that §210.83(a) is not enforceable and, as such, should be eliminated. Since there is no permit, no plan review, no inspection, nor any continuing monitoring, there will rarely be time where a flow in excess of 400 gallons per day is noted and corrected.

The commission declines to delete §210.83(a). The commission responds that THSC, §341.039, and TWC, §26.0311 do not allow the commission to require a permit for the domestic use of less than 400 gallons of graywater each day if the graywater use meets the requirements in THSC, §341.039, and TWC, §26.0311. The commission anticipates that the users of graywater will follow the requirements as laid out in the commission's rules. However, if the requirements are not followed, one of the means of monitoring this rule is citizen complaints to the commission regarding the inappropriate use of graywater. The commission made no change to the rules based on this comment.

One individual commented that §210.83(a)(3)(C) must have much more guidance provided. The individual also stated that at this time we are either breeding or harboring mosquitoes at an alarming rate in the pump tanks following aerobic treatment units. With that as a given, what will be required, that is not being required in OSSFs, to prevent a habitat for mosquitoes? Whatever will eliminate the habitat must be specifically identified to be followed.

The commission responds that in the OSSF system described by the commenter the tanks should be sealed, thereby, preventing a mosquito habitat. For graywater systems, §210.83(a)(3)(C) requires that "the graywater is stored in tanks and the tanks eliminate habitat for mosquitoes and other vectors...." Additionally, §210.83(a)(5)(A) and (B) require that the graywater not pond or pool, or cause runoff across the property lines or onto any paved surface. As long as users of less than 400 gallons of domestic graywater meet the requirements in Chapter 210, they have flexibility to meet the requirements in whatever manner is most cost-effective. Further, if domestic graywater users have questions about the manner in which they have chosen to meet the graywater requirements, agency staff is available to respond to their questions. The commission made no change to the rules based on this comment.

SAWS commented that in §210.83(a)(4) and §210.84(c)(4)(B) the use of the word "piping" is ambiguous. SAWS asked whether piping includes fittings that become an integral part of pipe on installation of such systems. SAWS stated that a clear regulatory definition of what is included within "piping" is essential to avoid inadvertent regulatory violations and to permit a thorough understanding of what the construction of such systems will require.

The commission responds that the term "piping" includes fittings and appurtenances. Because the statute does not define "piping," to include this definition in the rules would be inconsistent with statutory requirements. Therefore, the commission has made no change to the rules based on this comment.

Chapter 285

SAWS commented that the conditions for the use of laundry graywater should remain as they are in existing Chapter 285, Subchapter H. SAWS stated that it is without benefit to add a storage tank requirement for laundry graywater use.

The commission responds that THSC, §341.039(e), defines graywater as "wastewater from clothes-washing machines, showers, bathtubs, hand-washing lavatories, and sinks that are not used for disposal of hazardous or toxic ingredients." THSC, §341.039(c), subjects graywater use to additional requirements and does not exempt laundry graywater from the new requirements; therefore, the commission has included wastewater from clothes-washing machines in the types of graywater subject to the proposed requirements.

However, §285.81(h) and (i) allow people currently using laundry graywater to continue their use of graywater without subjecting them to the new provisions unless the graywater system is altered, creates a nuisance, or discharges graywater from any other source than a clothes-washing machine.

The commission responds that THSC, §341.039(c)(4), establishes tanks as one of the requirements that a domestic user of less than 400 gallons of graywater per day must meet to avoid the necessity of obtaining a permit for graywater use from the commission. THSC, §341.039(c)(4), expressly prohibits the commission from requiring a permit for the "domestic use of less than 400 gallons of graywater each day *if* the graywater is *stored* in tanks that...." (Emphasis added.) Since THSC, §341.039(c)(4), expressly requires storing graywater in a tank as an element that domestic users of less than 400 gallons of graywater per day must meet if they want to use their graywater without a permit from the commission, and because the statute defines wastewater from clothes-washing machines as graywater, the commission has included a tank as part of the requirements in its proposed rules. The commission made no change to the rules based on this comment.

TCE commented that the commission should add process water to the definition of graywater in §285.80.

The commission responds that it has taken the definition of graywater directly from THSC, §341.039, and to alter this definition in the rules would be inconsistent with statutory requirements. The commission made no change to the rules based on this comment.

One individual commented that the definition of graywater in §285.80(a) and §285.80(b) does not work. This individual stated that water that is used to wash hands, bodies, and undergarments will contain fecal material.

The commission agrees that in some instances water used to wash hands, bodies, and undergarments could contain fecal material. However, the definition of graywater in TWC, §26.0311(a)(1) and (2), and THSC, §341.039(e)(1) and (2), specifies that graywater does not include wastewater that has come in contact with toilet waste or from the washing of material, including diapers, soiled with human excreta. The commission made no change to the rules based on this comment.

Referencing §285.81(a), COA Utility commented that the commission should require residents who install a graywater system producing less than 400 gallons of graywater per day to provide written notification to the local authorized agent.

The commission responds that the amendments to Chapter 285 implement the changes in THSC, §341.039. THSC, §341.039(c), specifically states that "the commission may not require a permit for the domestic use of less than 400 gallons of graywater each day...." None of the amendments to the THSC from House Bill 2661 authorize the commission to require written notification to the local authorized agent for the use of less than 400 gallons of graywater each day. Because the statute does not provide for written authorizations to the local authorized agents, to include these provisions in the rules would be inconsistent with statutory requirements. Therefore, the commission made no change to the rules based on this comment.

However, §285.80(c) states that the construction of a graywater system must comply with any requirements of the local permitting authority. THSC, §366.032, states that if a local governmental entity's order, ordinance, or resolution adopts more stringent standards for on-site sewage disposal systems than this chapter or the commission's standards and provides greater public health and safety protection, the authorized agent's order or resolution prevails over this chapter or the standards. Therefore, if properly adopted, a local permitting authority may adopt more stringent requirements, such as a requirement that graywater users notify their local permitting authority in writing of their graywater use.

One individual asked how the 400 gallons per day limit in §285.81(a) is going to be monitored.

The commission anticipates that the users of graywater will follow the requirements as laid out in the commission's rules. However, if the requirements are not followed, one of the means of monitoring this rule is citizen complaints to the commission regarding the inappropriate use of graywater. The commission made no change to the rules based on this comment.

One individual asked how the requirement in §285.81(a)(2) that requires the graywater system to be designed so that 100% of

the graywater can be diverted to the owner's OSSF during periods of non-use and that the system may only be connected to an OSSF under certain requirements will be monitored. Additionally, the individual asked if a provision has been made to notify the buyer of the property that this system is only allowed under certain circumstances.

The commission anticipates that the users of graywater will follow the requirements as laid out in the commission's rules. However, if the requirements are not followed, one of the means of monitoring this rule is citizen complaints to the commission regarding the inappropriate use of graywater. The commission made no change to the rules based on this comment.

The commission responds that THSC, §341.039, does not require that notification be given to a buyer that the graywater system is located on the property. The commission did not include a requirement for notification to the buyer regarding the graywater system because the statute does not provide for this; therefore, to include this provision in the rules would be inconsistent with statutory requirements.

One individual stated that §285.81(a)(2)(B) requires the discharge from a graywater system to enter the OSSF through two backflow preventers. This individual asked how a problem can be detected before it occurs if a permit and inspection are not required.

The commission responds that THSC, §341.039, does not allow the commission to require a permit for the domestic use of less than 400 gallons of graywater each day if the graywater use meets the requirements in THSC, §341.039.

The commission did not include an inspection requirement because the statutes do not provide for any inspection procedures; therefore, to include these provisions in the rules would be inconsistent with statutory requirements. The commission made no change to the rules based on this comment.

One individual stated that §285.81(a)(5) does not allow graywater to create a nuisance or damage the quality of surface or groundwater. This individual asked how a violation could be detected before it occurs since no permit, inspection, or oversight is required.

The commission responds that THSC, §341.039, does not allow the commission to require a permit for the domestic use of less than 400 gallons of graywater each day if the graywater use meets the requirements in THSC, §341.039. The commission did not include an inspection or oversight requirement because the statute does not provide for inspection or oversight; therefore, to include a provision regarding inspection or oversight in the rules would be inconsistent with statutory requirements. The commission made no change to the rules based on this comment.

One individual asked how §285.81(d)(2), which requires that graywater only be used for gardening except on the edible parts of crops intended for human consumption, will be monitored.

The commission responds that in §285.81(d)(2), it has deleted the language "except that it may not be used such that the edible parts of crops intended for human consumption come into direct contact with graywater." Therefore, this is not a requirement that the commission will need to monitor. The commission made this change to more closely track the language in THSC, §341.039(c)(2).

The commission anticipates that the users of graywater will follow the requirements as laid out in the commission's rules. However, if the requirements are not followed, one of the means of monitoring this rule is citizen complaints to the commission regarding the inappropriate use of graywater. The commission made no change to the rules based on this comment.

One individual commented that a problem currently exists with graywater being discharged where the ground is wet. This individual stated that §285.81(h)(6) makes this worse because of the potential for untreated wastewater to be discharged to the ground's surface.

The commission responds that in the current rules §285.81 requires that the disposal area not create a public health nuisance; §285.81 requires that no ponding occur in the disposal area; and §285.81 requires that laundry graywater not be discharged if the soil is wet. The commission retained these requirements in the proposed §285.81(h) for current graywater users. Graywater use that begins after the effective date of these rules is subject to similar requirements in §285.81.

The commission did not include treatment requirements in the proposed rules because THSC, §341.039, does not provide for any treatment requirements; therefore, to include these provisions in the rules would be inconsistent with statutory requirements. The commission made no change to the rules based on this comment.

STATUTORY AUTHORITY

The amended sections are adopted under the authority granted to the commission by the Texas Legislature in THSC, Chapter 366. The amended sections implement THSC, §366.012(a)(1), which requires the commission to adopt rules consistent with the policy defined in TWC, §26.0311, and THSC, §341.039 and §366.012, relating to Standards for Control of Graywater, Graywater Standards, and Rules Concerning On-Site Disposal Systems. Specific statutory authorization derives from House Bill 2661, which amended TWC, §26.0311, and THSC, §341.039 and §366.012. The amendments are also adopted under the general authority granted in TWC, §5.013, which establishes the general jurisdiction of the commission over other areas of responsibility as assigned to the commission under the TWC and other laws of the state; TWC, §5.103 and §5.105, which authorize the commission to adopt rules and policies necessary to carry out its responsibilities and duties under TWC, §5.013(14)(b); and TWC, §7.002, which authorizes the commission to enforce provisions of the TWC and the THSC.

§285.81. Criteria for Disposal of Graywater.

(a) Permits and inspections are not required for the domestic use of less than 400 gallons of graywater each day if:

(1) the graywater originates from a single family dwelling;

(2) the graywater system is designed so that 100% of the graywater can be diverted to the owner's on-site sewage facility (OSSF) system during periods of non-use of the graywater system. A graywater system may only be connected to the OSSF system if the following requirements are met.

(A) The connection must be in the line between the house stub-out for the OSSF and the OSSF treatment tank.

(B) The discharge from the graywater system must enter the OSSF system through two backwater valves or backwater preventers;

(3) the graywater is stored in tanks and the tanks:

(A) are clearly labeled as nonpotable water;

(B) restrict access, especially to children;

(C) eliminate habitat for mosquitoes and other vectors;

(D) are able to be cleaned; and

(E) meet the structural requirements of the 2004 American Water Works Association standards;

(4) the graywater system uses piping clearly identified as a nonpotable water conduit, including identification through the use of painted purple pipe, purple pipe, pipe taped with purple metallic tape, or other methods approved by the commission;

(5) the graywater is applied at a rate that will not result in ponding or pooling or will not cause runoff across the property lines or onto any paved surface; and

(6) the graywater is not disposed of using a spray distribution system.

(b) No reduction in the size of the OSSF system will be allowed when using a graywater system.

(c) Builders of single family dwellings are encouraged to:

(1) install plumbing in new housing to collect graywater from all allowable sources; and

(2) design and install a subsurface graywater system around the foundation of new housing to minimize foundation movement or cracking.

(d) Graywater from a graywater system as described in subsection (a) of this section may only be used:

(1) around the foundation of new housing to minimize foundation movement or cracking;

(2) for gardening;

(3) for composting; or

(4) for landscaping at a single family dwelling.

(e) All aspects of the permitting, planning, construction, operation, and maintenance for any proposed graywater system that does not meet the requirements of subsection (a) of this section must meet the requirements of the remainder of this chapter.

(f) The installer of the graywater system must advise the owner of basic operating and maintenance procedures including any effects on the OSSF system.

(g) Graywater use must not create a nuisance or damage the quality of surface water or groundwater. If graywater use creates a nuisance or damages the quality of surface water or groundwater, the permitting authority may take action under §285.71 of this title (relating to Authorized Agent Enforcement of OSSFs).

(h) Homeowners who have been discharging wastewater from residential clothes-washing machines, otherwise known as laundry graywater, directly onto the ground prior to the effective date of this rule, may continue this discharge under the following conditions.

(1) The disposal area shall not create a public health nuisance.

(2) Surface ponding shall not occur in the disposal area.

(3) The disposal area shall support plant growth or be sodded with vegetative cover.

(4) The disposal area shall have limited access and use by residents and pets.

(5) Laundry graywater that has been in contact with human or animal waste shall not be discharged on the ground surface and shall be treated and disposed of according to §285.32 and §285.33 of this title (relating to Criteria for Sewage Treatment Systems and Criteria for Effluent Disposal Systems, respectively).

(6) Laundry graywater shall not be discharged to an area where the soil is wet.

(7) The use of detergents that contain a significant amount of phosphorus, sodium, or boron should be avoided.

(8) A lint trap shall be required at the end of the discharge line.

(i) Graywater systems that are altered, create a nuisance, or discharge graywater from any source other than clothes-washing machines are not authorized to discharge graywater under subsection (h) of 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 December 17, 2004.

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CHAPTER 290. PUBLIC DRINKING WATER
SUBCHAPTER H. CONSUMER CONFIDENCE REPORTS

30 TAC §§290.272 - 290.275

The Texas Commission on Environmental Quality (commission) adopts amendments to §§290.272 - 290.275. Sections 290.272, 290.273, and 290.275 are adopted *with changes* to the proposed text as published in the October 1, 2004, issue of the *Texas Register* (29 TexReg 9332). Section 290.274 is adopted *without change* to the proposed text and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The primary purpose of the adopted amendments is to incorporate federal standards under 40 Code of Federal Regulations (CFR) Part 141, Subpart O, Consumer Confidence Reports, as promulgated by the United States Environmental Protection Agency (EPA) in the December 7, 2000, January 22, 2001, and March 25, 2003, issues of the *Federal Register* (65 FR 76708, 66 FR 6976, and 68 FR 14501). The adopted amendments include updates to the information each community water system must provide to its customers regarding uranium and arsenic in the drinking water and other updates to conform with the federal regulations under 40 CFR Part 141, Subpart O. Certain administrative changes are also adopted to make

the rules consistent with Texas Register style and formatting requirements.

The federal Safe Drinking Water Act, §1413 establishes requirements that states must meet to maintain primary enforcement responsibility (i.e., primacy) for their public water systems, including adopting drinking water rules that are no less stringent than the corresponding federal regulations. This rulemaking is necessary in order to obtain federal approval to administer the arsenic and radionuclide drinking water standards and related notification and reporting requirements.

SECTION BY SECTION DISCUSSION

The commission adopts amendments to Subchapter H, Consumer Confidence Reports, §§290.272 - 290.275 to incorporate provisions of the previously mentioned federal rules. The commission also adopts administrative changes throughout these sections to be consistent with Texas Register requirements and other agency rules.

The commission amends §290.272(a)(3) to provide that the required brief summary in the report concerning a system's susceptibility to potential sources of contamination must contain language that is provided by the executive director, or alternatively, language that has been written by a water system official and approved by the executive director. The adopted change involves the addition of the phrase "and approved by the executive director."

The commission adds §290.272(b)(1)(C) to incorporate the provisions of 40 CFR §141.153(c)(3)(iii) by adding a definition for "Maximum residual disinfectant level goal (MRDLG)," which is defined as "The level of a drinking water disinfectant below which there is no known or expected risk to health. MRDLGs do not reflect the benefits of the use of disinfectants to control microbial contaminants." The commission adds §290.272(b)(1)(D) to incorporate the provisions of 40 CFR §141.153(c)(3)(iv) by adding a definition for "Maximum residual disinfectant level (MRDL)," which is defined as "The highest level of a disinfectant allowed in drinking water. There is convincing evidence that addition of a disinfectant is necessary for control of microbial contaminants."

The commission amends §290.272(c)(1)(A) to include a reference to reporting the MRDL, consistent with 40 CFR §141.153(d)(1)(i). The commission amends §290.272(c)(4)(I)(ii) to reference to MRDLs, consistent with 40 CFR §141.153(d)(6). The commission also amends §290.272(c)(4)(D)(ii) - (iv) to change the first word in each clause from "If" to "When." The commission amends §290.272(g)(3) to update the language by changing the phrase "non-English and non-Spanish speaking" to "limited English proficiency."

In response to comment, the commission amends §290.272(c)(4)(D)(iv) to require that rounding of results take place after multiplication rather than before.

The commission amends §290.273(b) to include the transition level and language for reporting arsenic levels consistent with the requirements of 40 CFR §141.154(b)(1). The commission amends §290.273(f) to correct the reference to the language regarding compliance determination for trihalomethanes and to change the phrase "an annual average" to "a running annual average," consistent with 40 CFR §141.133(b)(1)(i).

In response to comment, the commission amends §290.273(b) to add the requirement that community water systems with arsenic levels between 0.010 milligrams per liter (mg/L) and 0.05 mg/L use the health effects language of §290.275(3), Appendix C (10).

The commission amends §290.274(a) to remove redundant language that is contained more appropriately in §290.272(c)(3).

The commission amends §290.274(c) to adopt the correct date for submission of consumer confidence reports (CCRs) to the executive director, as identified by EPA in the most recent review of commission rules.

The commission adds §290.274(i) to incorporate the mailing waivers of 40 CFR §141.155(g). This provision gives the executive director the authority to allow community public water systems that serve 500 or fewer people to post, in an appropriate location, notice of the availability of the CCR upon request, which saves these systems significant mailing costs.

In response to comment, the commission amends the footnotes to the tables contained in §290.275(1) and (2) to correctly reference the effective date of the arsenic maximum contaminant level as January 23, 2006. In response to comment, the commission also amends §290.275(1) and (2) to change the units of all levels of uranium referenced in the rule to micrograms per liter (µ/L).

The commission amends Subchapter H, Appendix A in §290.275(1) to insert the language of 40 CFR Subpart O, Appendix A related to converting maximum contaminant level (MCL) compliance values for CCRs for total organic carbon as numeral 3 on the table. Subsequent table elements are renumbered to maintain the table sequence.

The commission amends Subchapter H, Appendix A to insert the language of 40 CFR Subpart O, Appendix A related to converting MCL compliance values for CCRs for uranium as numeral 8 on the table. Subsequent table elements are renumbered to maintain the table sequence.

The commission amends Subchapter H, Appendix A to insert the language of 40 CFR Subpart O, Appendix A related to converting MCL compliance values for CCRs for bromate as numeral 14 on the table. Subsequent table elements are renumbered to maintain the table sequence.

The commission amends Subchapter H, Appendix A to insert the language of 40 CFR Subpart O, Appendix A related to converting MRDL compliance values for CCRs for chloramines as numeral 16 on the table. Subsequent table elements are renumbered to maintain the table sequence.

The commission amends Subchapter H, Appendix A to insert the language of 40 CFR Subpart O, Appendix A related to converting MRDL compliance values for CCRs for chlorine as numeral 17 on the table. Subsequent table elements are renumbered to maintain the table sequence.

The commission amends Subchapter H, Appendix A to insert the language of 40 CFR Subpart O, Appendix A related to converting MRDL compliance values for CCRs for chlorine dioxide as numeral 18 on the table. Subsequent table elements are renumbered to maintain the table sequence.

The commission amends Subchapter H, Appendix A to insert the language of 40 CFR Subpart O, Appendix A related to converting MCL compliance values for CCRs for chlorite as numeral 19 on the table. Subsequent table elements are renumbered to maintain the table sequence.

The commission amends Subchapter H, Appendix A to insert the language of 40 CFR Subpart O, Appendix A related to converting MCL compliance values for CCRs for haloacetic acids (group of five) as numeral 74 on the table. Subsequent table elements are renumbered to maintain the table sequence.

The commission amends footnote 1 of Subchapter H, Appendix A to insert the language of 40 CFR Subpart O, Appendix A related to the effective date of the arsenic MCL.

The commission amends Subchapter H, Appendix B in §290.275(2) to remove bracketed references to a page of the *Federal Register* in which the consumer confidence rules were originally published, because this page number has no regulatory meaning.

The commission amends Subchapter H, Appendix B to insert the language of 40 CFR Subpart O, Appendix B relating to the source of total organic carbon contamination of drinking water as numeral 3. Subsequent table elements are renumbered to maintain the table sequence.

The commission amends Subchapter H, Appendix B to insert the language of 40 CFR Subpart O, Appendix B relating to the source of uranium contamination of drinking water as numeral 8. Subsequent table elements are renumbered to maintain the table sequence.

The commission amends Subchapter H, Appendix B to insert the language of 40 CFR Subpart O, Appendix B relating to the source of bromate contamination of drinking water as numeral 14. Subsequent table elements are renumbered to maintain the table sequence.

The commission amends Subchapter H, Appendix B to insert the language of 40 CFR Subpart O, Appendix B relating to the source of chloramine in drinking water as numeral 16. Subsequent table elements are renumbered to maintain the table sequence.

The commission amends Subchapter H, Appendix B to insert the language of 40 CFR Subpart O, Appendix B relating to the source of chlorine in drinking water as numeral 17. Subsequent table elements are renumbered to maintain the table sequence.

The commission amends Subchapter H, Appendix B to insert the language of 40 CFR Subpart O, Appendix B relating to the source of chlorine dioxide in drinking water as numeral 18. Subsequent table elements are renumbered to maintain the table sequence.

The commission amends Subchapter H, Appendix B to insert the language of 40 CFR Subpart O, Appendix B relating to the source of chlorite contamination of drinking water as numeral 19. Subsequent table elements are renumbered to maintain the table sequence.

The commission amends Subchapter H, Appendix B to insert the language of 40 CFR Subpart O, Appendix B relating to the source of haloacetic acid contamination of drinking water as numeral 74. Subsequent table elements are renumbered to maintain the table sequence.

The commission amends footnote 1 of Subchapter H, Appendix B to insert the language of 40 CFR Subpart O, Appendix B related to the effective date of the arsenic MCL.

The commission amends Subchapter H, Appendix C (3) in §290.275(3) to insert the health effects language of 40 CFR Subpart O, Appendix B relating to total organic carbon. Subsequent appendix elements are renumbered accordingly.

The commission amends Subchapter H, Appendix C (8) to insert the health effects language of 40 CFR Subpart O, Appendix B relating to uranium. Subsequent appendix elements are renumbered accordingly.

The commission amends Subchapter H, Appendix C (14) to insert the health effects language of 40 CFR Subpart O, Appendix B relating to bromate. Subsequent appendix elements are renumbered accordingly.

The commission amends Subchapter H, Appendix C (16) to insert the health effects language of 40 CFR Subpart O, Appendix B relating to chloramines. Subsequent appendix elements are renumbered accordingly.

The commission amends Subchapter H, Appendix C (17) to insert the health effects language of 40 CFR Subpart O, Appendix B relating to chlorine. Subsequent appendix elements are renumbered accordingly.

The commission amends Subchapter H, Appendix C (18) to insert the health effects language of 40 CFR Subpart O, Appendix B relating to chlorine dioxide. Subsequent appendix elements are renumbered accordingly.

The commission amends Subchapter H, Appendix C (19) to insert the health effects language of 40 CFR Subpart O, Appendix B relating to chlorite. Subsequent appendix elements are renumbered accordingly.

The commission amends Subchapter H, Appendix C (74) to insert the health effects language of 40 CFR Subpart O, Appendix B relating to haloacetic acids. Subsequent appendix elements are renumbered accordingly.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a "major environmental rule" as defined in that statute. 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 to Chapter 290 provide requirements concerning notification and reporting of arsenic and certain radionuclide levels in drinking water supplied by community water systems, thus providing the opportunity for a reduction of risks to human health. However, the adopted amendments to Chapter 290 do not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state because they apply only to a limited number of water systems and the requirements relate to notification and reporting requirements, which are not burdensome.

Furthermore, the adopted rulemaking does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). This section only applies 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. This rulemaking does not meet any of these four applicability requirements because this rulemaking: 1) does not exceed any standard set by federal law for notification and reporting of levels of arsenic or naturally occurring radioactive material in public drinking water systems and is adopted to be consistent with federal rules; 2) does not exceed the requirements of state law under Texas Health and Safety Code, Chapter 341, Subchapter C; 3) does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement any state and federal program on arsenic or radionuclides in public drinking water systems, but rather is proposed to be consistent with federal rules in order to allow the state to maintain its authority to implement the federal Safe Drinking Water Act; and 4) is not adopted solely under the general powers of the agency, but rather specifically under Texas Health and Safety Code, §341.031, which allows the commission to adopt and enforce rules to implement the federal Safe Drinking Water Act, as well as the other general powers of the agency.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the adopted amendments and performed an assessment of whether the rulemaking constitutes a takings under Texas Government Code, Chapter 2007. The primary purpose of the adopted amendments is to provide requirements concerning notification and reporting of arsenic and certain radionuclide levels in drinking water supplied by community water systems, as promulgated by EPA in the December 7, 2000, January 22, 2001, and March 25, 2003, issues of the *Federal Register* (65 FR 76708, 66 FR 6976, and 68 FR 14501).

The adopted amendments substantially advance this stated purpose by providing notification requirements concerning the contents of reports providing information on the source of water delivered and additional health information. Promulgation and enforcement of the adopted amendments would not affect private real property, which is the subject of the rules primarily because they amend and expand existing drinking water standards to authorize regulation of arsenic and radionuclides. The adopted amendments are not anticipated to affect private real property because they do not restrict or limit an owner's right to the property that would otherwise exist in the absence of this adopted rulemaking. The rulemaking simply requires community water systems to comply with notification and reporting requirements. Furthermore, the adopted rulemaking makes state standards for arsenic and radionuclides notification and reporting consistent with existing federal standards. Therefore, the adopted amendments do not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed this rulemaking and found that it is not a rulemaking subject to the Texas Coastal Management Program (CMP) because the rulemaking is neither identified in the Coastal Coordination Act Implementation rules, 31 TAC §505.11, nor will it affect any action or authorization identified in §505.11. Therefore, the rulemaking is not subject to the CMP. The purpose of the adopted amendments is to bring community water systems into compliance with certain requirements concerning radionuclide and arsenic notification and reporting. The rulemaking does not govern air pollutant emissions, on-site sewage disposal systems, or underground storage tanks, which would make it subject to the CMP under §505.11(b)(2). The rulemaking also does not govern or authorize actions listed in §505.11(a)(6).

PUBLIC COMMENT

The public comment period closed on November 1, 2004. The agency received written comments from EPA. The commenter had suggestions for changes to portions of the proposed rules.

RESPONSE TO COMMENTS

EPA commented that the proposal did not implement 40 CFR §141.154(f) relating to the requirement that community water systems with arsenic levels between 0.010 mg/L and 0.05 mg/L use the EPA-required health effects language.

The commission agrees with this comment and amends §290.273(b) to include that requirement.

EPA commented that the effective date for the revised arsenic MCL was referenced incorrectly in the proposal.

The commission agrees with this comment and amends the footnotes to the tables contained in §290.275(1) and (2) to correctly reference the effective date of the arsenic MCL as January 23, 2006.

EPA commented that §290.272(c)(4)(D)(iv) should be revised to require that rounding of results take place after multiplication rather than before.

The commission agrees with this comment and has revised the language accordingly.

EPA commented that all levels of uranium referenced in the rules should have units of µ/L, rather than picocuries per liter.

The commission agrees and has revised §290.275(1) and (2) to reflect these units.

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code, §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction; §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; and Texas Health and Safety Code, §341.031, which allows the commission to adopt rules to implement the federal Safe Drinking Water Act, 42 United States Code, §§300f - 300j-26.

§290.272. Content of the Report.

(a) Information on the source of the water delivered must be included in the report.

(1) Each report must identify the source(s) of the water delivered by the community water system by providing information on the type of the water (such as surface water or groundwater) and any commonly used name and location of the body(ies) of water.

(2) If a source water assessment has been completed, the report must notify consumers of the availability of this information and the means to obtain it. In the reports, systems should highlight significant sources of contamination in the source water area if they have readily available information.

(3) If a system has received a source water assessment from the executive director, the report must include a brief summary of the system's susceptibility to potential sources of contamination using language provided by the executive director or written by a water system official and approved by the executive director.

(b) The following explanations must be included in the annual report.

(1) Each report must contain the following definitions.

(A) Maximum contaminant level goal (MCLG)--The level of a contaminant in drinking water below which there is no known or expected risk to health. MCLGs allow for a margin of safety.

(B) Maximum contaminant level (MCL)--The highest level of a contaminant that is allowed in drinking water. MCLs are set as close to maximum contaminant level goals as feasible using the best available treatment technology.

(C) Maximum residual disinfectant level goal (MRDLG)--The level of a drinking water disinfectant below which there is no known or expected risk to health. MRDLGs do not reflect the benefits of the use of disinfectants to control microbial contaminants.

(D) Maximum residual disinfectant level (MRDL)--The highest level of a disinfectant allowed in drinking water. There is convincing evidence that addition of a disinfectant is necessary for control of microbial contaminants.

(2) The following terms and their descriptions must be included when they appear in the report:

(A) MFL--million fibers per liter (a measure of asbestos);

(B) mrem/year--millirems per year (a measure of radiation absorbed by the body);

(C) NTU--nephelometric turbidity units (a measure of turbidity);

(D) pCi/L--picocuries per liter (a measure of radioactivity);

(E) ppb--parts per billion, or micrograms per liter (µ/L);

(F) ppm--parts per million, or milligrams per liter (mg/L);

(G) ppt--parts per trillion, or nanograms per liter (ng/L); and

(H) ppq--parts per quadrillion, or picograms per liter (pg/L).

(3) A report for a community water system operating under a variance or an exemption of the Safe Drinking Water Act must include a description of the variance or the exemption granted under §290.102(b)(4) of this title (relating to General Applicability).

(4) A report that contains data on a contaminant for which the United States Environmental Protection Agency (EPA) has set a treatment technique or an action level must include, depending on the contents of the report, the following definitions.

(A) Treatment technique (TT)--A required process intended to reduce the level of a contaminant in drinking water.

(B) Action level (AL)--The concentration of a contaminant which, if exceeded, triggers treatment or other requirements that a water system must follow.

(c) Information on detected contaminants.

(1) This subsection specifies the requirements for information to be included in each report for detected contaminants subject to mandatory monitoring, excluding *Cryptosporidium*. Mandatory monitoring is required for:

(A) regulated contaminants subject to an MCL, MRDL, action level, or treatment technique;

(B) unregulated contaminants for which monitoring is required by 40 Code of Federal Regulations (CFR) §141.40, relating to Unregulated Contaminants and found in §290.275(4) of this title (relating to Appendices A - D); and

(C) disinfection by-products or microbial contaminants for which monitoring is required by 40 CFR §141.142, relating to Information Collection Requirements (ICR) for Public Water System--Disinfection by-product and related monitoring, and 40 CFR §141.143, relating to Microbial Monitoring Requirements.

(2) The data relating to these detected contaminants must be displayed in one table or in several adjacent tables. Any additional monitoring results that a community water system chooses to include in its reports must be displayed separately.

(3) The data must be derived from data collected to comply with EPA and the commission monitoring and analytical requirements during the previous calendar year, except when a system is allowed to monitor for regulated contaminants less often than once per year. In that case, the table(s) must include the date and results of the most recent sampling, and the report must include a brief statement indicating that the data presented in the report is from the most recent testing done in accordance with the regulations. The report does not need to include data that is older than five years. Furthermore, results of monitoring in compliance with 40 CFR §141.142 and §141.143 need only be included for five years from the date of the last sample or until any of the detected contaminants becomes regulated and subject to routine monitoring requirements, whichever comes first.

(4) For detected regulated contaminants listed under §290.275 of this title, the table(s) must contain:

(A) the MCLs for those contaminants expressed as a number equal to or greater than 1.0 (as provided under §290.275 of this title);

(B) the MCLGs for those contaminants expressed in the same units as the MCLs (as provided for under §290.275 of this title);

(C) if there is no MCL for a detected contaminant, the treatment technique or specific action level applicable to that contaminant; and

(D) for contaminants subject to an MCL, except turbidity and total coliforms, the highest contaminant level used to determine compliance with National Primary Drinking Water Regulations and the range of detected levels.

(i) For contaminants subject to MCLs, except turbidity and total coliforms, when sampling takes place once per year or less often, the table(s) must contain the highest detected level at any sampling point and the range of detected levels expressed in the same units as the MCL.

(ii) When sampling takes place more than once per year at each sampling point, the table(s) must contain the highest average of any of the sampling points and the range of all sampling points expressed in the same units as the MCL.

(iii) When compliance with any MCL is determined on a system-wide basis by calculating a running annual average of all samples at all sampling points, the table(s) must include the average and range of detections expressed in the same units as the MCL.

(iv) When the executive director allows the rounding of results to determine compliance with the MCL, rounding should be

done after multiplying the results by the factor listed under §290.275 of this title.

(E) When turbidity is reported under §290.111 of this title (relating to Turbidity), the table(s) must contain the highest single measurement and the lowest monthly percentage of samples meeting the turbidity limits specified in that section for the filtration technology being used. The report should include an explanation of the reasons for measuring turbidity.

(F) When lead and copper are reported, the table(s) must contain the 90th percentile value of the most recent round of sampling and the number of sampling sites exceeding the action level.

(G) When total coliform is reported, the table(s) must contain either the highest monthly number of positive samples for systems collecting fewer than 40 samples per month or the highest monthly percentage of positive samples for systems collecting at least 40 samples per month.

(H) When fecal coliform is reported, the table(s) must contain the total number of positive samples.

(I) The table(s) must contain information on the likely source(s) of detected contaminants based on the operator's knowledge. Specific information regarding contaminants may be available in sanitary surveys or source water assessments and should be used when available. If the operator lacks specific information on the likely source, the report must include one or more typical sources most applicable to the system for any particular contaminant listed under §290.275 of this title.

(i) If a community water system distributes water to its customers from multiple hydraulically independent distribution systems that are fed by different raw water sources, the table(s) must contain a separate column for each service area, and the report must identify each separate distribution system. Systems may produce separate reports tailored to include data for each service area.

(ii) The table(s) must clearly identify any data indicating violations of MCLs, MRDLs, or treatment techniques. The report must contain a clear and readily understandable explanation of the violation. The explanation must include the length of the violation, the potential adverse health effects, and the actions taken by the system to address the violation. To describe the potential health effects, the system must use the relevant language contained under §290.275 of this title.

(5) For detected unregulated contaminants found under §290.275 of this title, for which monitoring is required (except *Cryptosporidium*), the table(s) must contain the average and range of concentrations at which the contaminant was detected. The report must include the following explanation: "Unregulated contaminants are those for which EPA has not established drinking water standards. The purpose of unregulated contaminant monitoring is to assist EPA in determining the occurrence of unregulated contaminants in drinking water and whether future regulation is warranted."

(d) Information on *Cryptosporidium*, radon, and other contaminants.

(1) If the system has performed any monitoring for *Cryptosporidium*, the report must include a summary of the results of any detections and an explanation of the significance of the results.

(2) If the system has performed any monitoring for radon, which indicates that radon may be present in the finished water, the report must include the results of the monitoring and an explanation of the significance of the results.

(3) If the system has performed additional monitoring, which indicates the presence of other contaminants in the finished water, the executive director strongly encourages systems to report any results which may indicate a health concern. To determine if the results may indicate a health concern, the executive director recommends that systems find out if the EPA has proposed a standard in the *National Primary Drinking Water Regulations* (NPDWR) or issued a health advisory for any particular contaminant. This information may be obtained by calling the Safe Drinking Water Hotline at (800) 426-4791. The executive director considers detections that are above a proposed MCL or health advisory level to indicate possible health concerns. For such contaminants, the executive director recommends that the report include the results of the monitoring and an explanation of the significance of the results. The explanation should note the existence of a health advisory or a proposed regulation.

(e) Compliance with NPDWR. In addition to the requirements in subsection (c)(4)(I)(ii) of this section, the report must note any violation that occurred during the year covered by the report of a requirement listed in paragraphs (1) - (7) of this subsection.

(1) The report must include a clear and readily understandable explanation of each violation of monitoring and reporting of compliance data and explain any adverse health effects and steps the system has taken to correct the violation.

(2) The report must include a clear and readily understandable explanation of each violation of filtration and disinfection prescribed by Subchapter F of this chapter (relating to Drinking Water Standards Governing Drinking Water Quality and Reporting Requirements for Public Water Systems) and explain any adverse health effects and steps the system has taken to correct the violation. This applies both to systems that have failed to install adequate filtration, disinfection equipment, or processes, and to systems that have had a failure of such equipment or processes, each of which constitutes a violation. In either case, the report must include the following language as part of the explanation of potential adverse health effects: "Inadequately treated water may contain disease- causing organisms. These organisms include bacteria, viruses, and parasites that can cause symptoms such as nausea, cramps, diarrhea, and associated headaches."

(3) The report must include a clear and readily understandable explanation of each violation of the lead and copper control requirements prescribed by §290.117 of this title (relating to Regulation of Lead and Copper). For systems that fail to take one or more actions prescribed by §290.117(g), (h), and (i) of this title, the report must include the applicable health effects language of §290.275(3) of this title for lead, copper, or both and the steps the system has taken to correct the violation.

(4) The report must include a clear and readily understandable explanation of each violation of treatment techniques for Acrylamide and Epichlorohydrin prescribed by §290.107 of this title (relating to Organic Contaminants). If a system violates these requirements, the report must include the relevant health effects language from §290.275 of this title and the steps the system has taken to correct the violation.

(5) The report must include a clear and readily understandable explanation of each violation of recordkeeping of compliance data and explain any adverse health effects and steps the system has taken to correct the violation.

(6) The report must include a clear and readily understandable explanation of each violation of special monitoring requirements for unregulated contaminants and special monitoring for sodium as prescribed by 40 CFR §141.40 and §141.41 and explain any adverse health effects and steps the system has taken to correct the violation.

(7) The report must include a clear and readily understandable explanation of each violation of the terms of a variance, exemption, administrative order, or judicial order and explain any adverse health effects and steps the system has taken to correct the violation.

(f) Variances and exemptions. If a system is operating under the terms of a variance or exemption issued under §290.102(b) of this title, the report must contain:

(1) an explanation of the variance or exemption;

(2) the date on which the variance or exemption was issued and on which it expires;

(3) a brief status report on the steps the system is taking, such as installing treatment processes or finding alternative sources of water, to comply with the terms and schedules of the variance or exemption; and

(4) a notice of any opportunity for public input as the review or renewal of the variance or exemption.

(g) Additional information.

(1) The report must contain a brief explanation regarding contaminants that may reasonably be expected to be found in drinking water (including bottled water). This explanation may include the language contained within subparagraphs (A) - (C) of this paragraph, or systems may include their own comparable language. The report must include the language of subparagraphs (D) and (E) of this paragraph.

(A) The sources of drinking water (both tap water and bottled water) include rivers, lakes, streams, ponds, reservoirs, springs, and wells. As water travels over the surface of the land or through the ground, it dissolves naturally occurring minerals and, in some cases, radioactive material, and can pick up substances resulting from the presence of animals or from human activity.

(B) Contaminants that may be present in source water include:

(i) microbial contaminants, such as viruses and bacteria, which may come from sewage treatment plants, septic systems, agricultural livestock operations, and wildlife;

(ii) inorganic contaminants, such as salts and metals, which can be naturally occurring or result from urban storm water runoff, industrial or domestic wastewater discharges, oil and gas production, mining, or farming;

(iii) pesticides and herbicides, which might have a variety of sources such as agriculture, urban storm water runoff, and residential uses;

(iv) organic chemical contaminants, including synthetic and volatile organic chemicals, which are by- products of industrial processes and petroleum production, and can also come from gas stations, urban storm water runoff, and septic systems; and

(v) radioactive contaminants, which can be naturally occurring or the result of oil and gas production and mining activities.

(C) In order to ensure that tap water is safe to drink, the EPA prescribes regulations that limit the amount of certain contaminants in water provided by public water systems. Food and Drug Administration regulations establish limits for contaminants in bottled water that must provide the same protection for public health.

(D) Contaminants may be found in drinking water that may cause taste, color, or odor problems. These types of problems are not necessarily causes for health concerns. For more information on taste, odor, or color of drinking water, please contact the system's business office.

(E) Drinking water, including bottled water, may reasonably be expected to contain at least small amounts of some contaminants. The presence of contaminants does not necessarily indicate that water poses a health risk. More information about contaminants and potential health effects can be obtained by calling the EPA's Safe Drinking Water Hotline at (800) 426-4791.

(2) The report must include the telephone number of the owner, operator, or designee of the community water system as an additional source of information concerning the report.

(3) Each English language report must include the following statement in a prominent place on the first page: "Este reporte incluye informacion importante sobre el agua para tomar. Para asistencia en español, favor de llamar al telefono (XXX) XXX-XXXX." In addition to this statement in Spanish, for communities with a large proportion of limited English proficiency residents, as determined by the executive director, the report must contain information in the appropriate language(s) regarding the importance of the report or contain a telephone number or address where such residents may contact the system to obtain a translated copy of the report or assistance in the appropriate language.

(4) The report must include information about opportunities for public participation in decisions that may affect the quality of the water (e.g., time and place of regularly scheduled board meetings). Investor-owned utilities are encouraged to conduct public meetings, but must include a phone number for public input.

(5) The systems may include such additional information for public education consistent with, and not detracting from, the purposes of the report.

(6) Systems that use an interconnect or emergency source to augment the drinking water supply during the calendar year of the report must provide the source of the water, the length of time used, an explanation of why it was used, and whom to call for the water quality information.

§290.273. Required Additional Health Information.

(a) All reports must prominently display the following language on the first page of the consumer confidence report or in bold print on the second page of the report: "You may be more vulnerable than the general population to certain microbial contaminants, such as *Cryptosporidium*, in drinking water. Infants, some elderly, or immunocompromised persons such as those undergoing chemotherapy for cancer; those who have undergone organ transplants; those who are undergoing treatment with steroids; and people with HIV/AIDS or other immune system disorders can be particularly at risk from infections. You should seek advice about drinking water from your physician or health care provider. Additional guidelines on appropriate means to lessen the risk of infection by *Cryptosporidium* are available from the Safe Drinking Water Hotline at (800) 426-4791."

(b) A system that detects arsenic levels above 5 micrograms per liter but below the maximum contaminant level (MCL) shall include in its report a short informational statement about arsenic using the following language: "While your drinking water meets EPA's standard for arsenic, it does contain low levels of arsenic. EPA's standard balances the current understanding of arsenic's possible health effects against the costs of removing arsenic from drinking water. EPA continues to research the health effects of low levels of arsenic, which is a mineral known to cause cancer in humans at high concentrations and is linked to other health effects such as skin damage and circulatory problems." Beginning in the report that is due by July 1, 2002, and ending

January 22, 2006, a system that detects arsenic above 0.010 milligrams per liter (mg/L) and up to and including 0.05 mg/L must include the arsenic health effects language of §290.275(3) of this title (relating to Appendices A - D), Appendix C, paragraph (10).

(c) A system that detects nitrate at levels above 5 mg/L, but below the MCL shall include a short informational statement about the impacts of nitrate on children using the following language: "Nitrate in drinking water at levels above 10 ppm is a health risk for infants of less than six months of age. High nitrate levels in drinking water can cause blue baby syndrome. Nitrate levels may rise quickly for short periods of time because of rainfall or agricultural activity. If you are caring for an infant, you should ask advice from your health care provider."

(d) Systems collecting 20 or more samples that detect lead above the action level in greater than 5.0% of homes sampled shall include a short informational statement about the special impact of lead on children using the following language: "Infants and young children are typically more vulnerable to lead in drinking water than the general population. It is possible that lead levels at your home may be higher than at the homes in the community as a result of materials used in your home's plumbing. If you are concerned about elevated lead levels in your home's water, you may wish to have your water tested and flush your tap for 30 seconds to two minutes before using tap water. Additional information is available from the Safe Drinking Water Hotline at (800) 426-4791."

(e) Any water system subject to any or all of subsections (b) - (d) of this section may seek approval from the executive director to write its own alternative educational informational statement.

(f) Public water systems that detect total trihalomethanes above 0.080 mg/L as a running annual average shall include health effects language provided in §290.275(3) of this title (relating to Appendices A - D), Appendix C, paragraph (81).

§290.275. Appendices A - D.

The following appendices are integral components of the subchapter.

(1) Appendix A--Converting MCL Compliance Values for Consumer Confidence Reports.
Figure: 30 TAC §290.275(1)

(2) Appendix B--Sources of Regulated Contaminants.
Figure: 30 TAC §290.275(2)

(3) Appendix C--Health Effects Language.
Figure: 30 TAC §290.275(3)

(4) Appendix D--Unregulated Contaminants.
Figure: 30 TAC §290.275(4) (No change.)

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

Filed with the Office of the Secretary of State on December 17, 2004.

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CHAPTER 317. DESIGN CRITERIA FOR SEWERAGE SYSTEMS

30 TAC §317.1

The Texas Commission on Environmental Quality (commission or TCEQ) adopts an amendment to §317.1. Section 317.1 is adopted *with change* to the proposed text as published in the August 13, 2004, issue of the *Texas Register* (29 TexReg 7897).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

The legislature passed House Bill 346 in 1993 which required rules to be developed by the commission and the Texas State Board of Plumbing Examiners for graywater use in Texas. The commission adopted rules in June 2001 that allow water from clothes-washing machines as the only graywater to be discharged without going through an on-site sewage facility (OSSF). Water from other sources in a residence was not included in the use of graywater.

In 2003, the 78th Legislature passed House Bill 2661 which amended Texas Water Code (TWC), §26.0311 and Texas Health and Safety Code (THSC), §341.039 and §366.012. These amendments modify the definition of graywater and require the commission to adopt and implement standards by June 1, 2004 for the use of graywater and to address the separation of graywater in a residence served by an OSSF system. To implement this legislation, the commission concurrently amended 30 TAC Chapter 210, Use of Reclaimed Water; 30 TAC Chapter 285, On-Site Sewage Facilities; and Chapter 317. Amendments to Chapter 210 and Chapter 285 are also published in the Adopted Rules section of this issue of the *Texas Register.*

SECTION DISCUSSION

Throughout this rulemaking, the commission made wording changes to bring the existing rule language into agreement with guidance provided in the Texas Legislative Council Drafting Manual, October 2002.

The commission amended §317.1, General Provisions, by adding a requirement in subsection (c) that the final engineering design report include how the design of the collection system and the treatment plant can handle the loss of graywater as defined in TWC, §26.0311. The commission adopts this amendment to implement TWC, §26.0311.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed this rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" in that statute. Major environmental rule means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The amendment to §317.1(c) requires that the final engineering design report include how the design of the collection system and the treatment plant can handle the loss of graywater as defined in TWC, §26.0311. The adopted rule does not meet the definition of a major environmental rule as it does not adversely affect

in a material way, the economy, a section of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

In addition, the adopted amendment is not subject to Texas Government Code, §2001.0225, because it does not meet any of the four criteria specified in §2001.0225(a). Texas Government Code, §2001.0225(a), applies to a rule adopted by an agency, 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 adopted amendment to Chapter 317 does not meet any of these requirements. First, the revision does not exceed a standard set by federal law as there are no federal requirements for this rule. As a result, there are no applicable standards set by federal law that could be exceeded by the rule. Second, the revision does not exceed an express requirement of state law, but is being adopted to implement state law. Therefore, the rulemaking does not exceed an express requirement of state law. Third, the commission is not a party to a delegation agreement with the federal government concerning a state and federal program that would be applicable to requirements set forth in the rule. Therefore, there are no delegation agreement requirements that could be exceeded by the rule. Fourth, the adopted rule was not developed solely under the commission's general powers, but rather was developed to implement the specific requirements of House Bill 2661, amending TWC, §26.0311 and THSC, §341.039 and §366.012. Therefore, the commission does not adopt the rule solely under the commission's general powers. Thus, the commission concludes that a regulatory analysis is not required in this instance because the adopted rule does not meet any of the criteria of a major environmental rule as defined by Texas Government Code, §2001.0225.

TAKINGS IMPACT ASSESSMENT

The commission performed as assessment of the adopted rule in accordance with Texas Government Code, §2007.043. The purpose of this rulemaking is to implement House Bill 2661 which amended TWC, §26.0311 and THSC, §341.039 and §366.012. This amendment modifies the definition of graywater and requires the commission to adopt and implement standards for the use of graywater and to address the separation of graywater in a residence served by an OSSF system. The adopted graywater rules are voluntary. Thus, the commission's assessment indicates that Texas Government Code, Chapter 2007, does not apply to this rulemaking because the promulgation and enforcement of this rule will not create a burden on private real property.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

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

PUBLIC COMMENT

The comment period closed on September 13, 2005 at 5:00 p.m. A public hearing on this proposal was held in Austin on September 8, 2004. The commission received no comments with regard to Chapter 317.

STATUTORY AUTHORITY

The amended section is adopted under the authority granted to the commission by the Texas Legislature in THSC, Chapter 366. The amended section implements THSC, §366.012(a)(1), which requires the commission to adopt rules consistent with the policy defined in TWC, §26.0311 and THSC, §341.039 and §366.012, relating to Standards for Control of Graywater, Graywater Standards, and Rules Concerning On-Site Disposal Systems. Specific statutory authorization derives from House Bill 2661, 78th Legislature, 2003, which amended TWC, §26.0311 and THSC, §341.039 and §366.012. The amendment is also adopted under the general authority granted in TWC, §5.013, which establishes the general jurisdiction of the commission over other areas of responsibility as assigned to the commission under the TWC and other laws of the state; TWC, §5.103 and §5.105, which authorize the commission to adopt rules and policies necessary to carry out its responsibilities and duties under TWC, §5.013(14)(b); and TWC, §7.002, which authorizes the commission to enforce provisions of the TWC and the THSC.

§317.1. General Provisions.

(a) Purpose. These design criteria are minimum guidelines to be used for the comprehensive consideration of domestic sewage collection, treatment, or disposal systems and establish the minimum design criteria pursuant to existing state statutes pertaining to effluent quality necessary to meet state water quality standards. These criteria are intended to promote the design of facilities in accordance with good public health and water quality engineering practices. These criteria include the minimum requirements for a preliminary engineering report which provides the general engineering concepts underlying the proposed project as well as the final engineering report detailing the fully developed project along with related plans and specifications.

(1) Authority for requirement. The Texas Water Code prescribes the duties of the commission relating to the control of pollution including the review and approval of plans and specifications for sewage disposal systems. This authority is found in Texas Water Code (TWC), §§5.013, 12.081 - 12.083, 15.104, 15.114, 26.023, 26.034, 49.181 - 49.182, 54.024, and 51.333.

(2) Review of plans and specifications. Plans and specifications shall meet the design criteria and the operation, maintenance, and safety requirements for the proposed project as provided by this chapter. Approval given by the executive director, or a participating municipality with review authority as provided for in paragraphs (5) and (6) of this subsection, shall not relieve the sewerage system owner or the design engineer of any liabilities or responsibilities with respect to the proper design, construction, or authorized operation of the project in accordance with applicable commission rules.

(3) Submittal requirements.

(A) "Sanitary sewer collection system projects," which will be constructed within the jurisdiction of a municipality which performs technical reviews of sanitary sewer collection system projects under TWC, §26.034, and which are not prepared by the staff of a municipality, need not be submitted to the agency for review.

(B) "Sanitary sewer collection system projects," which are prepared by the staff of a municipality, which will be constructed within the jurisdiction of a municipality which performs technical reviews of sanitary sewer collection system projects under TWC,

§26.034, and where the entire project falls into one or more of the categories outlined in clauses (i) - (iii) of this subparagraph, need not be submitted to the agency for review.

(i) Any conventional gravity sewer collection system lines less than 1,500 linear feet in length which are extensions to existing systems where the existing system has been completed and in operation at least six months;

(ii) Any duplex lift stations which have a firm pumping capacity of less than 100 gallons per minute;

(iii) Any conventional gravity sewer piping less than 12 inches in diameter.

(C) "Domestic wastewater projects" which receive a technical review and approval from a state agency other than the commission need not be submitted to the agency for review, if:

(i) the review is performed under the supervision of a professional engineer registered in the State of Texas, the review ensures that the project complies with this chapter, and the state agency has requested that the commission not perform technical reviews of a wastewater project or category of projects; or

(ii) the state agency has been granted review authority in lieu of the commission under state law.

(D) A summary transmittal letter shall be submitted, by certified mail, to the Wastewater Permits Section, and to the appropriate commission regional office, for all wastewater projects constructed in the State of Texas, which are not exempted from the commission's submittal requirements as detailed in subparagraph (A), (B), or (C) of this paragraph. If the executive director does not notify the person who submitted the summary that a review will occur, under subparagraph (E) of this paragraph, the project is deemed approved. The information in the summary shall be signed, dated, and sealed by a professional engineer registered in the State of Texas. All summaries shall include, at a minimum:

(i) the name and address of the design firm;

(ii) the name, phone number, and facsimile number of the design engineer;

(iii) the county(s) in which the project will be located with an identifying name for the project;

(iv) the name of the entity which proposes to own, operate, and maintain the project through its design life;

(v) the permit name and permit number of the relevant wastewater treatment facility;

(vi) a statement verifying that the plans and specifications are in substantial compliance with all the requirements of this chapter and which states that any deviations from the requirements are based on the best professional judgement of the registered professional engineer who prepared the project plans and specifications and final engineering design report; and

(vii) a brief description of the project scope which includes the specifics of the project, a description of deviations from the requirements of this chapter, including the use of nonconforming or innovative technology, and an explanation of the reasons for such deviations.

(E) Any project, for which a summary is submitted, is subject to review by the executive director. Factors to be used to determine whether a review will be performed include, but are not limited to, whether or not a non-conforming or innovative technology is being proposed, the stream segment in which the project is located, and the applicant's compliance record. If the executive director chooses to review a project, the design engineer will be notified in writing or by facsimile of the executive director's intent to review the project, within ten days of receipt of the summary. Upon receipt of the notification of intent to review, the design engineer shall submit to the executive director a complete set of plans and specifications and a complete final engineering design report. These submitted materials shall be sufficient to satisfy the executive director that the project is in compliance with this chapter. If the executive director reviews a project, any approval may be granted under paragraph (4) of this subsection. Construction may not commence until approval has been obtained.

(F) A complete set of plans and specifications, the final version of such plans and specifications with engineer's certification, a complete engineering design report, all change orders and test results, a copy of the written summary submitted to the executive director, and any written approvals granted by the executive director, a municipality, or another state agency, shall be maintained and kept by the permittee, or for collection system projects, person(s) responsible for management of the collection system, for at least three years from the date the engineer certifies to the executive director that the project is complete. These materials shall be submitted to the executive director, another state agency, or municipality upon request. Such materials must be readily available for inspection by the executive director's staff upon request during regular business hours.

(4) Types of approval. Regardless of the type of approval, constructed facilities when in operation are required to produce the quality of effluent specified in their discharge permit(s). The types of approvals described in subparagraphs (A) - (C) of this paragraph will be utilized by the commission or any other review authority.

(A) Standard approval. Plans and specifications found to comply with all applicable parts of these criteria and to conform to commonly accepted sanitary engineering design practices shall be approved for construction.

(B) Approvals of innovative and nonconforming technologies.

(i) Technologies considered to be nonconforming or innovative include ones not conforming to or addressed in the design criteria of this chapter.

(ii) If an approval for nonconforming or innovative technologies is requested, engineering proposals for processes, equipment, or construction materials not covered in these criteria shall be fully described in the submitted planning materials and the reasons for their selection clearly outlined. Processes considered to be nonconforming or innovative should also be supported by results of pilot or demonstration studies. Where similarly designed full scale processes exist and are known to have operated for a reasonable period of time under conditions similar to those suggested for the proposed design, performance data from these existing full scale facilities shall be required to be submitted to the executive director in addition to, or in lieu of, pilot or small scale demonstration studies. Any warranties or performance bond agreements offered by the process, equipment, or material manufacturers shall be fully described in the request.

(iii) Approvals of processes, equipment, or construction materials which are considered to be innovative or nonconforming will be granted only in cases where the commission or review authority determines, after an engineering evaluation of the supporting information provided in the submitting engineer's design report, that the technology will not result in a threat to public health or the environment.

(iv) The executive director or review authority may require the manufacturer or supplier to obtain and furnish evidence of an acceptable two-year performance bond from an approved surety which insures the performance of the innovative or nonconforming technology. The performance bond shall cover the cost of removal or abandonment of the innovative or nonconforming facility and equipment, replacement with previously agreed upon facilities or equipment, and all associated engineering fees necessary for the removal and replacement.

(v) Approval of innovative and nonconforming technologies may include a condition which states that after some predetermined period of time after the installation and startup of the innovative or nonconforming technology, requiring an engineering report to be submitted after start-up, detailing the performance of the nonconforming or innovative technology. The engineering report shall include unbiased calculations and data supporting the technology's performance; and written submittals from the design engineer and permittee which state that the nonconforming or innovative technology has satisfied its manufacturer's claims.

(C) Conditional approval. The executive director or review authority may grant approvals which contain detailed conditions, stipulations, or restrictions. Examples of such conditions and stipulations include, but are not limited to, testing requirements, reporting requirements, operational requirements, and additional installation and design requirements which may be necessary to ensure compliance with this chapter. Any conditional approval granted may be issued for a specific set of flow situations, wastewater characteristics, and/or required effluent quality. If a conditional approval is granted, both the sewage system owner and design engineer, as appropriate, shall be responsible for ensuring that the approval conditions outlined by the commission or review authority have been met.

(5) Municipalities performing technical reviews of sanitary sewer collection systems under TWC, §26.034, within 90 days of the effective date of this rule and/or within 90 days of a boundaries change, shall submit maps to the agency's Wastewater Permits Section detailing the boundaries of the review authority. If a municipality decides to perform technical reviews of sanitary sewer collection systems after the effective date of this rule, the municipality shall submit maps detailing the boundaries of the review authority, within the 30 days before starting these reviews. If at any time a municipality, which has chosen to implement this review authority, decides to cease review of sanitary sewer collection system plans and specifications, the municipality shall notify the executive director within 30 days of the date on which the final plans and specifications review is expected to be performed. In order to meet the standards specified in TWC, §26.034, municipalities shall incorporate the items detailed in subparagraphs (A) - (E) of this paragraph into their review programs:

(A) The municipality's review and approval process shall ensure compliance with the rules of this chapter.

(B) All reviews performed by an employee of the municipality shall be conducted by a professional engineer, registered in the State of Texas, or the employee conducting the review shall be under the direct supervision of a professional engineer, registered in the State of Texas, who is ultimately responsible for the review and approval of each collection system submitted and installed in the municipality's jurisdiction.

(C) The responsible review engineer shall be either an employee of the reviewing municipality, or a consultant to the municipality, separate from the private consulting firm charged with the design work under review. For purposes of this section, the term "separate" means that the responsible review engineer is not employed by and does not receive compensation from the private consulting firm and from any of its parent companies, subsidiaries, or affiliates charged with the design. The municipality shall provide on request documentation of its agreements with private consultants sufficient to allow the agency to audit its compliance with this subsection.

(D) A participating municipality may review and approve engineering reports, plans, and specifications only for projects which transport primarily domestic waste within the boundaries of jurisdiction of that municipality. For each project approved for construction, the municipality shall issue an approval letter or other indication of the approval which clearly details the project being approved.

(E) The municipality shall maintain complete files of all review and approval activities carried out under its authority and shall make any existing project files available to the commission upon request and/or during audits performed in accordance with paragraph (6) of this subsection.

(6) The executive director may perform periodic audits of the review and approval process of municipalities which perform technical reviews of sanitary sewer collection systems in lieu of the commission, to ensure that the projects approved by the municipalities are in compliance with this chapter. If the executive director decides to perform an audit of a municipality's review and approval process, the executive director will provide the municipality with a minimum of five working days advance notice of the pending audit. The executive director may, for auditing purposes only, review specific projects which have previously been approved by the review authority. The municipality shall provide to the executive director, on request, documentation of all agreements between the private consultants and the municipality, which relate to the wastewater collection system review program. If the executive director finds through reviews of specific projects or through audits of the municipality's review and approval process that a municipality's review and approval process does not provide for compliance with the minimum design and installation requirements detailed in this chapter, the review and approval authority shall address these findings within a time established by the executive director. If compliance cannot be achieved, the review authority shall be voided for that municipality. If such authority is voided for a municipality, the executive director shall notify the municipality in writing and shall include the justification for voiding the authority of the municipality. If the authority of a municipality is voided, all new projects proposed to be constructed within that municipality's jurisdiction shall be submitted to the executive director in accordance with paragraph (3)(D) of this subsection.

(b) Preliminary engineering report.

(1) Definition. The preliminary engineering report shall form the conceptual basis for the collection, treatment, and/or disposal system proposed. This document shall bear the signed and dated seal of the registered professional engineer responsible for the design.

(A) For projects receiving United States Environmental Protection Agency construction grants assistance, a facility plan may serve as the preliminary engineering report.

(B) For all other projects, a preliminary engineering report proposing processes, methods, or procedures may be submitted as early in the planning stage as is practical. Submission of a preliminary engineering report at this point is only necessary to resolve any potential disagreements between the design engineer and the commission regarding the essential planning information, design data, population projections, and other requirements of the commission. Agreement is desirable to eliminate delays or inconveniences and to avoid the possibility of having to revise the final plans and specifications.

(C) The preliminary engineering report may be merged directly with the final engineering report to produce a single engineering report at the discretion of the sewerage system owner.

(2) General requirements. The following is required for each project as applicable.

(A) A brief description of the project with maps showing the area to be served, general location of proposed improvements, water and wastewater treatment plant sites, existing and proposed streets, parks, drainage ditches, creeks, streams, and water mains shall be provided. The drainage area should be defined clearly, either by contour map or otherwise. Where a contour map is not available to the community, one should be obtained and the contours should be shown at intervals of not more than ten feet. The maps and plans shall be reproduced on paper not larger than 24 inches by 36 inches in size; however, where variations are necessary, all sheets shall be uniform in size.

(B) The domestic population of the area to be served (present and projected) and design population of the project shall be included.

(C) The names of industries contributing any significant wastes, types of industry (standard industry codes), volume of wastes, characteristics and strength of wastes, population equivalent, and other pertinent information shall be included. It should be emphasized that if significant amounts of wastes other than normal domestic sewage are to be treated at the wastewater treatment plant, sufficient data on such wastes must be presented to allow an evaluation of the effect on the treatment process. This would include, but not be limited to, heavy metals and toxic materials such as polychlorinated biphenyls, organic chemicals, and pesticides.

(D) The preliminary engineering report shall include the technical information described in §317.10 of this title (relating to Appendix B--Overland Flow Process) for all overland flow projects.

(3) Collection system. The following information shall be provided in the preliminary engineering report if applicable to the project:

(A) present area served and future areas to be served;

(B) terrain data in sufficient detail to establish general topographical features of present and future areas to be served;

(C) lift stations existing and/or proposed;

(D) effect of proposed system expansion on existing system capacity; and

(E) amount of infiltration/inflow existing and anticipated, and how it is to be addressed in the collection system design.

(4) Treatment plant. The following information is required in a preliminary engineering report.

(A) Quantity and quality of existing sewage influent and changes in the characteristics anticipated in the future. If adequate records are not available, analyses shall be made for the existing conditions and such information included in the report.

(B) Design and peak flow rates being considered and the design period. Design flow is defined as the wet weather maximum 30-day average flow. Therefore, when determining design flow rates, consideration must be given to flows during periods of wet weather in order to assure consistent compliance with discharge permit volume and quality limitations. Peak flow is defined as the highest two hour flow expected to be encountered under any operational conditions, including times of high rainfall (generally the two-year, 24-hour storm is assumed) and prolonged periods of wet weather. For new systems, the peak flow to average annual flow ratio is normally in the range of three-five to one, although other peaking factors may be warranted.

(C) Type of treatment plant proposed and the effluent quality expected. The information should include basis of design, flow, organic loading, infiltration allowance, and efficiency determinations sufficient to a given level of treatment.

(D) Type of units proposed and their capacities, considering the criteria contained herein. The information should include detention times, surface loadings, weir loadings, flow diagram, and other pertinent information regarding the design of the plant, including sludge processing units required for the selected ultimate sludge disposal.

(E) Treatment plant site information and the siting analysis. The location of the plant, the area included in the plant site, dedicated buffer zone, and a description of the surrounding area including a map or a sketch of the area. Particular reference should be made as to the plant's proximity to present and future housing developments, industrial sites, prevailing winds, highways and/or public thoroughfares, water plants, water supply wells, parks, schools, recreational areas, and shopping centers. If the effluent is to be discharged to the waters of the state, the immediate receiving stream, canal, major water course, etc., shall be designated. The siting analysis shall include:

(i) flood hazard analysis. Provide the 100-year flood plain elevation. Proposed treatment units which are to be located within the 100-year flood plain will not be approved for construction unless protective measures satisfactory to the commission (such as levees or elevation of the treatment units) are included in the project design;

(ii) buffer zone analysis. Demonstrate that the location of each proposed treatment unit is consistent with the buffer zone criteria specified in Chapter 309 of this title (relating to Domestic Wastewater Effluent Limitation and Plant Siting).

(5) Sludge management. The preliminary engineering report shall include a discussion of the method of sludge disposal to be utilized. The report shall assess the following factors:

(A) estimated quantity of sludge that must be handled which includes future sludge loads based on flow projections;

(B) quality and sludge treatment requirements for ultimate disposal;

(C) sludge storage requirements for each alternative considering normal operating requirements and contingencies;

(D) transportation of sludge;

(E) land use and land availability; and

(F) reliability of the various alternatives, contingencies, and mitigation plans to ensure reliable capacity and operational flexibility.

(6) Control of bypassing. Information and data shall be submitted to describe features (auxiliary power, standby and duplicate units, holding tanks, storm water clarifiers, etc.) and operational arrangements (flexibility of piping and valves to control flow through the plant, reliability of power sources, etc.) to prevent unauthorized discharges of untreated or partially treated wastewater. An outline of control measures to prevent unauthorized discharges of untreated or partially treated wastewater during construction (see subsection (e)(5) of this section) is to be included.

(c) Final engineering design report. The final engineering design report shall be submitted with the final plans and technical specifications. The report shall include calculations and any other engineering information pertaining to the plant design as may be necessary in the review of the plans and specifications by the commission. The report must include how the design of the collection system and treatment plant will handle the potential loss of graywater as defined in TWC, §26.0311. This report shall bear the signed and dated seal of the registered professional engineer responsible for the design. Information should be included to describe any changes that have been made since a preliminary engineering report was submitted, along with additional information as follows.

(1) Collection system (if applicable):

(A) minimum and maximum grades proposed for each size and type of pipe;

(B) lift stations (also refer to §317.3 of this title (relating to Lift Stations)):

(i) the operating characteristics of the stations at minimum, maximum, and design flows (both present and future);

(ii) safety considerations, such as ventilation, entrances, working areas, and prevention of explosions; and

(iii) means of preventing overflow of raw sewage;

(C) capability of existing trunk and interceptor sewers and lift stations to handle the peak flow under anticipated conditions and capability of existing treatment facilities to receive and adequately treat the anticipated peak flows;

(D) type of pipe proposed and its anticipated performance under the conditions imposed by the particular wastewater quality and loading conditions;

(E) the manhole spacing proposed;

(F) areas not served by the present proposed project, and the projected means of providing service to these areas, including special provisions incorporated in the present plans for future expansion;

(G) amount of infiltration/inflow existing and anticipated, its hydraulic effect on the proposed and existing system, and an abatement plan if applicable, including a:

(i) description of infiltration allowances and test procedures in the specifications governing design of new sanitary sewer lines; and

(ii) description of control program to reduce infiltration/inflow occurring in the existing sewer system;

(H) soil conditions, such as quicksand, that will not support collection system development, and measures to be taken to overcome the anticipated difficulties.

(2) Treatment plant:

(A) the final decisions as to the method of treatment;

(B) types of units proposed and their capacities, considering the criteria contained herein including:

(i) detention times, surface loadings, weir loadings, and flow diagram; and

(ii) other pertinent information regarding the design of the plant, including hydraulic profiles for wastewater and sludge which includes a plot of the hydraulic gradient at peak flow conditions for all gravity lines;

(C) the anticipated operation mode of the plant, the degree of treatment expected and any special characteristics of the plant; and

(D) the safety features included such as stairways, railing, lighting, insulation mats, and walkway mats.

(3) Sludge management system:

(A) the final decisions as to the method(s) of managing sludge, including final disposal;

(B) contingency alternatives; and

(C) the type and size of sludge treatment units to provide the quality of sludge for the selected sludge management method.

(d) Final plans and technical specifications.

(1) Construction drawings and technical specifications will not be considered for review unless they bear the signed and dated seal of the registered professional engineer responsible for the design on each sheet of the plans and on the title page of the technical specifications. These shall be the plans and specifications to be used by the contractor for bidding and construction.

(2) Plans and profiles for sanitary sewers, insofar as practical, shall be prepared using one of the following scales.
Figure: 30 TAC §317.1(d)(2) (No change.)

(3) The size, grade, and type of pipe material shall be shown. Alternate materials may be identified in the bid document.

(4) The location and structural features of the sewers, including manholes to be installed, shall be shown on plans and profiles. The details of the appurtenances shall be provided.

(5) The plans and technical specifications for lift stations shall fully describe all pumps, valves, pumping control mechanisms, safety and ventilation equipment, access operator points, hatches, and hoisting equipment for installing and removing equipment.

(6) The plans and technical specifications for the wastewater treatment plant shall include construction details for all units of the plant as well as equipment and material specifications and installation procedures. The location and details of inlet and outlet structures, valving, and piping arrangements that allow alternate modes of operation during periods of stress such as mechanical failure, structural repair, or any other activity which requires the removal of one or more treatment elements from service, shall be included. The plans shall include a hydraulic profile of the treatment facilities at both design and peak flows. The plans shall also show provisions for future expansion of the plant, should such be contemplated. Details of complex piping should be clarified by the inclusion of an isometric flow diagram as a part of the plans.

(e) Other requirements.

(1) Completion. Upon completion of construction, the design engineer or other engineer appointed by the owner shall notify the commission of completion and attest to the fact that the completed work is substantially in accordance with the plans, technical specifications, and change orders approved by the commission. If substantial changes have been made to the original plans, record drawings documenting such changes shall be submitted to the commission.

(2) Inspection. During construction, the project may be visited by a representative of the commission during normal working hours to establish general compliance with the plans and technical specifications approved by the commission.

(3) Operation and maintenance manual. Prior to completion of construction of a new wastewater treatment plant or plant expansion, an operation and maintenance manual covering the recommended operating procedures and maintenance practices for the entire facility shall be furnished to the sewerage system owner by the design engineer. The design engineer shall submit a letter to the commission certifying that this action has been performed and shall furnish a copy of the operation and maintenance manual to the commission upon request.

(4) Sludge management implementation plan. The design engineer shall prepare an implementation plan for the selected sludge management method. The plan shall identify regulatory requirements of state and federal agencies. The plan shall also include requirements for selected contingency alternatives.

(5) Authorization to discharge. For treatment plant projects, the owner is required to secure proper authorization from the commission prior to initiation of construction. No discharge shall be authorized without a discharge permit. In no case shall bypassing of partially treated wastewater be authorized during construction without an order for such discharge from the commission. Also see §317.4(a)(3) of this title (relating to Wastewater Treatment Facilities).

(f) Variance. A variance from the design criteria herein may be granted by the commission if the variance would not result in an unreasonable risk to treatment plant performance, public health, or the waters in the state. Requests for variances must be submitted in writing by the design engineer and must, for each affected item, include a detailed engineering justification.

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 December 17, 2004.

TRD-200407369
Stephanie Bergeron Perdue
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: January 6, 2005
Proposal publication date: August 13, 2004
For further information, please call: (512) 239-5017

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

CHAPTER 51. EXECUTIVE

The Texas Parks and Wildlife Commission adopts the repeal of §§51.92, 51.131, 51.164, 51.167, 51.168, and 51.170, amendments to §§51.2, 51.3, 51.60, and 51.141, and new §§51.70 - 51.72, 51.80, 51.81, and 51.500, concerning the department's rules affecting agency operations. Section 51.3, concerning Consideration and Disposition, is adopted with changes to the proposed text as published in the October 1, 2004, issue of the *Texas Register* (29 TexReg 9339). The repeal of §§51.92, 51.131, 51.164, 51.167, 51.168, and 51.170, amendments to §§51.2, 51.60, and 51.141, and new §§51.70 - 51.72, 51.80, 51.81, and 51.500 are adopted without changes and will not be republished.

The change to §51.3 is nonsubstantive, consisting of grammatical alteration to make it clear that staff shall notify the executive director within 10 days of receipt of a petition. The wording in the proposal suggests that the 10-day period begins when the executive director gives a petition to the staff.

The repeals, amendments, and new sections are necessary as a result of the department's review of its regulations under the provisions of Government Code, §2001.039, which requires a state agency to review each of its regulations no less frequently than every four years and to re-adopt, adopt with changes, or repeal each rule as a result of the review. The new sections are intended to relocate and reorganize sections to be more "user friendly."

The repeal of §51.92, concerning Easement Requests, is necessary because the rule is not required by statute and the department has determined that the rule provides no functionality that is not presently within the authority of the agency to exercise under other provisions of law.

The repeal of §51.131, concerning Litigation and Other Legal Action, is necessary because the rule is not required by statute and the provisions of the rule are already set forth in Civil Practice and Remedies Code, §101.103 and §101.104 and Government Code, §402.021, which provide for legal representation of the department by the Office of the Attorney General.

The repeal of §51.164, concerning Gifts to the Department, is necessary to relocate the section to a new subchapter containing rules regarding fundraising.

The repeal of §51.167, concerning Employee Fundraising Activities, is necessary to relocate the section to a new subchapter containing rules regarding fundraising.

The repeal of §51.168, concerning Youth-appropriate Advertising, is necessary to relocate the section to a new subchapter containing rules regarding fundraising.

The repeal of §51.170, concerning Memorandum of Understanding with Texas Economic Development Department and Texas Department of Transportation, is necessary because the statute requiring the Memorandum of Understanding to be adopted by rule was repealed by the legislature in 2003, rendering the rule unnecessary.

The amendment to §51.2, concerning Content and Submission of Petitions for Rulemaking, makes nonsubstantive grammatical changes to enhance the user-friendliness of the rule and to provide for correspondence with petitioners via electronic mail. The amendment is necessary to make the instructions for petitioning the agency for rulemaking more accurate and to acknowledge changes in communications technologies.

The amendment to §51.3, concerning Consideration and Disposition, stipulates that a petition simply be delivered to the department, rather than submitted to the executive director. The amendment is necessary because the current wording requires the executive director to refer petitions to agency personnel for review and recommendation. However, as a practical matter, petitions for rulemaking are initially received and processed by staff. Therefore, the department seeks to expedite the process of review and notification of the commission by allowing petitions to be referred immediately upon receipt.

The amendment to §51.60, concerning Authority to Contract, makes nonsubstantive grammatical changes to enhance clarity and readability. The amendment is necessary to make the rule more user-friendly.

The amendment to §51.141, concerning Sick Leave Pool, makes a nonsubstantive change to a job title. The current rule references the director of personnel, but changes in the department's organizational nomenclature have caused that job function to be redesignated as the director of human resources. The amendment is necessary to maintain accurate terminology in the agency's regulations.

New §51.70, concerning Gifts to the Department, is the relocation of current §51.164, which is being repealed. The new section is necessary because the department is creating a new subchapter to contain the rules relating to fundraising activities overseen or conducted by the department.

New §51.71, concerning Employee Fundraising Activities, is the relocation of current §51.167, which is being repealed. The new section is necessary because the department is creating a new subchapter to contain the rules relating to fundraising activities overseen or conducted by the department.

New §51.72, concerning Youth-appropriate Advertising, is the relocation of current §51.168, which is being repealed. The new section is necessary because the department is creating a new subchapter to contain the rules relating to fundraising activities overseen or conducted by the department.

New §51.80, concerning Hunter Education Course and Instructors, is the relocation of current Chapter 55, Subchapter J (§§55.603, 55.605, and 55.607), which is being repealed. The new section, which is composed of the contents of the three sections currently in Chapter 55, Subchapter J, is necessary because the department is creating a new subchapter in Chapter 51 to contain the rules relating to outreach, education and fundraising activities overseen or conducted by the department.

New §51.81, concerning Mandatory Boater Education, is the relocation of current Chapter 55, Subchapter K (§§55.701, 55.703, 55.705, and 55.707), which is being repealed. The new section, which is composed of the contents of the four sections currently in Chapter 55, Subchapter K, is necessary because the department is creating a new subchapter in Chapter 51 to contain the rules relating to outreach, education and fundraising activities overseen or conducted by the department.

New §§51.70 - 51.72, 51.80 and 51.81 are intended to organize the rules in a way that will facilitate location of the rules by the public.

New §51.500, regarding Employee Training, is necessary to implement the requirements of Government Code, §656.048, which requires state agencies to adopt rules regarding "(1) the eligibility of the agency's administrators and employees for training and education supported by the agency; and (2) the obligations assumed by the administrators and employees on receiving the training and education." The new section authorizes the department to use agency funds and enter contracts to train and educate department employees; provides that employees may be required to attend training and that the training must relate to an employee's current or prospective job duties; gives examples of the types of training that may be provided; addresses approval to participate in training and ownership of training materials; sets out examples of an employee's obligations upon completion of training; and, directs the executive director to adopt agency policies regarding employee training.

The repeals, amendments, and new sections will function by eliminating unnecessary regulations, by reorganizing remaining regulations to make them more easily locatable, and by generally enhancing the clarity and succinctness of the agency's regulations.

The department received no comments concerning adoption of the proposals.

SUBCHAPTER A. PROCEDURES FOR THE ADOPTION OF RULES

31 TAC §51.2, §51.3

The amendments are adopted under the authority of Government Code, §2001.021, which requires each state agency by rule to prescribe the form and procedure for the submission, consideration, and disposition of petitions for rulemaking; §661.002, which requires the governing body of each state agency to adopt rules to prescribe procedures relating to the operation of the agency sick leave pool; Parks and Wildlife Code, §11.0171, which requires the commission to adopt policies and procedures consistent with applicable state procurement practices for soliciting and awarding contracts; §11.0172, which requires the commission to adopt rules regarding the types of advertising that are appropriate for viewing by youth; §11.0182, which requires the commission by rule to adopt policies to govern fundraising activities by department employees on behalf of the department; §11.203, which requires the commission by rule to require a nonprofit partner to comply with specified state standards and safeguards for accounting for state assets held by the nonprofit partner; §11.205, which requires the commission by rule to establish guidelines under which the official nonprofit partner may solicit and accept sponsorships from private entities and the best practices under which the partner may engage in activities governed by the chapter; §31.108, which requires the commission to adopt rules to administer a boater education program; and §62.014, which requires the commission to adopt rules to implement the hunter education program.

§51.3. Consideration and Disposition.

(a) An administratively complete petition shall be referred to the appropriate agency personnel for review and recommended action.

(b) Within 10 days of receiving a petition, agency personnel shall make a recommendation to the executive director to either deny the petition or initiate rulemaking, and shall include reasons for the recommendation.

(c) The executive director shall forward to each member of the commission a copy of the petition and the staff recommendation and shall verify that each commissioner has received a copy of the petition and the staff recommendation.

(d) If a member of the commission determines that further deliberations are warranted, the executive director shall place the petition on the agenda of the commission and notify the petitioner in writing of the date, time, and place of the commission meeting at which the petition will be deliberated.

(e) If, by the 50th day following the submission of the petition, no member of the commission has determined that further deliberations are warranted, the petition will be denied. The department shall notify the petitioner in writing of the staff recommendation and final disposition of the petition by no later than the 60th day after submission of the petition.

(f) In the event that rulemaking is to be initiated as a result of a petition involving any portion of Chapter 65, Subchapter A of this title (relating to Statewide Hunting and Fishing Proclamation), the department may defer the rulemaking activity until such time as it initiates other rulemaking activity involving Chapter 65, Subchapter A of this title.

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 December 14, 2004.

TRD-200407309
Gene McCarty
Chief of Staff
Texas Parks and Wildlife Department
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Proposal publication date: October 1, 2004
For further information, please call: (512) 389-4775

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SUBCHAPTER B. AUTHORITY TO CONTRACT

31 TAC §51.60

The amendment is adopted under the authority of Parks and Wildlife Code, §11.0171, which requires the commission to adopt policies and procedures consistent with applicable state procurement practices for soliciting and awarding contracts

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

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Gene McCarty
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Texas Parks and Wildlife Department
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SUBCHAPTER C. EMPLOYEE FUNDRAISING AND SPONSORSHIPS

31 TAC §§51.70 - 51.72

The new sections are adopted under the authority of Parks and Wildlife Code, §11.0172, which requires the commission to adopt rules regarding the types of advertising that are appropriate for viewing by youth; §11.0182, which requires the commission by rule to adopt policies to govern fundraising activities by department employees on behalf of the department; §11.203, which requires the commission by rule to require a nonprofit partner to comply with specified state standards and safeguards for accounting for state assets held by the nonprofit partner; and §11.205, which requires the commission by rule to establish guidelines under which the official nonprofit partner may solicit and accept sponsorships from private entities and the best practices under which the partner may engage in activities governed by the chapter.

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

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Gene McCarty
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SUBCHAPTER C. EASEMENT REQUESTS AND UNAUTHORIZED EASEMENT ACTIVITY

31 TAC §51.92

The repeal is adopted under the authority of Parks and Wildlife Code, Chapter 13, Subchapter B, which provides the Commission with the authority to establish regulations governing the conservation, preservation, and use of state property.

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

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Gene McCarty
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SUBCHAPTER D. EDUCATION

31 TAC §51.80, §51.81

The new sections are adopted under the authority of Parks and Wildlife Code, §31.108, which requires the commission to adopt rules to administer a boater education program; and §62.014, which requires the commission to adopt rules to implement the hunter education program.

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

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Gene McCarty
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Texas Parks and Wildlife Department
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SUBCHAPTER D. DEPARTMENT LITIGATION

31 TAC §51.131

The repeal is adopted under the authority of Government Code, §2001.004, which authorizes state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

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

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Gene McCarty
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Texas Parks and Wildlife Department
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For further information, please call: (512) 389-4775

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SUBCHAPTER E. SICK LEAVE POOL

31 TAC §51.141

The amendment is adopted under the authority of Government Code, §661.002, which requires the governing body of each state agency to adopt rules to prescribe procedures relating to the operation of the agency sick leave pool.

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

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Gene McCarty
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SUBCHAPTER G. NONPROFIT ORGANIZATIONS

31 TAC §§51.164, 51.167, 51.168

The repeals are adopted under the authority of Parks and Wildlife Code, §11.0172, which requires the commission to adopt rules regarding the types of advertising that are appropriate for viewing by youth; §11.0182, which requires the commission by rule to adopt policies to govern fundraising activities by department employees on behalf of the department; §11.203, which requires the commission by rule to require a nonprofit partner to comply with specified state standards and safeguards for accounting for state assets held by the nonprofit partner; and §11.205, which requires the commission by rule to establish guidelines under which the official nonprofit partner may solicit and accept sponsorships from private entities and the best practices under which the partner may engage in activities governed by the chapter.

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

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Gene McCarty
Chief of Staff
Texas Parks and Wildlife Department
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For further information, please call: (512) 389-4775

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SUBCHAPTER H. MEMORANDUM OF UNDERSTANDING

31 TAC §51.170

The repeal is adopted under Senate Bill 275, enacted by the 78th Texas Legislature (Regular Session) which amended Government Code, Chapter 481, by eliminating the requirement that the agency's memorandum of understanding with the Texas Department of Economic Development and the Texas Department of Transportation be adopted 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.

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Gene McCarty
Chief of Staff
Texas Parks and Wildlife Department
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SUBCHAPTER N. EMPLOYEE TRAINING

31 TAC §51.500

The new section is adopted under the authority of Government Code, §658.048, which requires each state agency to adopt rules regarding agency training programs.

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

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Gene McCarty
Chief of Staff
Texas Parks and Wildlife Department
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CHAPTER 53. FINANCE
SUBCHAPTER A. FEES
DIVISION 1. LICENSE, PERMIT, AND BOAT AND MOTOR FEES

31 TAC §53.6

The Texas Parks and Wildlife Commission adopts an amendment to §53.6, concerning saltwater sportfishing stamp fees, without changes to the proposed text as published in the July 23, 2004, issue of the *Texas Register* (29 TexReg 7032). The amendment increases the future fee for the Saltwater Sportfishing Stamp.

The amendment to §53.6(b)(2) removes the expiration date from the $3 surcharge to the saltwater sportfishing stamp. The funds generated by extending this fee are necessary to maintain or accelerate the department's commercial fishing license buyback programs for shrimp, crab, and finfish, established in Texas Parks and Wildlife Code, §§77.119, 78.111, and 47.081, respectively.

The license buyback funds are used for purchasing and retiring commercial crab, finfish, bait shrimp, and bay shrimp licenses. The goal of the program is to reduce the number of license holders and fishing effort in those fisheries, respectively. The proposal to maintain the $3 surcharge (or to increase the current saltwater stamp by $3 when the current $3 surcharge expires) will help to accelerate the buyback programs in future years.

Currently, the license buyback programs for each fishery under a limited entry system (crab, finfish and inshore shrimp) are partially supported by a percentage of the commercial license fee collected to fish or participate in each of those fisheries. In addition, the department during the 2000-01 license year established the existing $3 surcharge on the saltwater sportfishing stamp, which generated approximately $1.4 million per year. The license buyback programs depend on voluntary sellers to offer their licenses to be purchased by the department. To date, most of the funds expended have been used for the purchase of commercial bay and bait shrimp fishing boat licenses. This is primarily due to the size of the fishery and that the inshore shrimp fishery was the first limited entry program and buyback program established.

Following the implementation of the $3 surcharge, the average annual purchase of commercial bay and bait shrimp fishing boat licenses increased 43.5% per year. Another way of expressing this difference, based on the average number of licenses bought back each of the three years before there was a surcharge compared to the average number bought back each of the four years after there was funding from a surcharge, is that 216 commercial bay and bait shrimp fishing boat licenses were purchased per year that could not have otherwise been purchased. To date, $7.2 million has been spent in the purchase of 1,188 commercial bay and bait shrimp fishing boat licenses. Additionally, during the same period $716,107 has been spent purchasing 25 commercial crab fishing boat licenses and 125 commercial finfish fishing boat licenses. While the program has been successful from its inception in reducing license numbers and is showing evidence of reducing fishing effort, the ability to continue to purchase licenses at the current pace is dependent on the continuation of the $3 saltwater surcharge.

There will be direct economic costs of $3 for those who are required to comply, however; since the $3 fee has been in effect for five years at expiration this is not a new additional cost. These additional monies will enhance the license buyback program, which will lead to the long term benefit of sustainability of these resources.

The department received a total of 205 comments in support of the proposed regulations and 44 expressed disagreement.

Of the 44 opposed, 18 defined their opposition as follows:

COMMENT: Six individuals opposed adoption of the rules, stating that the Commercial Fishing License Buy Back Program is no longer needed, that effort has been adequately reduced and that the program should not be continued.

AGENCY RESPONSE: The agency disagrees and responds that while the Commercial Fishing License Buy Back Program has been successful in reducing the number of bay and bait shrimp licenses (e.g., 1,188 license have been purchase of the original 3,321 licenses which were eligible at the start of the license management program), and commercial shrimp fishing effort has been reduced. The program will continue to monitor the reduction in effort in the inshore shrimp fishery to determine when the optimum reduction in effort has been reached. As compared to the shrimp license buyback programs, the commercial crab and commercial finfish license buyback programs have been ongoing for a shorter period of time and reductions in effort in these fisheries is less than expected in the inshore shrimp fishery. To maintain the current rate of buybacks for all these programs the $3 surcharge needs to be extended at this time. No changes were made as a result of these comments.

COMMENT: Five individuals opposed adoption of the rules, stating that the fee should have an expiration date as previously existed in the regulation.

AGENCY RESPONSE: The agency disagrees and responds that the date that previously existed in the regulation was to insure that the fee would not be continued without the review of the Commission. This review took place roughly one year before the required review date stated in the regulation. The Commission has the authority to review this regulation, as with all other Commission adopted regulations, as frequently as needed. Also, the Legislature requires all state agencies to review each of their regulations at least every four years to determine if the need for the regulation still exists and that the

regulation still adequately addresses that need. No changes were made as a result of these comments.

COMMENT: Four individuals opposed adoption of the rules, stating recreational fishermen should not be paying for the Commercial Fishing License Buy Back Program and that the cost of the program should be paid for by others, particularly by commercial fishing license holders.

AGENCY RESPONSE: The agency disagrees, and while the program could be paid for by other entities, the Department license fees remain the primary source of funding for all programs of the Department. The Department has sought and received grants and outside donations to fund the program to date in addition to the license fees. In order to accelerate the buyback program the initial increase of $3 to the saltwater stamp was implemented. To continue this level of funding the $3 expiration or sunset date would have to be lifted or extended. In this case, reductions in commercial saltwater fishing effort for shrimp, crabs, and finfish benefit the entire ecosystem and ultimately those who fish Texas waters. In addition, reductions in fishing pressure also reduce the amount of bycatch and habitat disturbance caused by any of these fishing activities also creating benefits to the ecosystem and other users of the resource. In addition, commercial fishermen are paying a surcharge on their commercial license fees, providing funding for the buyback programs as well. No changes were made as a result of these comments.

COMMENT: Four individuals opposed adoption of the rules, stating that the Commission should use a lottery or similar device to simply reduce the number of shrimp fishermen.

AGENCY RESPONSE: The agency disagrees and responds that the Commission does not have the statutory authority to conduct a lottery or use any other manner to prevent a commercial bay or bait shrimp license holder from continuing to purchase their license so long as they meet the renewal requirements. The current criterion for renewal under each of the license limitation programs is that the license must be purchased in the preceding year. No changes were made as a result of these comments.

COMMENT: One individual opposed adoption of the rules, stating that the Commercial Fishing License Buyback Program is no longer and has never been needed; that effort would be adequately reduced if the Department enforced federal law prohibiting non-citizens from obtaining United States Coast Guard documentation for a vessel participating in any fishery in the navigable waters of the United States; that the Department boat registration program and the issuance of commercial fishing vessel license is somehow a violation of federal law; and that neither the fee nor the commercial fishing license buyback program should be continued.

AGENCY RESPONSE: The agency disagrees and responds that the matter of citizenship is determined at the time that a vessel is documented by the United States Coast Guard and the department's role in enforcement is insuring that a commercial fishing vessel that is required by federal law to have such documentation (i.e., greater than 5 tons) is licensed to fish in Texas waters and that current coast guard documentation with fishery endorsement is presented. The Texas requirement that all powered vessels have a Texas registration does not replace any federal requirement for coast guard documentation on commercial fishing vessels greater than 5 tons operating in the navigable waters of the United States. The Texas requirement that commercial fishing vessels have either a resident or non-resident commercial fishing license appropriate for the particular fishery being fished does not replace any federal requirement for coast guard documentation and fishery endorsement on commercial fishing vessels greater than 5 tons operating in the navigable waters of the United States. The department and federal agencies enforce these laws and this enforcement has not had an appreciable impact on fishing effort in the fisheries for which there exists a license buyback program. No changes were made as a result of these comments.

The amendment is adopted under the authority of Parks and Wildlife Code, §43.403, which authorizes the commission to establish a fee for the saltwater sportfishing stamp when that fee is in excess of $5. The amendment provides necessary funding to maintain or accelerate the department's commercial fishing license buyback programs for shrimp, crab, and finfish, under the authority of Parks and Wildlife Code, §§77.120, 78.111, and 47.081, respectively.

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 December 14, 2004.

TRD-200407322
Gene McCarty
Chief of Staff
Texas Parks and Wildlife Department
Effective date: January 3, 2005
Proposal publication date: July 23, 2004
For further information, please call: (512) 389-4775

CHAPTER 55. LAW ENFORCEMENT

The Texas Parks and Wildlife Commission adopts the repeal of §§55.603, 55.605, 55.607, 55.701, 55.703, 51.705, and 55.707, concerning the agency's regulations governing mandatory hunter education and mandatory boater education, without changes to the proposed text as published in the October 1, 2004, issue of the *Texas Register* (29 TexReg 9345).

The repeals are a result of the department's review process under the provisions of Government Code, §2001.039, which requires each state agency to perform a review of all regulations not less than every four years and to either readopt, amend, or repeal each rule as necessary and appropriate. As a result of the review, the department has relocated the hunter education and boater education rules to Chapter 51, concerning Executive. A notice of adoption to that effect appears elsewhere in this issue. The effect of the repeals is nonsubstantive.

The repeals will function by allowing the rules to be transferred to a chapter of the department's rules where it is more logical for them to be located.

The department received no comments concerning adoption of the proposed repeals.

SUBCHAPTER J. MANDATORY HUNTER EDUCATION PROGRAM

31 TAC §§55.603, 55.605, 55.607

The repeals are adopted under Parks and Wildlife Code, §62.014, which requires the commission to adopt rules to implement the hunter education program.

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

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Gene McCarty
Chief of Staff
Texas Parks and Wildlife Department
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For further information, please call: (512) 389-4775

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SUBCHAPTER K. MANDATORY BOATER EDUCATION PROGRAM

31 TAC §§55.701, 55.703, 55.705, 55.707

The repeals are adopted under Parks and Wildlife Code, §31.108, which requires the commission to adopt rules to administer a boater education program.

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

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Gene McCarty
Chief of Staff
Texas Parks and Wildlife Department
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For further information, please call: (512) 389-4775

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CHAPTER 61. DESIGN AND CONSTRUCTION

SUBCHAPTER A. CONTRACTS FOR PUBLIC WORKS

31 TAC §61.23, §61.24

The Texas Parks and Wildlife Commission adopts amendments to §61.23 and §61.24, concerning submission, receipt and award of bids for design and construction of department facilities, without changes to the proposed text as published in the October 1, 2004, issue of the *Texas Register* (29 TexReg 9346).

The amendments are necessary as a result of the department's review of its regulations under the provisions of Government Code, §2001.039, which requires a state agency to review each of its regulations no less frequently than every four years and to re-adopt, adopt with changes, or repeal each rule as a result of the review.

Under Government Code, §2166.003(a)(4), projects constructed by the department are exempt from the general state construction requirements of the Texas Building and Procurement Commission. Parks and Wildlife Code, §11.0171, requires the Parks and Wildlife Commission to adopt by rule "policies and procedures consistent with applicable state procurement practices for soliciting and awarding contracts."

The amendment to §61.23, concerning Submission and Receipt of Bids, is necessary to update this section by adding a reference to the currently used Texas Marketplace and to eliminate the prohibition and limitation regarding bids submitted electronically.

The amendment of §61.24, concerning Award of Bids, is necessary to accurately reflect the basis for the award of bids for construction and design contracts as being the best value to the state, rather than the lowest and best bid. The use of the best value to the state as the standard for bid awards is consistent with state procurement practices. (See, e.g., Texas Government Code §§2166.2526(a), 2166.2531(f)(3), 2166.2532(h) and (i), and 2166.2533 (g) and (h))

The amendment to §61.24 is also necessary to enable department staff to obtain information in various forms regarding a contractor's previous performance. Consideration of various sources of information about a contractor's previous performance is consistent with state procurement practices.

The amendments will function by establishing a current and accurate set of practices for the agency's construction procurement activities.

The department received no comments concerning adoption of the proposed amendments.

The amendments are adopted under the authority of Parks and Wildlife Code, §11.0171, which requires the commission to adopt by rule "policies and procedures consistent with applicable state procurement practices for soliciting and awarding contracts."

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

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Gene McCarty
Chief of Staff
Texas Parks and Wildlife Department
Effective date: January 3, 2005
Proposal publication date: October 1, 2004
For further information, please call: (512) 389-4775

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CHAPTER 65. WILDLIFE

SUBCHAPTER C. PERMITS FOR TRAPPING, TRANSPORTING, AND TRANSPLANTING GAME ANIMALS AND GAME BIRDS

31 TAC §65.107

The Texas Parks and Wildlife Commission adopts an amendment to §65.107, concerning permits for trap, transport, and

transplant game animals and game birds (popularly referred to as 'Triple T' permits), with changes to the proposed text as published in the September 24, 2004, issue of the *Texas Register* (29 TexReg 9165).

The change is nonsubstantive, altering a reference to a job title in subsection (b)(2)(C). There is no longer a Game Branch; it has been renamed the Big Game Program.

The amendment is a result of the department's review process under the provisions of Government Code, §2001.039, which requires each state agency to perform a review of all regulations not less than every four years and to either readopt, amend, or repeal each rule. As a result of the review and the department's recent rulemaking that consolidated all fee amounts in 31 TAC Chapter 53 (relating to Finance), the amendment eliminates references to specific fee amounts and comport the remaining language accordingly. The effect of the amendment is nonsubstantive.

The amendment is necessary to remove unnecessary and obsolete references to fee amounts.

The amendment will function by removing a fee amount from the rule text.

The department received no comments concerning adoption of the proposed amendment.

The amendment is adopted under Parks and Wildlife Code, §43.061, which requires the commission to adopt rules for the content of wildlife stocking plans, certification of wildlife trappers, and the trapping, transporting, and transplanting of game animals and game birds under Chapter 43, Subchapter E.

§65.107. Permit Applications and Processing.

(a) Permit applications.

(1) Application for permits authorized under this subchapter shall be on a form prescribed by the department.

(2) A single application for a Trap, Transport, and Transplant Permit or an Urban White-tailed Removal Permit may specify multiple trap and/or release sites. A single application for a Trap, Transport, and Process Surplus White-tailed Deer Permit may specify multiple trap sites and/or processing facilities.

(3) A single application may not specify multiple species of game birds and/or game animals.

(4) The application must be signed by:

(A) the applicant;

(B) the landowner or agent of the trap site(s); and

(C) the landowner or agent of the release site(s) or the owner or agent of the processing facility or facilities.

(5) The applicant may designate certain persons and/or companies that will be involved in the permitted activities, including direct handling, transport and release of game animals or game birds. In the absence of the permittee, at least one of the named persons and/or companies shall be present during the permitted activities.

(b) Appeals. An applicant for a permit under this subchapter may appeal the decisions of the department concerning the stipulations of a permit. All appeals involving the provisions of paragraphs (1) and (2) of this subsection shall be resolved within 10 working days of notification of the department by the person making the appeal.

(1) An applicant seeking to appeal the decisions of the department with respect to permit issuance under this subchapter shall first contact the immediate in-line supervisor of the TPW employee responsible for authorizing the permitted activities.

(2) If the determination of the immediate in-line supervisor is unsatisfactory to the applicant, the applicant is entitled to have the appeal presented to an appeals panel. The decision of the appeals panel is final. The appeals panel shall consist of the following:

(A) the Director of the Wildlife Division;

(B) the Regional Director and District Leader with jurisdiction; and

(C) the White-tailed Deer Program Leader and the Big Game Program Director.

(3) If the determination of the panel is unsatisfactory to the applicant, the applicant is entitled to have the appeal presented to the Private Lands Advisory Board and the Hunting Advisory Board for the purpose of determining if regulatory revision is appropriate.

(c) Permit fees.

(1) The nonrefundable processing fees for permits and amendments authorized pursuant to this subchapter are prescribed in Chapter 53, Subchapter A of this title (relating to Fees).

(2) The department will not process any permit application unless the appropriate fee has been received by the department.

(3) Applications to trap, transport, and transplant nuisance squirrels are exempt from application fees.

(4) Applications for urban white-tailed deer removal permits that specify trap sites consisting solely of property owned by a political subdivision or institution of higher education of this state are exempt from application fees.

(5) Applications to trap, transport, and process surplus white-tailed deer are exempt from application fees.

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 December 14, 2004.

TRD-200407323
Gene McCarty
Chief of Staff
Texas Parks and Wildlife Department
Effective date: January 3, 2005
Proposal publication date: September 24, 2004
For further information, please call: (512) 389-4775

SUBCHAPTER D. DEER MANAGEMENT PERMIT

31 TAC §65.132

The Texas Parks and Wildlife Commission adopts an amendment to §65.132, concerning deer management permits, without changes to the proposed text as published in the September 24, 2004, issue of the *Texas Register* (29 TexReg 9166).

The amendment is a result of the department's review process under the provisions of Government Code, §2001.039, which requires each state agency to perform a review of all regulations

not less than every four years and to either readopt, amend, or repeal each rule. As a result of the review and the department's recent rulemaking that consolidated all fee amounts in 31 TAC Chapter 53 (relating to Finance), the amendment would update the citation of the portion of Chapter 53 where the processing fees for deer management permits are located. The effect of the amendment is nonsubstantive.

The amendment will function by eliminating references to fee amounts.

The department received no comments concerning adoption of the proposed amendment.

The amendment is adopted under Parks and Wildlife Code, §43.603, which authorizes the commission to establish conditions for a permit issued under Chapter 43, Subchapter R.

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 December 14, 2004.

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Gene McCarty
Chief of Staff
Texas Parks and Wildlife Department
Effective date: January 3, 2005
Proposal publication date: September 24, 2004
For further information, please call: (512) 389-4775

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SUBCHAPTER H. PUBLIC LANDS PROCLAMATION

31 TAC §§65.190, 65.191, 65.193, 65.194, 65.202

The Texas Parks and Wildlife Commission adopts amendments to §65.190, 65.191, 65.193, 65.194, and 65.202, concerning the Public Lands Proclamation. Section 65.202, concerning Youth Hunting on Public Lands, is adopted with changes to the proposed text as published in the September 24, 2004, issue of the *Texas Register* (29 TexReg 9167). Sections 65.190, 65.191, 65.193, and 65.194 are adopted without changes and will not be republished.

The change to §65.202 adds language to clarify that the minimum age for youth participating in waterfowl hunts on public lands during the federally designated youth waterfowl hunting weekend is 15.

The amendments are a result of the department's review process under the provisions of Government Code, §2001.039, which requires each state agency to perform a review of all regulations not less than every four years and to either readopt, amend, or repeal each rule. As a result of the review, the department identified several instances within the subchapter of outdated or inaccurate references, which are addressed by the nonsubstantive changes adopted here, with the exception of the change involving §65.193, which is discussed elsewhere in this preamble.

The amendment to §65.190, concerning Application, will function by assigning a numbered identifier to the following units of public hunting lands: Lake McClellan Recreation Area, Mason Mountain Wildlife Management Area, and Nannie Stringfellow Wildlife Management Area. The numerical designations are used in department publications as a shorthand notation and therefore need to be appended to the rule.

The amendment to §65.191, concerning Definitions, will function by eliminating the definition for the Texas Conservation Passport, which has been discontinued, and replaces the current definition of 'minor' with a definition of 'youth,' which is intended to make the terminology in the rules more consistent with department literature and regulations concerning youth and youth hunting.

The amendment to §65.193, concerning Access Permit Required and Fees, will function by eliminating all references to the Texas Conservation Passport, which has been discontinued; eliminating a reference to the fee ceiling for a special hunting permit, which is necessary because all fee amounts have been consolidated, through a previous rulemaking, in 31 TAC Chapter 53, concerning Finance; and eliminating the provision allowing for the resubmission of incorrectly completed applications for special permit hunts. Until recently, the department's procedures for processing special permit hunt applications allowed applicants in some but not all cases to be notified of an invalid application, giving the applicant the opportunity to correct and resubmit the application prior to the deadline. The fee for special permit hunt applications is to cover the administrative costs to the department of processing the applications and administering the public hunting program. The fee is nonrefundable because the department incurs a processing cost regardless of whether an application is valid or not. Owing to the steady increase in the popularity of special permit hunts, the number of invalid applications has risen to the point that the department is no longer able to review the applications at a point in time that would allow for notification and resubmission by participants.

The amendment to §65.194, concerning Competitive Hunting Dog Event (Field Trials) and Fees, will function by altering a citation to Chapter 53, concerning Finance, which was rendered obsolete and inaccurate by a recent rulemaking.

The amendment to §65.202, concerning Youth Hunting on Public Lands, will function by replacing the term 'minor' with the term 'youth' and stipulates that a person must be younger than 17 to apply for youth hunts on public lands. The current provision does not identify the precise age cut-off for applications for youth hunts.

The department received no comments concerning adoption of the proposed rules.

The amendments are adopted under Parks and Wildlife Code, Chapter 81, Subchapter E, which provides the Parks and Wildlife Commission with authority to establish an open season on wildlife management areas and public hunting lands and authorizes the executive director to regulate numbers, means, methods, and conditions for taking wildlife resources on wildlife management areas and public hunting lands; Chapter 12, Subchapter A, which provides that a tract of land purchased primarily for a purpose authorized by the code may be used for any authorized function of the department if the commission determines that multiple use is the best utilization of the land's resources; and Chapter 62, Subchapter D, which provides authority, as sound biological management practices warrant, to prescribe seasons, number, size, kind, and sex and the means and method of taking any wildlife.

§65.202. Youth Hunting on Public Lands.

(a) Youth participating in public hunts by special permit must be not less than eight nor more than 16 years of age at the time of application.

(b) It is an offense for a youth to fail to be under the immediate supervision of a duly permitted and authorized supervising adult when hunting on public hunting lands. For a youth who has received hunter education certification, the requirement for immediate supervision is relaxed to the extent that the authorized supervising adult is required only to be present on the public hunting area. The authorized supervising adult is responsible for the actions and liability of the youth.

(c) Youth participating in a youth waterfowl hunt during the federal youth waterfowl hunting season must be 15 years of age or younger.

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 December 14, 2004.

TRD-200407325
Gene McCarty
Chief of Staff
Texas Parks and Wildlife Department
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Proposal publication date: September 24, 2004
For further information, please call: (512) 389-4775

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SUBCHAPTER T. SCIENTIFIC BREEDER'S PERMITS

31 TAC §65.603

The Texas Parks and Wildlife Commission adopts an amendment to §65.603, concerning scientific breeder's permits, without change to the proposed text as published in the September 24, 2004, issue of the *Texas Register* (29 TexReg 9170).

The amendment is a result of the department's review process under the provisions of Government Code, §2001.039, which requires each state agency to perform a review of all regulations not less than every four years and to either readopt, amend, or repeal each rule. As a result of the review and the department's recent rulemaking that consolidated all fee amounts in 31 TAC Chapter 53 (relating to Finance), the amendment would update the citation of the portion of Chapter 53 where the processing fees for deer management permits are located. The effect of the amendment is nonsubstantive.

The rule will function by ensuring that correct cross references exist in rule language.

The department received no comments concerning adoption of the proposed rule.

The amendment is adopted under Parks and Wildlife Code, Chapter 43, Subchapter L, which authorizes the Parks and Wildlife Commission to establish regulations governing the possession of white-tailed and mule deer for scientific, management, and propagation purposes.

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 December 14, 2004.

TRD-200407326
Gene McCarty
Chief of Staff
Texas Parks and Wildlife Department
Effective date: January 3, 2005
Proposal publication date: September 24, 2004
For further information, please call: (512) 389-4775

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TITLE 34. PUBLIC FINANCE

PART 4. EMPLOYEES RETIREMENT SYSTEM OF TEXAS

CHAPTER 63. BOARD OF TRUSTEES

34 TAC §63.4

The Employees Retirement System of Texas (ERS) adopts amendments to §63.4 of Title 34, Texas Administrative Code, concerning the election of trustees (ballot). The amendments are adopted without changes to the text as published in the November 5, 2004 issue of the *Texas Register* (29 TexReg 10217). The text will not be republished.

The amendments to §63.4 are adopted to provide an option for electronic elections and to simplify the election/balloting process.

Subsection (b) was adopted to change the term "printing" to "presentation". This is a conforming change to comport with the change to subsection (d), and the change will allow for an electronic presentation of the ballot.

Subsection (c) was adopted to increase the word count from 200 to 250 for the candidate statement of qualifications and position on system issues. This change allows for a more definitive statement by each candidate. The amendment also changed the requirement that the election newsletter be made available at the beginning of each election instead of at the time of ballot distribution. This change permits flexibility in distributing the newsletter in a variety of ways.

Subsection (d) was adopted to provide for balloting to be conducted electronically or in combination with a printed ballot. This change allows for multiple methods of conducting trustee elections and takes advantage of electronic communication systems.

Subsection (e) was adopted to remove the requirement of the ballot distribution method and printing of voter name to accommodate either paper or electronic ballots. It also increased the number of blank ballots mailed to each candidate from 200 to 500 to facilitate voter access.

Subsection (f) was adopted to remove the ballot distribution method to conform with the changes to subsections (d) and (e) and to allow for an electronic presentation of the ballot.

Subsection (g) was adopted to remove the requirement that all ballots be returned through the US Postal Service to conform with the changes made to subsections (d) and (i) and to take advantage of modern electronic communications for casting votes.

The previous subsection (g) was inconsistent with electronic voting and it is expected that the mailing instructions for paper ballots will be incorporated into the printed ballots as specified in the amendment to subsections (g) and (i).

Subsection (i) was adopted to provide that valid ballots must meet the requirements and instructions specified in the electronic format or printed on the ballot. This change was made to allow the election to be conducted through either paper or electronic means and some requirements that are unique to printed ballots were deleted.

Subsection (j) was adopted to provide that the ERS Board of Trustees may designate a system official to certify the results of any election. This change shortens the election process by allowing the election certification to take place at times other than at a regularly scheduled ERS Board of Trustees meeting.

ERS received no comments regarding the amended subsections.

The amendments are adopted under Texas Government Code, §815.003, which provides authorization for the ERS Board of Trustees to adopt rules governing the election of trustees and §815.102, which provides authorization for the ERS Board of Trustees to adopt rules in carrying out its responsibilities for the administration and operation of the retirement system.

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 December 16, 2004.

TRD-200407356
Paula A. Jones
General Counsel
Employees Retirement System of Texas
Effective date: January 5, 2005
Proposal publication date: November 5, 2004
For further information, please call: (512) 867-7125

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 4. COMMERCIAL VEHICLE REGULATIONS AND ENFORCEMENT PROCEDURES

SUBCHAPTER A. REGULATIONS GOVERNING HAZARDOUS MATERIALS

37 TAC §4.1

The Texas Department of Public Safety adopts amendments to §4.1, concerning Regulations Governing Hazardous Materials, without changes to the proposed text as published in the November 5, 2004, issue of the *Texas Register* (29 TexReg 10221).

Amendments to §4.1 are necessary to ensure that the Federal Hazardous Material Regulations, incorporated by reference in the section, reflects all amendments and interpretations issued through October 1, 2004.

A second amendment to §4.1 is necessary in order to clarify that a vehicle subject to the Federal Hazardous Materials Regulations, but not the Federal Motor Carrier Safety Regulations, can be placed out-of-service for the hazardous materials violations found in the North American Standard Hazardous Materials Out-of-Service Criteria.

On December 6, 2004, the department held a public hearing to receive comment(s) from all interested person(s) regarding adoption of the amendments. No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Government Code, §411.018, which authorizes the director to adopt all or part of the federal hazardous materials rules by reference; and Texas Transportation Code, §644.051, which authorizes the director to adopt all or part of the federal safety regulations by reference.

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 December 15, 2004.

TRD-200407345
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: January 4, 2005
Proposal publication date: November 5, 2004
For further information, please call: (512) 424-2135

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SUBCHAPTER B. REGULATIONS GOVERNING TRANSPORTATION SAFETY

37 TAC §§4.11 - 4.17

The Texas Department of Public Safety adopts amendments to §§4.11 - 4.17, concerning Regulations Governing Transportation Safety, without changes to the proposed text as published in the November 5, 2004, issue of the *Texas Register* (29 TexReg 10222).

Amendments to §4.11 are necessary in order to ensure that the Federal Motor Carrier Safety Regulations, incorporated by reference in the section, reflects all amendments and interpretations issued through October 1, 2004. An additional amendment to §4.11 adopts Title 49, Code of Federal Regulations, Part 380.

Amendments to §4.12 are necessary in order to specify what subparts of Title 49, Code of Federal Regulations, Part 380 will be applicable to intrastate motor carriers and to establish a date for compliance with the proposed requirements.

Amendments to §4.13 are necessary in order to update the title of the out-of-service criteria cited in the rule and to clarify the training requirements for obtaining certification to inspect motorcoaches.

Amendments to §4.14 are necessary in order to reflect changes being made to the Memorandum of Understanding process utilized by the department for municipal and county certification requirements.

Amendments to §4.15 are necessary in order to further clarify department procedures for assigning motor carrier safety ratings in the Safety Audit Program.

Amendments to §4.16 are necessary in order to further clarify department procedures for the collection of administrative penalties assessed and the issuance of impoundment orders.

Amendments to §4.17 are necessary in order to further clarify department procedures for the notification that is sent to motor carriers concerning pending enforcement actions.

On December 6, 2004, the department held a public hearing to receive comment(s) from all interested person(s) regarding adoption of the amendments. No comments were received regarding adoption of the amendments.

The amendment are adopted pursuant to Texas Transportation Code, §644.051, which authorizes the director to adopt rules regulating the safe transportation of hazardous materials and the safe operation of commercial motor vehicles; and authorizes the director to adopt all or part of the federal safety regulations by reference.

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 December 15, 2004.

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Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: January 4, 2005
Proposal publication date: November 5, 2004
For further information, please call: (512) 424-2135

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PART 5. TEXAS BOARD OF PARDONS AND PAROLES

CHAPTER 141. GENERAL PROVISIONS SUBCHAPTER C. SUBMISSION AND PRESENTATION OF INFORMATION AND REPRESENTATION OF OFFENDERS

37 TAC §141.60, §141.61

The Texas Board of Pardons and Paroles adopts amendments to 37 TAC §141.60 and §141.61, concerning the time period for submitting information to the parole panel in support of an offender's release without changes to the proposed text as published in the November 5, 2004, issue of the *Texas Register* (29 TexReg 10244). The text of the rules will not be republished.

The amended rules are adopted in order to incorporate new language under Chapter 141, General Provisions, and to clarify the review period for discretionary mandatory review.

No comments were received regarding adoption of the amendments.

The amended rules are adopted under §508.082, and §508.083, Government Code. Section 508.082 requires the board to adopt rules relating to the submission and presentation of information and arguments to the board, a parole panel, and the department for and in behalf of an inmate. Section 508.083 relates to representation of an inmate in a matter before the board or a parole panel.

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 December 20, 2004.

TRD-200407387
Laura McElroy
General Counsel
Texas Board of Pardons and Paroles
Effective date: January 9, 2005
Proposal publication date: November 5, 2004
For further information, please call: (512) 406-5388

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SUBCHAPTER G. DEFINITION OF TERMS

37 TAC §141.111

The Texas Board of Pardons and Paroles adopt an amendment to 37 TAC §141.111, concerning definitions. The amendment is adopted with changes to the proposed text as published in the November 5, 2004 issue of the *Texas Register* (29 TexReg 10244). The purpose of the changes are to delete the definitions of 1, 2, 5, 7, 12, 13, 14, 24, 26, 28, 33, 43, and 48; to update definitions 3, and 23; and to delete reference to "administrative" from definitions 9, 23, 35, and 44. The terms "administrative release" and "administrative releasee" are no longer used in the context of revocation hearings. Definitions 5, 7, 12, 13, 14, 24, 26, 28, 33, 43, and 48 are not used in the rules; therefore, they do not require definitions. The term "technical" was added to definition 3 for clarification. The terms "a revocation" was added and "administrative release" was deleted from definition 23 to conform with the language used in the revocation hearing process. The text of the rules will be republished.

The amended rule is adopted in order to incorporate new language under Chapter 141, General Provisions. The amendment to the section is necessary to add definitions for the terms "CU/SA" and "Projected Release Date," and to remove the definition for "Policy Board;" and to conform definitions to current rules as well as to statutory and case law.

No comments were received regarding adoption of the amendment.

The amended rule is adopted under §508.036, Government Code. Section 508.036 requires the board to adopt rules relating to the decision-making processes used by the board and parole panels.

§141.111. Definitions.

The following words and terms used within these rules shall have the following meanings, unless the context clearly indicates otherwise.

(1) Administrative Violation of Parole or Mandatory Supervision--A technical violation of parole or mandatory supervision which does not allege criminal conduct.

(2) Affinity (Marriage)--A husband-wife relationship (first degree). By virtue of the marriage, a spouse is also related to individuals related to the other spouse by blood (consanguinity), and the degree of relationship by affinity is the same as the underlying relationship of consanguinity. The ending of a marriage by divorce or death of a spouse ends relationships of affinity created by that marriage unless a child of that marriage is living, in which case the marriage is considered to continue as long as a child of that marriage lives.

(3) Board--The Texas Board of Pardons and Paroles, consisting of seven members appointed by the governor.

(4) Commutation of sentence--An act of clemency by the governor which serves to modify the conditions of a sentence.

(5) Conditional pardons--A form of executive clemency granted by the governor which serves to release the grantee from the conditions of his or her sentence and any disabilities imposed by law thereby, subject to the conditions contained in the clemency proclamation. A person released pursuant to the terms of a conditional pardon is considered, for purposes of revocation thereof, to be a releasee.

(6) Consanguinity--A relationship in which one individual is related to another individual where one is a descendant of the other or where they share a common ancestor. An adopted child is considered to be a child of the adoptive parent for this purpose. The degree of relationship by consanguinity may be determined by adding the number of generations between an individual and the individual's ancestor or descendant.

(7) Consanguinity within the third degree--An individual's relatives within the third degree by consanguinity are the individual's parent or child (relatives in the first degree); brother, sister, grandparent, or grandchild (relatives in the second degree); and great-grandparent, great-grandchild, aunt who is a sister of a parent of the individual, uncle who is a brother of a parent of the individual, nephew who is a child of a brother or sister of the individual, or niece who is a child of a brother or sister of an individual (relatives in the third degree).

(8) CU/FI--Consecutive felony sentence vote that designates the date on which the offender would have been eligible for release on parole if the offender had been sentenced to serve a single sentence. This is not a vote to release on parole.

(9) CU/NR--Consecutive felony sentence vote to deny favorable parole action and set for review on a future specific month and year (set-off).

(10) CU/SA--Consecutive felony sentence vote to deny parole and not release the offender until the serve-all date.

(11) DMS--Mandatory supervision vote to deny release to mandatory supervision and set for review on a future specific month and year (set-off).

(12) Division--The Parole Division of the Texas Department of Criminal Justice.

(13) Fiduciary--A person holding a position of trust, who has the duty, created by the undertaking, to act primarily for another's benefit in that undertaking.

(14) Full Pardon--An unconditional act of executive clemency by the governor which serves to release the grantee from the conditions of his or her sentence and from any disabilities imposed by law thereby.

(15) Further Investigation (FI)--An initial determination by a parole panel favorable to parole of an offender, subject to additional investigation and processing.

(16) Hearing officer--A staff member designated by the board and assigned to conduct a revocation hearing concerning one or more allegations of violation of the terms and conditions of parole, mandatory supervision, or conditional pardon.

(17) Mandatory supervision--The non-discretionary release of an offender from incarceration, but not from the legal custody of the state, under such conditions and provisions for supervision as the parole panel may determine. For the purposes of revocation, the terms "parole" and "mandatory supervision" are interchangeable and reference to either one of said terms includes the other.

(18) Mandatory supervision date--The date on which the release to mandatory supervision of an eligible offender may occur.

(19) Offender--A person incarcerated in the TDCJ-Correctional Institutions Division, other penal institution, or jail serving a sentence imposed upon conviction of a felony.

(20) Pardon--See the definition of "full pardon" set forth in this section.

(21) Parole--The discretionary release of an offender from incarceration, but not from the legal custody of the state, under such conditions and provisions for supervision as a parole panel may determine.

(22) Parole certificate--An order of the board incorporating the terms and conditions of release.

(23) Parole panel--A three member decision-making body authorized to act in release matters. In certain cases, the full board acts as the parole panel.

(24) Parolee--A person released from prison on parole (see definition of parole set forth in this section).

(25) Party--Each person or agency named or admitted as a party.

(26) Preliminary hearing--Hearing to determine whether probable cause exists to continue holding the offender in custody pending the outcome of the final hearing.

(27) Pre-parole transfer--The transfer of an eligible offender, as defined in §499.002, Government Code, to a community residential facility, as defined in §499.001, Government Code.

(28) Projected Release Date--The minimum expiration date as determined by the Texas Department of Criminal Justice.

(29) Release plan--Proposed community and place of residence and proposed employment or proposed provision for maintenance and care of the releasee.

(30) Remission of fine or forfeiture--An act of clemency by the governor releasing the grantee from payment of all or a portion of a fine or canceling a forfeiture of a bond.

(31) Reprieve--A temporary release from the terms of an imposed sentence.

(32) Revocation--The cancellation of parole, mandatory supervision, or of a conditional act of executive clemency which subjects the administrative releasee or grantee of the act of executive clemency to immediate incarceration or, in the instance of reprieve of a fine, to immediate payment of the fine.

(33) RMS--Mandatory supervision vote to release to mandatory supervision when TDCJ determines that the offender has reached the projected release date.

(34) Serve-All (SA)--A decision by the board to deny parole and not release the offender until the serve-all date.

(35) Serve-All Date--The projected release date or minimum expiration date as determined by the Texas Department of Criminal Justice.

(36) Trial officials--The present sheriff, each chief of police, prosecuting attorney, and judge in the county and court of conviction and release.

(37) Victim--A person who is the victim of sexual assault, kidnapping, or aggravated robbery, or who has suffered bodily injury or death as a result of the criminal conduct of another, as defined in the Texas Code of Criminal Procedure, Article 56.01 §3.

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 December 20, 2004.

TRD-200407386
Laura McElroy
General Counsel
Texas Board of Pardons and Paroles
Effective date: January 9, 2005
Proposal publication date: November 5, 2004
For further information, please call: (512) 406-5388

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 22. TEXAS WORKFORCE INVESTMENT COUNCIL

CHAPTER 901. DESIGNATION AND REDESIGNATION OF LOCAL WORKFORCE DEVELOPMENT AREAS

40 TAC §901.1

The Texas Workforce Investment Council (Council) adopts an amendment to 40 TAC §901.1, concerning procedures for considering redesignation of workforce development areas without changes to the proposed text as published in the September 10, 2004, issue of the *Texas Register* (29 TexReg 8771).

The amendment to subsection (b) is made to update the Council's name from the Texas Council on Workforce and Economic Competitiveness to the Texas Workforce Investment Council.

The public comment period closed on October 9, 2004. No comments were received on the proposed amendment.

The amendment is adopted under the authority of Texas Government Code, §2308.101(3) which requires the Council to recommend to the Governor the designation and redesignation of local workforce development areas and §2308.103(a)(1) which authorizes the Council to adopt rules.

No other code, statute, or article is affected by the adopted amendment.

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

Filed with the Office of the Secretary of State on December 17, 2004.

TRD-200407381
Cheryl Fuller
Director
Texas Workforce Investment Council
Effective date: January 6, 2005
Proposal publication date: September 10, 2004
For further information, please call: (512) 936-8100

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TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 2. ENVIRONMENTAL POLICY SUBCHAPTER D. PUBLIC PARTICIPATION PROGRAMS

43 TAC §§2.61 - 2.63, 2.68

The Texas Department of Transportation (department) adopts amendments to §2.61, §2.62, §2.63, and §2.68 concerning public participation programs, specifically the Adopt-a-Highway Program (Program). The amendments to §2.63 are adopted with changes to the proposed text as published in the October 15, 2004 issue of the *Texas Register* (29 TexReg 9636). The amendments to §2.61, §2.62, and §2.68 are adopted without changes to the proposed text as published in the October 15, 2004 issue of the *Texas Register* (29 TexReg 9636) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

Section 2.61 describes the purpose and scope of the department's public participation programs. This section is amended to omit the reference to safety rest areas since safety rest areas are no longer a part of the public participation programs for maintenance, landscaping, and beautification.

Section 2.62 outlines definitions used in the department's public participation programs and is amended to add definitions for an Adopt-a-Highway coordinator and vandalism, and to eliminate references to safety rest areas, which are no longer a part of the public participation programs. These revisions are necessary for a clearer understanding of subsequent sections.

Section 2.63(a) is amended to clarify that the main purpose of the program is to prevent litter, rather than just to clean it up.

Section 2.63(b) is amended to more accurately describe the department's expectations of program participants by clarifying that individuals as well as groups may participate, limiting participation to those who will genuinely support the department's litter prevention program, emphasizing safety as a principal concern of the department, and requiring participants to agree not to hold the department responsible for any injuries or damage suffered

as a result of participation in the Program. These revisions will improve the effectiveness of the Program by limiting participation to those who are actually interested in litter prevention and who understand their role in the Program.

Section 2.63(c) is amended to allow submission of an application to the district Adopt-a-Highway coordinator instead of the district engineer, to require contact information for a secondary representative of the group, and to require the name and contact information of a faculty sponsor in the case of school or university groups. These amendments will streamline the application process and improve contact information for participating groups.

Section 2.63(e) is amended to provide more detailed litter pickup procedures and to clarify the adopting group's responsibilities with regard to selecting an alternate spokesperson, supervising minor participants, and the possession and use of illegal drugs. This amendment will also allow participants to attend safety meetings rather than conducting their own. These revisions will streamline the process of working with groups in the Program by providing an additional method of contacting the group, improve safety for minor and adult participants in the Program, and improve the aesthetics of state highways by requiring that the trash pick ups are conducted at approximately quarterly intervals throughout the year instead of allowing the four required pick ups to occur in close proximity to each other. This amendment also allows a group to pick up two times a year if the district engineer determines that it is adequate to maintain an acceptable right of way.

Section 2.63(f) is amended to clarify participants' status in the Program by specifying that the department will not directly supervise the participants' activities, and to improve safety by prohibiting children under age 7 from participating in the Program.

Section 2.63(g) is amended to allow participants to suspend their agreement or choose a new section to adopt if their adopted section is on a construction project. This amendment will encourage participants to stay in the Program while their chosen highway is unavailable.

Section 2.63(h) is amended to allow the adoption of a section of the state highway system in memory of an individual within the existing framework for the Adopt-a-Highway Program. This revision will make memorial adoptions a permanent part of the Adopt-a-Highway Program instead of a pilot program and will increase awareness of traffic safety, allow for additional participants in the Program, and allow the public to pick up litter on a stretch of highway in memory of a loved one.

Section 2.68 is amended to insert the missing word "election," which is critical to the meaning of the paragraph that prohibits the department from expending any funds, directly or indirectly, for the purpose of influencing the outcome of any election or the passage or defeat of any legislation.

COMMENTS

The department has decided to change Section 2.63(e)(1)(G) to allow a group to pick up two times a year if the district engineer determines that it is adequate to maintain an acceptable right of way. No comments were received on the proposed amendments. However, the department has decided to adopt §2.63(e)(1)(G) with changes to the proposed amendments. As proposed, subparagraph (G) was amended to delete the statement that "unless the district engineer determines that two times a year is adequate to maintain an acceptable right of way." As adopted, this statement will not be deleted. Section 2.63(3)(1)(G) provides that groups must pick up litter four times a year at approximately quarterly intervals. Some highways in the west Texas districts do no accumulate enough litter to justify four pick ups a year and allowing two pick ups a year will encourage groups to take ownership of the litter problem and have the educational opportunity to pick up litter even if the roadway is not heavily littered.

STATUTORY AUTHORITY:

The amendments are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE: None.

§2.63. Adopt-a-Highway Program.

(a) Purpose. The Adopt-a-Highway Program (Program) allows private citizens an opportunity to support the department's litter prevention programs by adopting a section of highway for the purpose of reducing litter on an adopted section through public participation. This section sets forth policies and procedures to be used in administering the Program.

(b) Participation.

(1) Adoption. An eligible group may, upon approval by the department, adopt a section of a highway on the state highway system for purposes of picking up and removing litter from the rights-of-way of that section under such terms and conditions as may be prescribed by the department and the commission. The adoption of a section of highway is a privilege that may be granted by the department to individuals or groups who would assist the Program in achieving its purpose and goals. The department may deny a request to adopt a section of highway if, in its opinion, granting the request would jeopardize the Program, be counterproductive to its purpose, or create a hazard to the safety of the traveling public. Highway safety is a principal concern in all decisions related to the Program. Program participants must agree to hold the department harmless and agree not to hold the department responsible for any injuries that they may suffer or damages they may cause or suffer as a result of participation in the Program.

(2) Eligibility.

(A) The following groups are eligible to participate in the Program:

(i) members or employees of civic and nonprofit organizations;

(ii) employees of private businesses and governmental entities;

(iii) families; and

(iv) individuals.

(B) To be eligible a group must be located or reside in the county or a county adjacent to the county in which the adopted section is located.

(C) Only individuals or groups who are responsible and wish to assist the department will be allowed to adopt a highway.

(c) Application.

(1) The authorized representative of a group who desires to participate, or to continue to participate, in the Program shall submit an application to the district Adopt-a-Highway coordinator of the district in which the section of highway to be adopted is located.

(2) The application shall be in the form prescribed by the department and shall at a minimum include:

(A) the date of application;

(B) the name and complete mailing address, including street address, of the group;

(C) the name, telephone number, complete mailing address, and e-mail address if applicable, of the group's authorized representative, and the same information for a secondary representative, or in the case of school or university groups, the name and contact information for a faculty sponsor; and

(D) the highway section the group is interested in adopting.

(d) Agreement.

(1) If the application submitted by the group under subsection (c) of this section is approved by the district engineer, the authorized representative of that group shall execute a written agreement with the department providing for the group's participation in the Program.

(2) The agreement shall be in the form prescribed by the department and shall include:

(A) an acknowledgment by the group of the hazardous nature of the work involved in participating in the Program;

(B) an acknowledgment that the members of the group agree jointly and severally to be bound by and comply with the terms of the agreement; and

(C) the respective responsibilities of the group and the department as contained in subsection (e) of this section.

(e) Responsibilities of group and department.

(1) Groups must:

(A) appoint or select an authorized representative and alternate to serve as spokesperson for the group;

(B) obey and abide by all laws and regulations relating to safety and such other terms and conditions as may be required by the district engineer for special conditions on a particular adopted section;

(C) furnish adequate supervision by one or more adults for minor participants of a group who are 15 years of age and older, with at least one adult for every three children who are 7 to 14 years of age;

(D) conduct or attend at least two safety meetings per year and ensure participants of the group attend a safety meeting before participating in the cleanup of the adopted section;

(E) adopt a section that is a minimum of two miles in length unless the district engineer determines a shorter length is in the best interests of the department;

(F) adopt a section for a minimum period of two years;

(G) pick up litter a minimum of four times a year at approximately quarterly intervals and at such additional times as required by the district engineer, unless the district engineer determines that two times a year is adequate to maintain an acceptable right of way (it is desired that one of these pickups occur during the department's annual Don't Mess with Texas trash-off events);

(H) obtain required supplies and materials from the department during regular business hours;

(I) assure that traffic control signs are open during a cleanup and returned to the closed position (or removed in the case of detachable signs) after the cleanup;

(J) wear department furnished safety vests during the pickup;

(K) place litter in trash bags furnished by the department, place filled trash bags at the sign base, and contact the district maintenance office the first working day after the cleanup for removal of the bags;

(L) return all unused materials and supplies to the department within one week following cleanup;

(M) neither possess nor consume alcoholic beverages or illegal drugs while on the adopted section; and

(N) maintain a first-aid kit and adequate drinking water while picking up litter on the adopted section.

(2) The department will:

(A) work with the group to determine the specific section of state highway right of way to be adopted;

(B) erect a sign at each end of the adopted section with the group's name or acronym displayed;

(C) provide traffic control signs, safety vests, trashbags, and safety information;

(D) after notification from the group, remove the filled trashbags the first workday after the pickup; and

(E) remove litter from the adopted section only under unusual circumstances, i.e., to remove large, heavy, or hazardous items or if the group has not fulfilled its responsibilities.

(f) General limiting conditions. The Program is subject to the following conditions.

(1) The department may consider such factors as width of right of way, geometrics, congestion, and sight distance of roadways in determining what sections of highways shall be eligible for adoption. In no circumstance shall a section of an interstate highway be eligible for adoption.

(2) If any actions are determined to be contrary to any legislative restrictions or any restrictions on the use of appropriated funds for political activities, the department, at its sole discretion will take any and all necessary remedial actions, including, but not limited to, the removal of signs displaying the group's name or acronym.

(3) Adopt-a-Highway signs shall be four feet by four feet, shall be the least expensive and most effective for each situation, and will not state the full name or official title of an elected official.

(4) A group may not subcontract or assign its responsibilities to any other group, organization, or enterprise without the express written authorization of the department.

(5) The department, in no event, shall have the right to control the group in performing the details of picking up litter from the section of highway adopted by the group, and, in picking up litter, the group shall act as an independent contractor without direct, on-site supervision from the department.

(6) Children under the age of seven may not participate in the Program.

(g) Modification/renewal/termination of the agreement.

(1) An agreement may be modified in any manner at the sole discretion of the department.

(2) If the department undertakes a construction project on an adopted section, the group may suspend its agreement or choose a new section to adopt for the duration of the construction project.

(3) The group will have the option of renewing an agreement subject to the approval of the district engineer and the continuation of the Program.

(4) The department may terminate an agreement and remove the signs upon 30-day notice, if in its sole judgment it finds and determines that the group is not meeting the terms and conditions of the agreement.

(h) Memorial adoptions. An eligible group may adopt a section of highway as a memorial to an individual who has died as a result of a motor vehicle accident on the state highway system. Except as provided in this subsection, all applicable provisions of this subchapter governing the Adopt-a-Highway program apply to memorial adoptions under this subsection.

(1) The adopting group must include family members of the individual in whose memory the section of highway is adopted.

(2) A sign erected for a memorial adoption may include the phrase "in memory of" and the name of the individual in whose memory the section is adopted, along with the name of the adopting group.

(3) In approving memorial adoptions, the district engineer will consider:

(A) the availability of sections of highway on the state highway system that are appropriate for litter control by volunteers; and

(B) the potential of the proposed adoption to increase public awareness of traffic safety.

(4) The requirements of subsection (b)(2)(B) do not apply if the adopting group adopts the segment of highway on which the accident occurred.

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 December 20, 2004.

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Richard D. Monroe
General Counsel
Texas Department of Transportation
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For further information, please call: (512) 463-8630

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CHAPTER 15. TRANSPORTATION PLANNING AND PROGRAMMING

SUBCHAPTER E. FEDERAL, STATE, AND LOCAL PARTICIPATION

43 TAC §§15.51, 15.52, 15.54, 15.55

The Texas Department of Transportation (department) adopts amendments to §§15.51, 15.52, 15.54, and 15.55, concerning federal, state, and local participation. The amendments to §§15.51, 15.52, 15.54, and 15.55 are adopted without changes to the proposed text as published in the October 15, 2004 issue of the *Texas Register* (29 TexReg 9639) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

Transportation Code, §222.053(b) authorizes the Texas Transportation Commission (commission) to require, request, or accept from a political subdivision matching or other local funds, rights of way, utility adjustments, additional participation, planning, or any local incentives to make the most efficient use of its highway funding. Pursuant to this authority, the commission previously adopted §§15.50-15.56, to specify the roles of federal, state, and local entities in the development of highway improvement projects.

Article III, §50 of the Texas Constitution generally prohibits state agencies from extending the credit of the state. Accordingly, the department requires local governments to pay all estimated costs for which the local government is responsible prior to those costs being incurred, rather than have the department pay those costs and be reimbursed by the local government.

The amendments update department policy concerning the funding of highway improvement projects and clarify the role of local governments in the development of highway improvement projects to be used as the basis of an agreement between the department and the local government.

Section 15.51 is amended to define additional terms used in the subchapter, to include on and off system safe routes to school program established by recent legislation to advance the safety of school age children in the state, and to include a definition for "on-system turnpike project." Section 15.51 is also amended to delete the definition of the "Urban Street Program" which has lapsed. Unnecessary language has been deleted. The substance of the definition for "incremental payments" has been moved to §15.52(3)(c). The definition for "state funds" has been clarified so that it does not include funding that is in excess of the minimum amount required.

Section 15.52 is amended to improve readability and to clarify that the standard payment provision includes right of way.

Section 15.54 is amended to improve readability and to update cross-references. The amendments also remove the participation ratios for traffic signals and continuous and safety lighting systems since cost participation is contained in Chapter 25 of this title, relating to Traffic Operations.

To allow the department to maximize its flexibility in the use of federal funding in conjunction with the restructuring of the Unified Transportation Plan, the Appendix in §15.55(c) is amended to revise numerous participation ratios to allow the department the flexibility to request federal reimbursement for more right of way and preliminary engineering activities, as well as construction, thus reducing the required state and local participation required for some types of projects, and allowing those funds to be used for other projects. Numerous footnotes in the chart are deleted to provide the department the flexibility to utilize federal funds other than those under the control of metropolitan planning organizations. To provide for the expeditious and systematic development of farm to market and urban road system projects, this section is also amended to revise participation ratios due to the

elimination of urbanized area boundaries on new federal census maps. Other specific changes to the Appendix in §15.55(c), include: (1) adding participation ratios for the newly created on and off state system safe routes to schools program and the on-system turnpike projects; (2) adding "#1" to preliminary engineering and construction engineering and construction fund participation ratios for off-state system bridge program; (3) deleting the conditions for traffic signal participation from the figure, as special traffic signal condition needs are no longer required; and (4) deleting the conditions for continuous lighting systems and safety lighting participations to be substituted with a note to more clearly define the situation.

In order to rehabilitate as many bridges as possible, §15.55(d)(7)(B) is amended to allow additional time for a local government to complete its equivalent-match project if it has made a good faith effort to comply with the deadlines. The amendments allow the district engineer to grant an extension to the three-year completion requirement if a contract for the equivalent-match project has been executed within that three years and the contract timeline for completion is reasonable. In the absence of information suggesting that a shorter or longer period is appropriate, two years or less will be presumed to be a reasonable time, for a maximum of five years to complete the equivalent-match project.

COMMENTS

No comments on the proposed amendments were received.

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.

CROSS REFERENCE TO STATUTE: Transportation Code, §222.053(b).

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

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CHAPTER 25. TRAFFIC OPERATIONS
SUBCHAPTER G. SPECIFIC INFORMATION LOGO SIGN PROGRAM

The Texas Department of Transportation (department) adopts amendments to §§25.400-25.402, and §§25.404-25.406, the repeal of §25.403, and new §25.403, concerning the Specific Information Logo Sign Program. The amendments to §§25.400-25.402, and §§25.404-25.406, the repeal of §25.403, and new §25.403 are adopted without changes to the proposed text as published in the October 15, 2004 issue of the *Texas Register* (29 TexReg 9659) and will not be republished.

EXPLANATION OF ADOPTED 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.

In the July 9, 2004 issue of the *Texas Register* (29 TexReg 6608-6618), the department proposed revisions to these sections. Based on comments received and the substantive changes the department made to the rules, the initial proposed rules were withdrawn and reproposed in a revised format.

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 renumbered §25.402(l) and (o) update the statutory citations to Transportation Code, Chapter 391, and Government Code, Chapter 2253.

The amendments to subsection (e) of §25.402 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 §25.402 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) through (r) of §25.402 are renumbered to reflect the addition of new subsection (h). The subsections are also updated for improved readability and clarity.

Amendments to renumbered subsection (n) of §25.402 remove the mandatory set percentage that the contractor must remit to the department for installation, annual rental, covering, maintenance, and replacement costs. 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 renumbered subsection (r) of §25.402 clarify that the contractor will 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 depreciation schedule for reimbursement under this section is amended to provide compensation to the contractor for signs that are less than three years of age. The department believes that this time frame provides sufficient opportunity for the contractor to recoup its initial sign installation costs and associated overhead expenses.

Subsection (r) is also modified to allow the program contractor to receive compensation for the remaining economic value of specific information logo signs installed by the contractor at the end of the contract period. Part of the responsibility of the program contractor is to install and market these signs to local businesses. It can take up to three years for the contractor to recoup sign installation and other costs (such as marketing and overhead) through program revenues. When these signs are installed late in the term of the contract, the contractor has no way to recover its initial investment. The amendment requires that when a new contractor is awarded the contract, the new contractor must reimburse the department for the remaining economic value of the signs installed by the previous program contractor if the contract terminates at its specified termination date, the existing contractor is not awarded the contract, and the existing contractor's contract contains payment terms for economic value to be paid at the end of the specified termination date. The department must in turn reimburse that amount to the existing contractor. The requirement will ensure that the contractor or contractors have appropriate incentive to properly service the program at the end of the contract period. This amendment should also help to ensure that no contractor has an unreasonable advantage. The amendment also notes that the department will provide an estimate of the remaining economic value of the signs in the request for offer when new program bids are solicited. No compensation would be provided in cases where the existing program contractor is awarded a new contract.

The evaluation provisions of repealed §25.403 are moved to §25.404. The remainder of repealed §25.403 is re-enacted in new §25.403, Notice and Proposal Submission, which 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.

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. Previous requirements relating to the allowable ranges of specific fees and references to specific types of fees are deleted since all fees charged to participating businesses will be evaluated by the department during the proposal review process as a single item.

The amendments to §25.404 also provide 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 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. 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.

COMMENTS

No comments on the proposed amendments, repeal and new section were received.

43 TAC §§25.400 - 25.402, 25.404 - 25.406

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, §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.

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 December 20, 2004.

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Richard D. Monroe
General Counsel
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43 TAC §25.403

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, 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.

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

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43 TAC §25.403

STATUTORY AUTHORITY

The new section 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, 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.

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

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SUBCHAPTER K. MAJOR AGRICULTURAL INTEREST SIGN PROGRAM

The Texas Department of Transportation (department) adopts amendments to §25.702, the repeal of §25.703 and §25.704, and new §25.703 and §25.704, concerning the Major Agricultural Interest Sign Program. The amendments to §25.702, the repeal of §25.703 and §25.704, and new §25.703 and §25.704 are adopted without changes to the proposed text as published in the October 15, 2004 issue of the *Texas Register* (29 TexReg 9659) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS, REPEALS, AND NEW SECTIONS

House Bill 2905 and House Bill 3330, 78th Legislature, Regular Session, 2003, require certain contracting provisions relating to required 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.

In the July 9, 2004 issue of the *Texas Register* (29 TexReg 6608-6618), the department proposed revisions to these sections. Based on comments received and the substantive changes the department made to the rules, the initial proposed rules were withdrawn and re-proposed in a revised format.

The amendments to §25.702 remove 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.

Section 25.702(e) is amended to 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.

Section 25.702(m) is amended to remove the mandatory set percentage that the contractor must remit to the department for installation, annual rental, covering, maintenance, and replacement costs. Under House Bill 2905 and House Bill 3330, the department may accept a best value bid that is higher than the current 5% fee. The subsection is also amended to require the contractor to assess from program participants a single fee rather than a series of fees as currently required. The subsection is also amended to include maintenance as an item that the program contractor should assess from program participants. The mandatory set amounts for sign installation, annual rental, covering, and replacement fees are removed in order that the state may accept the contract with the best value.

Section 25.702(q) is amended to clarify that the contractor will be paid for a portion of the depreciated 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 depreciation schedule for reimbursement under this subsection is amended to provide compensation to the contractor for signs that are less than three years of age. The department believes that this time frame provides sufficient opportunity for the contractor to recoup its initial sign installation costs and associated overhead expenses.

Subsection (q) is also amended to allow the program contractor to receive compensation for the remaining economic value of major agricultural interest signs installed by the contractor at

the end of the contract period. Part of the responsibility of the program contractor is to install and market these signs to local agricultural businesses. It can take up to three years for the contractor to recoup sign installation and other costs (such as marketing and overhead) through program sign rental revenues. When these signs are installed late in the term of the contract, the contractor has no way to recover its initial investment. The amendment requires that when a new contractor is awarded the contract, the new contractor must reimburse the department for the remaining economic value of the signs installed by the previous program contractor if the contract terminates at its specified termination date, the existing contractor is not awarded the contract, and the existing contractor's contract contains payment terms for economic value to be paid at the end of the specified termination date. The department must in turn reimburse that amount to the existing contractor. The requirement will ensure that the contractor or contractors have appropriate incentive to properly service the program at the end of the contract period. This change should also help to ensure that no contractor has an unreasonable advantage. The new provision also notes that the department will provide an estimate of the remaining economic value of the signs in the request for offer when new program bids are solicited. No compensation would be provided in cases where the existing program contractor is awarded a new contract.

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 Interest Sign Program contract. This notice will include the proposal requirements. New §25.703 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 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 or fails to guarantee a return to the department of 10% of the rental fees collected from program participants as required under House Bill 3330.

New §25.704 removes from repealed §25.704, the references to the allowable range of installation fees that may be charged to program participants. Since these items will be incorporated into a single fee and reviewed as part of the program evaluation process, the department believes that this requirement is no longer necessary.

The reference to "rental fees" previously contained in 25.704(a)(2) is also changed to "fee" to conform to the amended §25.702(m).

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 return to the department from fees collected from program participants, and proposed amount for 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.

COMMENTS

No comments on the proposed amendments, repeals and new sections were received.

43 TAC §25.702

STATUTORY AUTHORITY

These 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, §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.

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 December 20, 2004.

TRD-200407400
Richard D. Monroe
General Counsel
Texas Department of Transportation
Effective date: January 9, 2005
Proposal publication date: October 15, 2004
For further information, please call: (512) 463-8630

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43 TAC §25.703, §25.704

STATUTORY AUTHORITY

These repeals 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, §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.

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 December 20, 2004.

TRD-200407401
Richard D. Monroe
General Counsel
Texas Department of Transportation
Effective date: January 9, 2005
Proposal publication date: October 15, 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 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, §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.

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 December 20, 2004.

TRD-200407402
Richard D. Monroe
General Counsel
Texas Department of Transportation
Effective date: January 9, 2005
Proposal publication date: October 15, 2004
For further information, please call: (512) 463-8630

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CHAPTER 28. OVERSIZE AND OVERWEIGHT VEHICLES AND LOADS

The Texas Department of Transportation (department) adopts amendments to §28.2 and §28.3, concerning general provisions; §28.11 and §28.12, concerning general permits; and §28.92, concerning Port of Brownsville port authority permits issuance requirements and procedures. The amendments to §§28.2, 28.3, 28.11, 28.12 and 28.92 are adopted without changes to the proposed text as published in the October 15, 2004 issue of the *Texas Register* (29 TexReg 9663) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

The adopted amendments are necessary to update statutory references; clarify existing language; clarify the effective period of a surety bond; add trunnion axle information to allow for 60,000 pounds to the maximum axle weight limits of axle groups; eliminate the option for department analysis of structures to be crossed by loads between 200,001 and 254,300 pounds total with less than 95 feet overall axle spacings, or is over the maximum permittable weight on any axle or axle group, or by loads exceeding 254,300 pounds gross weight while maintaining departmental approval; add Saturday to the list of days that the Permit Branch is closed when certain holidays fall on a Sunday; clarify that a route inspection will be handled as part of the permit process to ensure that the state is compensated for work performed on behalf of applicants; comply with Insurance Code, Article 21.11, comply with a new law mandated by Senate Bill 1748, 78th Legislature, Regular Session, 2003, that changes the expiration date of Subchapter G from March 1, 2005, to June 1, 2007; and revise the title of Subchapter G to be content specific.

The statutory reference in §28.2(32) is amended to update the Transportation Code reference from §502.276 to §504.504.

The statutory references in §28.2(33) are amended to update the references from Texas Civil Statutes to the Occupations Code.

Definition §28.2(34) is amended to match the definition in the Transportation Code.

The statutory reference in §28.2(50) is amended to update the Transportation Code reference from §502.276 to §504.504.

The citation to the United States Code is amended in §28.2(60) to reflect the transfer of the single state registration responsibilities from the Interstate Commerce Commission to the Secretary of Transportation.

Section 28.2(64) is amended to clarify the effective period of surety bonds.

Section 28.2(71) is amended to update the definition of "trunnion axle" to eliminate the option of having two tires on each axle. Four tires to an axle provides for an even distribution of weight to protect Texas highway infrastructure and bridges.

Section 28.3(b)(1)(D) is added to clarify the effective period of a surety bond for ready-mix concrete trucks, concrete pump trucks, vehicles transporting recyclable materials, and solid waste vehicles.

The figure in §28.11(c)(3)(C) is amended to eliminate the option for department analysis of structures to be crossed by loads between 200,001 and 254,300 pounds total with less than 95 feet overall axle spacing, or is over the maximum permittable weight on any axle or axle group, or is over 254,300 pounds gross weight; to clarify that the $35 vehicle supervision fee for additional loads within 30 days of the original permit movement date is only for identical loads moved over the same route; and to make the language consistent throughout the subchapter. Elimination of department analysis of certain oversize/overweight loads will increase the effectiveness of division operations while improving the efficiency of the load approval process. This change streamlines the process by giving the applicant the opportunity to reconfigure loads to accommodate constraints of specific structures to avoid delays in obtaining application approval.

Section 28.11(c)(4)(H) is amended to add Saturday to the list of days that the Permit Office is closed when certain holidays fall on a Sunday.

Section 28.11(d)(2)(G) is added to include trunnion axle information to allow for 60,000 pounds to the maximum weight limit of axle groups. Subsection (d)(2)(G)(iii) includes a new figure as a visual display of the trunnion axle configuration. Current rules on weight limits were written before the rise in demand for trunnion axle permits in Texas. The trucking industry is now asking for additional weight on trunnions. The department's Construction Division and Bridge Division have completed studies and approved allowances of 60,000 pounds on a trunnion.

Section 28.11(d)(3)(G) is added to include the 54,000 pound weight limit for load restricted roads for trunnion axles. To conform with allowances for load restricted roads for all axle groupings.

Section 28.11(h)(4), (i)(7), and (j)(2) are amended to clarify that a permit application and the appropriate fee are required for every route inspection.

Section 28.11(n)(1)(A)(ii) is amended to clarify the effective period of surety bonds.

Section 28.11(n)(1)(A)(vi) is amended to comply with Insurance Code, Article 21.11, concerning the issuance of a reciprocal nonresident license by the Texas Department of Insurance.

Section 28.12(b)(5) is removed to eliminate an applicant's option of providing the department with a written engineer's certification that structures to be crossed are capable of sustaining the movement of an overdimension load exceeding 200,000 pounds gross weight. The amendments make this a requirement instead of an option.

Renumbered §28.12(b)(7) is amended to clarify that loads between 200,001 and 254,300 pounds total, with less than 95 feet overall axle spacing, or loads over the maximum permitted weight on any axle group or the maximum permittable load on any axle or axle group are included with load types that must submit required items to the department's Motor Carrier Division to determine if a permit can be issued.

Section 28.12(b)(7)(E) adds the requirement that an applicant requesting a permit to move an overdimension load, must submit the name, phone number, and fax number of the applicant's licensed professional engineer who has been approved by the department. The department's Motor Carrier Division requires this information to maintain contact with the engineer during the permitting process.

Renumbered §28.12(b)(9) is added to require the permit applicant's license professional engineer to submit to the department's Bridge Division a written certification that the bridges and culverts on the travel route are capable of sustaining the load. Section 28.12(b)(10) is thus amended to eliminate the option for the department to conduct this structural analysis of bridges to be crossed on the proposed route. This change shifts responsibility for conducting the structural bridge analysis from the department to the applicant's licensed professional engineer.

Section 28.92(c)(3)(F) is added to include trunnion axle information for Port of Brownsville port authority permits to allow for 60,000 pounds to the maximum weight limit of axle groups. A figure is added as a visual display of the trunnion axle configuration. Current rules on weight limits were written before the rise in demand for trunnion axle permits in Texas. The trucking industry is now asking for additional weight on trunnions. The department's Construction Division and Bridge Division have completed studies and approved allowances of 60,000 pounds on a trunnion.

Section 28.92(h)(7) is amended to extend to June 1, 2007, the expiration date of the subchapter.

COMMENTS

No comments were received on the proposed amendments.

SUBCHAPTER A. GENERAL PROVISIONS

43 TAC §28.2, §28.3

STATUTORY AUTHORITY:

The amendments are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE: Transportation Code, Chapters 201, 221, 502, 541, 543, 621, 622, 623, 643, and 645, and Insurance Code, Article 21.11.

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 December 20, 2004.

TRD-200407403
Richard D. Monroe
General Counsel
Texas Department of Transportation
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Proposal publication date: October 15, 2004
For further information, please call: (512) 463-8630

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SUBCHAPTER B. GENERAL PERMITS

43 TAC §28.11, §28.12

STATUTORY AUTHORITY:

The amendments are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE: Transportation Code, Chapters 201, 221, 502, 541, 543, 621, 622, 623, 643, and 645, and Insurance Code, Article 21.11.

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

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TRD-200407404

Richard D. Monroe
General Counsel
Texas Department of Transportation
Effective date: January 9, 2005
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For further information, please call: (512) 463-8630

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SUBCHAPTER G. PORT OF BROWNSVILLE PORT AUTHORITY PERMITS

43 TAC §28.92

STATUTORY AUTHORITY:

The amendments are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE: Transportation Code, Chapters 201, 221, 502, 541, 543, 621, 622, 623, 643, and 645, and Insurance Code, Article 21.11.

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 December 20, 2004.

TRD-200407405
Richard D. Monroe
General Counsel
Texas Department of Transportation
Effective date: January 9, 2005
Proposal publication date: October 15, 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 Review

Texas Water Development Board

Title 31, Part 10

The Texas Water Development Board files this notice of intent to review and consider for readoption, revision or repeal 31 TAC, Part 10, Chapter 373, Grants Administration, in accordance with the Texas Government Code, §2001.039.

The Construction Grants Program has expended all the funds provided for it and all projects receiving funding from the program have been closed out. In addition, there is no evidence that funding for this program will be revived by the federal government. The board finds that the reason for adopting the chapter does not continue to exist.

The Board proposes the repeal of 31 TAC Chapter 373, Grants Administration, §§373.1 - 373.14, §§373.16 - 373.30 and §§373.32 - 373.44.

As required by statute, the board will accept comments and make a final assessment regarding whether the reason for adopting each of the rules in Chapter 373 continues to exist. The comment period will last 30 days beginning with the publication of this notice of intention to review.

Comments or questions regarding this rule review may be submitted to Srin Surapanani, Attorney, (512) 475-3065, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, or by e-mail to srin.surapanani@twdb.state.tx.us or by fax at (512) 463-5580.

TRD-200407363
Suzanne Schwartz
General Counsel
Texas Water Development Board
Filed: December 15, 2004

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Adopted Rule Reviews

Coastal Coordination Council

Title 31, Part 16

The Coastal Coordination Council (Council) has completed its review of the rules in Texas Administrative Code, Title 31, Chapters 501, 503, 504, 505, and 506. The Council's notice of intention to review these Chapters was published in the October 22, 2004, issue of the *Texas Register* (29 TexReg 9853). The Council received no comments concerning the notice of intention to review.

During its review, the Council determined that the reasons for adopting each rule in Chapters 501, 503, 504, 505, and 506 continue to exist. The rules are therefore readopted in accordance with the requirements of Texas Government Code §2001.039.

The contents of Chapter 501, Subchapter B, Section 501.26 were proposed for revision in the October 22, 2004, issue of the *Texas Register* (29 TexReg 9853), concurrently with this rule review. The readoption of the Council's rules does not affect the proposed revision of Chapter 501, Subchapter B, Section 501.26.

This concludes the Council's review of the rules in Chapters 501, 503, 504, 505, and 506.

TRD-200407441
Trace Finley
Policy Director
Coastal Coordination Council
Filed: December 21, 2004

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Texas State Board of Medical Examiners

Title 22, Part 9

The Texas State Board of Medical Examiners adopts the review of Chapter 166 (§§166.1-166.6), concerning Physician Registration, pursuant to the Texas Government Code, §2001.039.

The proposed review was published in the November 12, 2004, issue of the *Texas Register* (29 TexReg 10589).

No comments were received regarding adoption of the review.

The agency's reason for adopting the rules contained in this chapter continues to exist.

This concludes the review of Chapter 166, Physician Registration.

TRD-200407436
Donald W. Patrick, MD, JD
Executive Director
Texas State Board of Medical Examiners
Filed: December 21, 2004

♦ ♦ ♦

The Texas State Board of Medical Examiners adopts the review of Chapter 175 (§§175.1-175.4), concerning Fees, Penalties and Applications, pursuant to the Texas Government Code, §2001.039.

The proposed review was published in the October 29, 2004, issue of the *Texas Register* (29 TexReg 10145).

No comments were received regarding adoption of the review.

The agency's reason for adopting the rules contained in this chapter continues to exist.

This concludes the review of Chapter 175, Fees, Penalties and Applications.

TRD-200407437
Donald W. Patrick, MD, JD
Executive Director
Texas State Board of Medical Examiners
Filed: December 21, 2004

♦ ♦ ♦

Texas Department of Transportation

Title 43, Part I

Notice of Readopted Rule: In accordance with Government Code, §2001.039, the Texas Department of Transportation readopts Title 43 TAC, Part 1, Chapter 24, Trans-Texas Corridor, and Chapter 26, Regional Mobility Authority. This concludes the review of Chapters 24 and 26.

The proposed review was published in the October 1, 2004, issue of the *Texas Register* (29 TexReg 9414). No comments were received regarding the readoption of these rules. The Texas Transportation Commission has reviewed these rules and determined that the reasons for initially adopting them continue to exist.

TRD-200407362
Bob Jackson
Deputy General Counsel
Texas Department of Transportation
Filed: December 16, 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 §1.1217(a)(7)

CONSUMER CREDIT DISCLOSURE - PROMISSORY NOTE

ACCOUNT / CONTRACT NO. _____ DATE OF NOTE _____

CREDITOR / LENDER _____ BORROWER _____

ADDRESS _____ ADDRESS _____

"I" and "me" and similar words mean each person who signs as a Borrower. "You" and "your" and similar words mean the Lender.

ANNUAL PERCENTAGE RATE The cost of my credit as a yearly rate.	FINANCE CHARGE The dollar amount the credit will cost me.	Amount Financed The amount of credit provided to me or on my behalf.	Total of Payments The amount I will have paid after I have made all payments as scheduled.
%	$	$	$

My Payment Schedule will be:

Number of Payments	Amount of Payments	When Payments Are Due

Security: You will have a security interest in the following described collateral _____.
If checked, Borrower is giving a security interest in:
☐Motor Vehicle ☐Property Purchased with the Money from this Loan ☐Personal Property ☐Other
Late Charge: If any part of a payment is unpaid for 10 days after it is due, I may be charged 5% of the amount of payment.
Prepayment: If I pay off early, I may be entitled to a refund of part of the Finance Charge and I will not have to pay a penalty.
Additional Information: See the contract documents for any additional information about nonpayment, default, any required repayment in full before the scheduled date, and prepayment refunds and penalties.

I promise to pay the total of Payments to the order of you, the Lender. I will make the payments at your address above. I will make the payments on the dates and in the amounts shown in the Payment Schedule. If I don't pay all of a payment within 10 days after it is due, you can charge me a late charge. The late charge will be 5% of the scheduled payment. If I don't pay all I owe when the final payment becomes due, I will pay interest on the amount that is still unpaid. That interest will be the higher rate of 18% per year or the maximum rate allowed by law. That interest will begin the day after the final payment becomes due.

I can make a whole payment early. Unless you agree otherwise in writing, I may not skip payments. If I make a payment early, my next payment will still be due as scheduled. [Finance Charge Earnings and Refund Method clause]

If I ask for more time to make any payment and you agree, I will pay more interest to extend the payment. The extra interest will be figured under the Finance Commission rules. I agree to pay you a fee of up to $30 for a returned check. You can add the fee to the amount I owe or collect it separately.

OPTION A

ITEMIZATION OF AMOUNT FINANCED

1. Amount Financed: (2+3+4) $_____

2. Amount given to me directly $_____

3. Amount paid on my account (Net Balance - Prior Account) $_____

4. Amount paid to others on my behalf (A + B + C +D + E + F) $_____
(You may be retaining a portion of this amount.)

A. Cost of personal property insurance paid to insurance company $_____

B. Cost of single-interest insurance paid to insurance company $_____

C. Cost of optional credit insurance paid to insurance company or companies

Life $_____

Disability $_____

Involuntary Unemployment Insurance $_____

Total C: $_____

D. Non-Filing Insurance paid to insurance company $_____

E. Official fees paid to government agencies $_____

F. Payable to: _____ $_____

Payable to: _____ $_____

Payable to: _____ $_____

Total F: $_____

5. Prepaid Finance Charge (Administrative Fee) $_____

I will be in default if:
I do not timely make a payment;
I break any promise I made in this agreement;
I allow a judgment to be entered against me or the collateral;
I sell, lease, or dispose of the collateral;
I use the collateral for an illegal purpose; or
you believe in good faith that I am not going to keep any of my promises.

If there is more than one Borrower, each Borrower agrees to keep all of the promises in the loan documents.

PROPERTY INSURANCE: I must keep the collateral insured against damage or loss in the amount I owe. I may obtain property insurance from anyone I want or provide proof of insurance I already have. The insurer must be authorized to do business in Texas. If I buy personal property insurance through you, the rate is not fixed or approved by the Texas Department of Insurance.

I agree to give you proof of property insurance. I must name you as the person to be paid under the policy in the event of damage or loss. If I obtain the insurance through you, I will pay the premium shown below. However, I have 5 days from the date of this loan to furnish like (equivalent) coverage from another source. If I fail to meet any of these requirements, you may obtain collateral protection insurance at my expense. If you obtain collateral protection insurance, you will mail notice to my last known address.

☐ Personal Property Insurance $_____ Term _____

☐ Single Interest Insurance (Vehicle) $_____ Term _____

Credit insurance is optional.

Credit life insurance, credit disability insurance and involuntary unemployment insurance are not required to obtain credit. They will not be provided unless I sign and agree to pay the extra cost.

☐ Credit Life, one borrower $_____ ☐ Credit Life, both borrowers $_____ Term ____

☐ Credit Disability, one borrower $_____ ☐ Credit Disability, both borrowers $_____ Term ____

☐ Credit Involuntary Unemployment Insurance, one borrower $_____ Term ____

☐ **If this box is marked, the premium for the insurance coverage(s) above is not fixed or approved by the Texas Insurance Commissioner.**

I want the insurance above.

Borrower's signature: _____ Date: _____

Co-Borrower's signature: _____ Date: _____

I agree:

1. You can mail any notice to me at my last address in your records. Your duty to give me notice will be satisfied when you mail it.
2. I promise that all information I gave you is true.
3. If I am in default, you may require me to repay the entire unpaid principal balance, and any accrued interest at once. You don't have to give me notice that you are demanding or intend to demand immediate payment of all that I owe. If you don't enforce your rights every time, you can still enforce them later. If this debt is referred to an attorney for collection, I will pay any attorney fees set by the court plus court costs.
4. I understand that you may seek payment from only me without first looking to any other Borrower.
5. I don't have to pay interest or other amounts that are more than the law allows.
6. If any part of this contract is declared invalid, the rest of the contract remains valid.
7. **This written loan agreement is the final agreement between you and me and may not be changed by prior, current, or future agreements or statements between you and me. There are no oral agreements between us relating to this loan agreement. Any change to this agreement has to be in writing. Both you and I have to sign it.**
8. If I am giving collateral for this loan, I will see the separate security agreement for more information and agreements.
9. Federal law and Texas law apply to this contract.

This lender is licensed and examined by the State of Texas - Office of Consumer Credit Commissioner. Call the Consumer Credit Hotline or write for credit information or assistance with credit problems: Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207, www.occc.state.tx.us, (512) 936-7600 - (800) 538-1579

I agree to the terms of this contract. I received a completed copy on _____.

X_____
Borrower
X_____
Borrower

Recibi la Forma Informe de Prestamo _____
I received the Spanish Disclosure.

Figure: 7 TAC §1.1217(a)(8)

CONSUMER CREDIT DISCLOSURE - PROMISSORY NOTE

ACCOUNT / CONTRACT NO. _____ DATE OF NOTE _____

CREDITOR / LENDER _____ BORROWER _____

ADDRESS _____ ADDRESS _____

_____ _____

"I" and "me" and similar words mean each person who signs as a Borrower. "You" and "your" and similar words mean the Lender.

ANNUAL PERCENTAGE RATE The cost of my credit as a yearly rate.	FINANCE CHARGE The dollar amount the credit will cost me.	Amount Financed The amount of credit provided to me or on my behalf.	Total of Payments The amount I will have paid after I have made all payments as scheduled.
%	$	$	$

My Payment Schedule will be:

Number of Payments	Amount of Payments	When Payments Are Due

Security: You will have a security interest in the following described collateral _____.
If checked, Borrower is giving a security interest in:
☐ Motor Vehicle ☐ Property Purchased with the Money from this Loan ☐Personal Property ☐Other
Late Charge: If any part of a payment is unpaid for 10 days after it is due, I may be charged 5% of the amount of payment.
Prepayment: If I pay off early, I will not have to pay a penalty.
Additional Information: See the contract documents for any additional information about nonpayment, default, any required repayment in full before the scheduled date, and prepayment refunds and penalties.

I promise to pay the cash advance plus the accrued interest to the order of you, the Lender. I will make the payments at your address above. I will make the payments on the dates and in the amounts shown in the Payment Schedule. If I don't pay all of a payment within 10 days after it is due, you can charge me a late charge. The late charge will be 5% of the scheduled payment. If I don't pay all I owe when the final payment becomes due, I will pay interest on the amount that is still unpaid. That interest will be the higher rate of 18% per year or the maximum rate allowed by law. That interest will begin the day after the final payment becomes due.

I can make any payment early. Unless you agree otherwise in writing, I may not skip payments. If I make a payment early, my next payment will still be due as scheduled. [Finance Charge Earnings and Refund Method clause]

If I ask for more time to make any payment and you agree, I will pay more interest to extend the payment. The extra interest will be figured under the Finance Commission rules. I agree to pay you a fee of up to $30 for a returned check. You can add the fee to the amount I owe or collect it separately.

OPTION A

ITEMIZATION OF AMOUNT FINANCED

1. **Amount Financed: (2+3+4)** $_____
2. **Amount given to me directly** $_____
3. **Amount paid on my account (Net Balance - Prior Account)** $_____
4. **Amount paid to others on my behalf (A + B + C +D + E + F)** $_____
   (You may be retaining a portion of this amount.)
   - **A. Cost of personal property insurance paid to insurance company** $_____
   - **B. Cost of single-interest insurance paid to insurance company** $_____
   - **C. Cost of optional credit insurance paid to insurance company or companies**
     - **Life** $_____
     - **Disability** $_____
     - **Involuntary Unemployment Insurance** $_____
     - **Total C:** $_____
   - **D. Non-Filing Insurance paid to insurance company** $_____
   - **E. Official fees paid to government agencies** $_____
   - **F. Payable to::** _____ $_____
     - **Payable to::** _____ $_____
     - **Payable to::** _____ $_____
     - **Total F:** $_____
5. **Prepaid Finance Charge (Administrative Fee)** $_____

I will be in default if:
I do not timely make a payment;
I break any promise I made in this agreement;
I allow a judgment to be entered against me or the collateral;
I sell, lease, or dispose of the collateral;
I use the collateral for an illegal purpose; or
you believe in good faith that I am not going to keep any of my promises.

If there is more than one Borrower, each Borrower agrees to keep all of the promises in the loan documents.

PROPERTY INSURANCE: I must keep the collateral insured against damage or loss in the amount I owe. I may obtain property insurance from anyone I want or provide proof of insurance I already have. The insurer must be authorized to do business in Texas. If I buy personal property insurance through you, the rate is not fixed or approved by the Texas Department of Insurance.

I agree to give you proof of property insurance. I must name you as the person to be paid under the policy in the event of damage or loss. If I obtain the insurance through you, I will pay the premium shown below. However, I have 5 days from the date of this loan to furnish like (equivalent) coverage from another source. If I fail to meet any of these requirements, you may obtain collateral protection insurance at my expense. If you obtain collateral protection insurance, you will mail notice to my last known address.

☐ Personal Property Insurance $_____ Term _____

☐ Single Interest Insurance (Vehicle) $_____ Term _____

Credit insurance is optional.

Credit life insurance, credit disability insurance and involuntary unemployment insurance are not required to obtain credit. They will not be provided unless I sign and agree to pay the extra cost.

☐ Credit Life, one borrower $_____ ☐ Credit Life, both borrowers $_____ Term ____

☐ Credit Disability, one borrower $_____ ☐ Credit Disability, both borrowers $_____ Term ____

☐ Credit Involuntary Unemployment Insurance, one borrower $_____ Term ____

☐ **If this box is marked, the premium for the insurance coverage(s) above is not fixed or approved by the Texas Insurance Commissioner.**

I want the insurance above.

Borrower's signature: _____ Date: _____

Co-Borrower's signature: _____ Date: _____

I agree:

1. You can mail any notice to me at my last address in your records. Your duty to give me notice will be satisfied when you mail it.
2. I promise that all information I gave you is true.
3. If I am in default, you may require me to repay the entire unpaid principal balance, and any accrued interest at once. You don't have to give me notice that you are demanding or intend to demand immediate payment of all that I owe. If you don't enforce your rights every time, you can still enforce them later. If this debt is referred to an attorney for collection, I will pay any attorney fees set by the court plus court costs.
4. I understand that you may seek payment from only me without first looking to any other Borrower.
5. I don't have to pay interest or other amounts that are more than the law allows.
6. If any part of this contract is declared invalid, the rest of the contract remains valid.
7. **This written loan agreement is the final agreement between you and me and may not be changed by prior, current, or future agreements or statements between you and me. There are no oral agreements between us relating to this loan agreement. Any change to this agreement has to be in writing. Both you and I have to sign it.**
8. If I am giving collateral for this loan, I will see the separate security agreement for more information and agreements.
9. Federal law and Texas law apply to this contract.

This lender is licensed and examined by the State of Texas - Office of Consumer Credit Commissioner. Call the Consumer Credit Hotline or write for credit information or assistance with credit problems: Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207, www.occc.state.tx.us, (512) 936-7600 - (800) 538-1579.

I agree to the terms of this contract. I received a completed copy on _____.

X_____
Borrower

X_____
Borrower

Recibi la Forma Informe de Prestamo _____
I received the Spanish Disclosure.

Figure: 7 TAC §1.1227(a)(7)

THIS IS AN EXTENSION OF CREDIT AS DEFINED BY SECTION 50(a)(6), ARTICLE XVI OF THE TEXAS CONSTITUTION

TEXAS HOME EQUITY NOTE
(Fixed Rate – Second Lien)

ACCOUNT/CONTRACT NO. _____
CREDITOR/LENDER _____
ADDRESS _____
_____

DATE OF NOTE _____
BORROWER _____
ADDRESS _____
_____

A word like "I" or "me" means each person who signs as a Borrower. A word like "you" or "your" means the Lender or "Note Holder."

The Lender is _____. The Lender may sell or transfer this Note. The Lender or anyone who is entitled to receive payments under this Note is called the "Note Holder." You will tell me in writing who is to receive my payments.

ANNUAL PERCENTAGE RATE The cost of my credit as a yearly rate.	**FINANCE CHARGE** The dollar amount the credit will cost me.	**Amount Financed** The amount of credit provided to me or on my behalf.	**Total of Payments** The amount I will have paid after I have made all payments as scheduled.
%	$	$	$

My Payment Schedule will be:

Number of Payments	Amount of Payments	When Payments Are Due

Security: You will have a security interest in my homestead.
Late Charge: (Scheduled Installment Earnings Method): If any part of a payment is unpaid for 10 days after it is due, I may be charged 5% of the amount of payment.
Prepayment:(Scheduled Installment Earnings Method): If I pay off early, I may be entitled to a refund of part of the Finance Charge. I will not have to pay a penalty. **(True Daily Earnings Method):** If I pay off early, I will not have to pay a penalty.
Additional Information: See the contract documents for any additional information about nonpayment, default, any required repayment in full before the scheduled date, and prepayment refunds and penalties.

~~[ITEMIZATION OF AMOUNT FINANCED~~

~~1. Amount Financed (2+3+4) $_____~~

~~2. Amount given to me directly $_____~~

~~3. Amount paid on my account $_____~~
~~(Net Balance Prior Account)~~

~~4. Amount paid to others on my behalf $_____~~
~~(A+B+C+D+E)~~
~~A. Cost of hazard/property insurance paid to insurance company $_____~~
~~B. Cost of optional credit insurance paid to insurance company or companies $_____~~
~~Life $_____~~
~~Disability $_____~~
~~Total B: $_____~~
~~C. Title Insurance paid to insurance company $_____~~
~~D. Official fees paid to government agencies $_____~~
~~E. Payable to: _____ $_____~~
~~Payable to: _____ $_____~~
~~Payable to: _____ $_____~~
~~Total E: $_____~~

~~5. Prepaid Finance Charge $_____]~~

1. BORROWER'S PROMISE TO PAY

This loan is an Extension of Credit defined by Section 50(a)(6), Article XVI of the Texas Constitution. Scheduled Installment Earnings Method: I promise to pay the Total of Payments to the order of you. [The "principal" or "cash advance" is $_____. This amount plus interest must be paid by _____ (maturity date).] I will make payments to you at the address above or as you direct. I will make the payments on the dates and in the amounts shown in the Payment Schedule. True Daily Earnings Method: I promise to pay the cash advance plus the accrued interest to the order of you. (The "principal" or "cash advance" is $_____. This amount plus interest must be paid by _____ (maturity date).) I will make payments to you at the address above or as you direct. I will make the payments on the dates and in the amounts shown in the Payment Schedule.

2. LATE CHARGE

Scheduled Installment Earnings Method: If I don't pay all of a payment within 10 days after it is due, you can charge me a late charge. The late charge will be 5% of the scheduled payment.

3. AFTER MATURITY INTEREST

If I don't pay all I owe when the final payment becomes due, I will pay interest on the amount that is still unpaid. That interest will be the higher of the rate of 18% per year or the maximum rate allowed by law. That interest will begin the day after the final payment becomes due.

4. PREPAYMENT

Scheduled Installment Earnings Method: I can make a whole payment early. Unless you agree otherwise in writing, I may not skip payments. If I make a payment early, my next payment will still be due as scheduled. True Daily Earnings Method: I can make any payment early. Unless you agree otherwise in writing, I may not skip payments. If I make a payment early, my next payment will still be due as scheduled.

5. FINANCE CHARGE AND REFUND METHOD

For contracts using Scheduled Installment Earnings Method - Section 342.301 rate loans: The annual rate of interest is ___%. This interest rate may be different from the Annual Percentage Rate. You figure the finance charge by applying the scheduled installment earnings method as defined by the Texas Finance Code to the unpaid

cash advance. The unpaid cash advance does not include the administrative fee, late charges, and returned check charges. If I prepay my loan in full before the final payment is due, I may save a portion of the Finance Charge. I will not be paid a refund if the refund would be less than $1.00. You base the Finance Charge and Total of Payments as if I will make each payment on the day it is due. My final payment may be larger or smaller than my regular payment.

I have paid any points, administrative fee, or loan origination fee as prepaid interest. The Administrative Fee is earned at the time the loan is made and is not subject to refund. If I pay the loan in full early, you will refund any points that would make the interest rate exceed the maximum rate allowed by law. Any refund will be credited to my account.

Any payment(s) that you accept after the final payment becomes due is not a renewal or extension of this Loan Agreement unless you agree in writing.

You will apply my payments in the following order: (1) interest that is due, (2) principal, (3) any other charges I owe.

For contracts using Scheduled Installment Earnings Method with prepayments option - Section 342.301 rate loans: The annual rate of interest is ___%. This interest rate may not be the same as the Annual Percentage Rate. I may make a full or partial payment early without paying a penalty. My early payments will reduce the principal that I owe. If I make an early partial payment, the due date and amount of my next payment will not change unless you agree in writing.

I have paid any points, administrative fee, or loan origination fee as prepaid interest. The Administrative Fee is earned at the time the loan is made and is not subject to refund. If I pay the loan in full early, you will refund any points that would make the interest rate exceed the maximum rate allowed by law. Any refund will be credited to my account.

Any payment(s) that you accept after the final payment becomes due is not a renewal or extension of this Loan Agreement unless you agree in writing.

You will apply my scheduled payments in the following order: (1) interest that is due, (2) principal, (3) any other charges I owe.

For contracts using True Daily Earnings Method - Section 342.301 rate loans: The annual rate of interest is ___%. This interest rate may not be the same as the Annual Percentage Rate. You figure the Finance Charge by applying the true daily earnings method as defined by the Texas Finance Code to the unpaid portion of the cash advance. You base the Finance Charge and Total of Payments as if I will make each payment on the day it is due. You will apply payments on the date they are received. This may result in a different Finance Charge or Total of Payments. My final payment may be larger or smaller than my regular payment.

I have paid any points, administrative fee, or loan origination fee as prepaid interest. The Administrative Fee is earned at the time the loan is made and is not subject to refund. If I pay the loan in full early, you will refund any points that would make the interest rate exceed the maximum rate allowed by law. Any refund will be credited to my account.

Any payment(s) that you accept after the final payment becomes due is not a renewal or extension of this Loan Agreement unless you agree in writing.

You will apply my payments as follows: (1) interest that is due, (2) principal, (3) any charges I owe other than principal and interest.

6. DISHONORED CHECK FEE

I agree to pay you a fee of up to $30 for a returned check. You may add the fee to the amount I owe or collect it separately.

7. DEFAULT

I will be in default if:

a. I do not timely make a payment to the person or place you direct;
b. I break any promise I made in the Loan Agreement;
c. I allow a lien to be entered against the homestead unless you agree in writing;
d. I sell, lease, or dispose of the homestead;
e. I use the homestead for an illegal purpose; or
f. you believe in good faith I am not going to keep any of my promises.

If there is more than one Borrower, each Borrower agrees to keep all of the promises in the Loan Agreement.

If I am in default, you will send me a written notice telling me how to cure the default. You must give me at least 21 days after the date on which the notice is mailed or delivered to cure the default. You may not demand that I pay the loan in full solely because the market value of the homestead decreases or because I default under any indebtedness not secured by the homestead.

8. PROPERTY INSURANCE

PROPERTY INSURANCE: I must keep my homestead insured against damage or loss in at least the amount I owe. I may obtain property insurance from anyone I want or provide proof of insurance I already have. The insurer must be authorized to do business in Texas.

☐ **If this box is checked, the premium is not fixed or approved by the Texas Department of Insurance.**

I agree to give you proof of property insurance. I must name you as the person to be paid under the policy in the event of damage or loss. If I obtain the insurance through you, I will pay the premium shown below. However, I have 5 days from the date of this loan to furnish like (equivalent) coverage from another source. If I fail to meet any of these requirements, you may obtain collateral protection insurance at my expense. We will insure the homestead for the lesser amount of the value of the property or the amount of the debt. If you obtain collateral protection insurance, you will mail notice to my last known address.

Credit property insurance is not required to obtain credit.

☐ Property Insurance $_____ Term _____

9. CREDIT INSURANCE

Credit insurance is optional. Credit life insurance and credit disability insurance are not required to obtain credit. This insurance will not be provided unless I sign and agree to pay the extra cost. I will look to the insurance policy or certificate for the terms and description of benefits, exclusions, and premium rates.

Single Premium

Credit Life, one borrower $_____ Credit Life, both borrowers $_____ Term _____

Credit Disability, one borrower $_____ Credit Disability, both borrowers $_____ Term _____

☐ **If this box is marked, the premium for the insurance coverage(s) above is not fixed or approved by the Texas Insurance Commissioner.**

I want the insurance above.

Borrower's Signature: _____ Date: _____

Co-Borrower's Signature: _____ Date: _____

Monthly Premium

If I want credit life or credit disability insurance, I must sign below and pay the monthly premium. The monthly premium will be added to the monthly loan payment. If I do not pay the monthly premium, I will not have the insurance coverage.

I request the following insurance:

_____

_____

Borrower's Signature Date

Premium Due with the First Month's Loan Payment	First Year Premium	Insurance Type:
$	$	
$	$	
$	$	

_____

Co-Borrower's Signature Date

The first year's premiums are based on an assumption that monthly loan payments are timely made. All unpaid premiums are due at the time of the final payment. The insurance may be canceled if I do not pay the premiums. ** I may cancel any of the optional insurance products offered at any time. The optional insurance will be canceled upon the earliest of the following occurrences:

(1) your receipt of my written request for cancellation;
(2) cancellation under the insurance certificate or policy;
(3) payment in full of my loan; and
(4) my death

**Optional language: The insurance will cancel on the date when the total past due premiums equal or exceed ((four)) times the first month premium.

10. MAILING OF NOTICES TO BORROWER

You or I may mail or deliver any notice to the address above. You or I may change the notice address by giving written notice. Your duty to give me notice will be satisfied when you mail it by first class mail.

11. DUE ON SALE CLAUSE, NOTICE OF INTENT TO ACCELERATE, AND NOTICE OF ACCELERATION

If all or any interest in the homestead is sold or transferred without your prior written consent, you may require immediate payment in full of all that I owe under this Loan Agreement. You will not exercise this option if prohibited by law.

If you exercise this option, you will give me notice of acceleration (i.e., payment of all I owe at once). This notice will give me a period of not less than 21 days from the date of the notice within which I must pay all that I owe under this Loan Agreement. If I fail to pay all that I owe before the end of this period, you may use any remedy allowed by the Loan Agreement.

12. NO WAIVER OF LENDER'S RIGHTS

If you don't enforce your rights every time, you can still enforce them later.

13. COLLECTION EXPENSES

If you require me to pay all that I owe at once, you will have the right to be paid back by me for all of your costs and expenses in enforcing this Loan Agreement to the extent not prohibited by law, including Section 50(a)(6), Article XVI of the Texas Constitution. These expenses include, for example, reasonable attorneys' fees. I understand that these fees are not for maintaining or servicing this Loan Agreement.

14. JOINT LIABILITY

I understand that you may seek payment from only me without first looking to any other Borrower. You can enforce your rights under this Loan Agreement solely against the homestead. This Loan Agreement is made without personal liability against each owner of the homestead and against the spouse of each owner unless the owner or spouse obtained this loan by actual fraud.

If this loan is obtained by actual fraud, I will be personally liable for the debt, including a judgment for any deficiency that results from your sale of the homestead for an amount less than is owed under this Loan Agreement.

15. USURY SAVINGS CLAUSE

I do not have to pay interest or other amounts that are more than the law allows.

16. SAVINGS CLAUSE

If any part of this Loan Agreement is declared invalid, the rest of the Loan Agreement remains valid. If any part of this Loan Agreement conflicts with law, that law will control. The part of the Loan Agreement that conflicts with the law will be modified to comply with the law. The rest of the Loan Agreement remains valid.

17. PRIOR AGREEMENTS

This written Loan Agreement is the final agreement between you and me and may not be changed by prior, current, or future oral agreements between you and me. There are no oral agreements between us relating to this Loan Agreement. Any change to this agreement must be in writing. Both you and I have to sign written agreements.

18. HOMESTEAD IS SUBJECT TO THE LIEN OF THE SECURITY DOCUMENT

The homestead described above by the property address is subject to the lien of the Security Document. I will see the separate Security Document for more information about my rights and responsibilities.

19. APPLICATION OF LAW

Federal law and Texas law apply to this Loan Agreement. The Texas Constitution will be applied to resolve any conflict between the Texas Constitution and any other law.

20. COMPLAINTS AND INQUIRIES NOTICE

This lender is licensed and examined by the State of Texas – Office of Consumer Credit Commissioner. Call the Consumer Credit Hotline or write for credit information or assistance with credit problems.

Office of Consumer Credit commissioner
2601 North Lamar Boulevard, Austin, Texas 78705-4207
www.occc.state.tx.us
(512) 936-7600 – (800) 538-1579

21. COLLATERAL

The homestead described above by the property address is subject to the lien of the Security Document.

Do not sign if there are blanks left to be completed in this document. This document must be signed at the office of the Lender, an attorney at law, or a title company.

I must receive a copy of this document after I have signed it. I agree to the terms of this loan agreement.

_____(Seal)
-Borrower

_____(Seal)
-Borrower

_____(Seal)
-Borrower

_____(Seal)
-Borrower

(Sign Original Only)

Figure: 7 TAC §1.1227(a)(8)

THIS SECURITY DOCUMENT SECURES AN EXTENSION OF CREDIT AS DEFINED BY SECTION 50(a)(6), ARTICLE XVI OF THE TEXAS CONSTITUTION.

NOTICE OF CONFIDENTIALITY RIGHTS: I MAY REMOVE OR STRIKE MY SOCIAL SECURITY NUMBER OR MY DRIVER'S LICENSE NUMBER FROM THIS DOCUMENT BEFORE IT IS FILED IN THE PUBLIC RECORDS.

TEXAS HOME EQUITY SECURITY DOCUMENT (Second Lien)

This Security Document is not intended to finance Borrower's acquisition of the Property.

DEFINITIONS

(A) "Loan Agreement" means the Note, Security Document, deed of trust, any other related document, or any combination of those documents, under which you have extended credit to me.

(B) "Security Document" means this document, which is dated _____, together with all Riders to this document.

(C) "I" or "me" means _____, the grantor under this Security Document and the person who signed the Note ("Borrower").

(D) "You" means _____, the Lender and any holder entitled to receive payments under the Note. Your address is _____. You are the beneficiary under this Security Document.

(E) "Trustee" is _____. Trustee's address is _____.

(F) "Note" means the promissory Note signed by me and dated _____. The Note states that the amount I owe you is _____ Dollars (U.S. $____) plus interest. I have promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than _____.

(G) "My Homestead" means the property that is described below under the heading "Transfer of Rights in the Property."

(H) "Extension of Credit" means the debt evidenced by the Note, as defined by Section 50(a)(6), Article XVI of the Texas Constitution and all the documents executed in connection with the debt.

(I) "Riders" means all Riders to this Security Document that I execute. The Riders include *(check box as applicable):*

☐ Texas Home Equity Condominium Rider
☐ Texas Home Equity Planned Unit Development Rider
☐ Other: _____

(J) "Applicable Law" means all controlling applicable federal, Texas and local constitutions, statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.

(K) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other charges that are imposed on me or My Homestead by a condominium association, homeowners association or similar organization.

(L) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. The term includes point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.

(M) "Escrow Items" means those items that are described in Section ___ of this Security Document.

(N) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than proceeds paid under my insurance) for: (i) damage or destruction of My Homestead; (ii) condemnation or other taking of all or any part of My Homestead; (iii) conveyance instead of condemnation; or (iv) misrepresentations or omissions related to the value or condition of My Homestead.

(O) "Periodic Payment" means the regularly scheduled amount due for (i) principal and interest under the Note plus (ii) any amounts under this Security Document.

(P) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. §2601 et seq.) and Regulation X (24 C.F .R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Document, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan Agreement does not qualify as a "federally related mortgage loan" under RESPA.

(Q) "Successor in Interest of me" means any party that has taken title to My Homestead, whether or not that party has assumed my obligations under the Loan Agreement.

(R) "Ground Rents" means amounts I owe if I rented the real property under the buildings covered by this Security Document. Such an arrangement usually takes the form of a long-term "ground lease."

SECURED AGREEMENT

To secure this loan, I give you a security interest in My Homestead including existing and future improvements, easements, fixtures, attachments, replacements and additions to the property, insurance refunds, and proceeds. This security interest is intended to be limited to the homestead property and not other collateral, as required under the Texas Constitution.

TRANSFER OF RIGHTS IN THE PROPERTY

I give to the Trustee, in trust, with power of sale, My Homestead located in _____ County at *(Street Address) (City) (State)(Zip Code)* and further described as:

(Legal Description)

The security interest in My Homestead includes existing and future improvements, easements, fixtures, attachments, replacements and additions to the property, insurance refunds, and proceeds. To the extent required by law, the security interest is limited to homestead property. No additional real or personal property secures the Loan Agreement.

This Security Document secures:

a. repayment of the Note, and all extensions and modifications of the Note; and
b. the completion of my promises and agreements under the Loan Agreement.

I warrant that I own My Homestead and have the right to grant you an interest in it. I also warrant that My Homestead is free of any lien, except liens that are publicly recorded. I promise that I will generally defend the title to My Homestead. I will be responsible for your losses that result from a conflicting ownership right in My Homestead. Any default under my agreements with you will be a default of this Security Document.

YOU AND I PROMISE:

LATE CHARGES AND PREPAYMENT

I will timely pay the principal, interest, and any other amounts due under the Loan Agreement. I will comply with the requirements of my escrow account under the Loan Agreement. I will make payments in U.S. currency. If any check is returned to you unpaid, you may select the form of future payments including:

a. cash;
b. money order;
c. certified check, bank check, treasurer's check or cashier's check drawn upon an institution whose deposits are federally insured; or
d. Electronic Funds Transfer.

I will make payments to the location as you direct. You will apply my payments against the loan only when they are received at the designated location. You may change the location for payments if you give me notice.

You may return any partial payment that does not bring the account current. You may accept any payment or partial payment that does not bring the account current without losing your rights to refuse full or partial payments in the future. I will not use any offset or claim against you to relieve me from my duty to make payments under the Loan Agreement.

FUNDS FOR ESCROW ITEMS

I will pay you an amount ("Funds") for:

a. taxes and assessments and other items that can take priority over your security interest in My Homestead under the Loan Agreement;
b. leasehold payments or Ground Rents on My Homestead, if any; and
c. premiums for any insurance you require under the Loan Agreement.

These items are called "Escrow Items." At any time during the term of the Loan Agreement, you may require me to pay Community Association Dues, Fees, and Assessments, if any, as an Escrow Item.

I will promptly give you all notices of amounts to be paid. I will pay you the Funds for Escrow Items unless you, at any time, waive my duty to pay you. Any escrow waiver must be in writing. If you waive my duty to pay you the Funds, I will pay, at your direction, the amounts due for waived Escrow Items. If you require, I will give you receipts showing timely payment. My duty to make Escrow Item payments and to provide receipts is an independent promise in the Loan Agreement.

If you grant me an escrow waiver, you may require me to pay the waived Escrow Items. If I fail to directly pay the waived Escrow Items, you may use any right given to you in the Loan Agreement. You may pay waived Escrow Items and require me to repay you. You may cancel the waiver for Escrow Items at any time by a notice that complies with the Loan Agreement. If you cancel the waiver, I will pay you all Funds that are then required under this Section.

At any time you may collect and hold Funds in an amount:

a. to permit you to apply the Funds at the time specified under RESPA, and
b. not to exceed the maximum amount you may require under RESPA.

You will estimate the amount of Funds due on the basis of current data and reasonable estimates of future expenses for Escrow Items or otherwise, according to Applicable Law. The Funds will be held in an institution whose deposits are federally insured (including you, if your deposits are insured) or in any Federal Home Loan Bank.

You will timely pay Escrow Items as required by RESPA. You will not charge me a fee for maintaining or handling my escrow account. You are not required to pay me any interest on the amounts in my escrow account. You will give me an annual accounting of the Funds as required by RESPA. If there is a surplus in my escrow account, you will follow RESPA. If there is a shortage or deficiency, as defined by RESPA, you will notify me, and I will pay you the amount necessary to make up the shortage or deficiency. I will repay the shortage or deficiency in no more than twelve monthly payments. You will promptly return to me any Funds after I paid the Loan Agreement in full.

CHARGES AND LIENS

I will timely pay all taxes, assessments, charges, and fines relating to My Homestead that can take priority over this Security Document. I also will timely pay leasehold payments or Ground Rents on My Homestead, if any, and Community Association Dues, Fees, and Assessments, if any. If these items are Escrow Items, I will pay them as required by the Loan Agreement. I will promptly satisfy any lien that has priority over this Security Document unless I:

a. agree in writing to pay the amount secured by the lien in a manner acceptable to you and only so long as I comply with my agreement;
b. contest the lien in good faith by stopping the enforcement of the lien through legal proceedings (this contest must be satisfactory to you); or
c. obtain an agreement from the holder of the lien that is satisfactory to you.

If you determine that any part of My Homestead is subject to a lien that can take priority over this Security Document, you may give me a notice identifying the lien. I will satisfy the lien or take one or more of the actions described above in this section within 10 days of the date of the notice.

PROPERTY INSURANCE

I will insure the current and future improvements to My Homestead against loss by fire, hazards included within the term "extended coverage," and any other hazards including earthquakes and floods, as you may require. I will keep this insurance in the amounts (including deductible levels) and for the periods that you require. You may change these insurance requirements during the term of the Loan Agreement. I have the right to choose an insurance carrier that is acceptable to you. You will exercise your right to disapprove reasonably.

I will pay any fee charged by the Federal Emergency Management Agency for the review of any flood zone determination. You may require me to pay either:

a. a one-time charge for flood zone determination, certification and tracking services; or
b. a one-time charge for flood zone determination and certification services; and subsequent charges each time re-mappings or similar changes occur that reasonably might affect the determination or certification.

If I do not keep any required insurance, you may obtain insurance at your option and at my expense. You are not required to purchase any type or amount of insurance. Any insurance you buy will always protect you, but may not protect me, my equity in My Homestead, my contents in My Homestead or protect me from certain hazards or liability. I understand that this insurance may cost significantly more than insurance I can purchase. I will owe you for the cost of any insurance that you buy under this section. Interest will be charged on this amount at the interest rate used by the Note. The interest will be charged from the date you made the payment. You will give me notice of the amounts I owe under this Section.

You may disapprove any insurance policy or renewal. Any insurance policy must include a standard mortgage clause, and must name you as mortgagee or a loss payee. I will give you all insurance premium receipts and renewal notices, if you request. If I obtain any optional insurance to cover damage or destruction of My Homestead, I will name you as a loss payee. In the event of loss, I will give notice to you and the insurance company. You may file a claim if I do not file one promptly. You will apply insurance proceeds to repair or restore My Homestead unless your interest will be reduced or it will be economically unreasonable to perform the work. You may hold the insurance proceeds until you have had an opportunity to inspect the work and you consider the work to be acceptable. The insurance proceeds may be given in a single payment or multiple payments as the work is completed. You will not pay any interest on the insurance proceeds. If I hire a public adjuster or other third party, I am responsible for the fee. It will not be paid from the insurance proceeds. The insurance proceeds will be applied to the amount I owe if your interest will be reduced or if the work will be economically unreasonable to perform. You will pay me any excess insurance proceeds. You will apply insurance proceeds in the order provided by the Loan Agreement.

If I abandon My Homestead you may file, negotiate, and settle any insurance claim. If the insurance company offers to settle a claim and I do not respond within thirty days to a notice from you, then you may settle the claim. The 30-day period will begin when the notice is given. If I abandon My Homestead, fail to respond to the offer of settlement, or you foreclose on My Homestead, I assign to you:

a. my rights to any insurance proceeds in an amount not greater than what I owe; and
b. any of my other rights under insurance policies covering My Homestead.

You may apply the proceeds to repair or restore My Homestead or to the amount that I owe.

HOMESTEAD

I now occupy and use the property secured by this Security Document as my Texas homestead.

PRESERVATION, MAINTENANCE, PROTECTION, AND INSPECTION OF THE PROPERTY

I will not destroy, damage or impair My Homestead, allow it to deteriorate, or commit waste. Whether or not I live in My Homestead, I will maintain it in order to prevent it from deteriorating or decreasing in value due to its condition. I will promptly repair the damage to My Homestead to avoid further deterioration or damage unless you and I agree in writing that it is economically unreasonable. I will be responsible for repairing or restoring My Homestead only if you release the insurance or condemnation proceeds for the damage to or the taking of My Homestead. You may release proceeds for the repairs and restoration in a single payment or in a series of payments as the work is completed. I still am obligated to complete repairs or restoration of My Homestead even if there are not enough proceeds to complete the work. You or your agent may inspect My Homestead. You may inspect the interior of My Homestead with reasonable cause. You will give me notice stating reasonable cause when or before the interior inspection occurs.

CONDITIONS CAUSING ACTUAL FRAUD

I commit actual fraud under Section 50(a)(6)(c), Article XVI of the Texas Constitution if I or any person acting at my direction or with my knowledge or consent:

a. gives you materially false, misleading, or inaccurate information or statements;
b. fails to provide material information regarding the loan; or
c. commits any other action or inaction that is determined to be actual fraud.

Material representations include statements concerning my occupancy of My Homestead as a Texas homestead, the statements and promises contained in any document that I sign in connection with the Loan Agreement, and the execution of an acknowledgment of fair market value of My Homestead as described in the Loan Agreement. If I commit actual fraud I will be in default of the Loan Agreement and may be held personally liable.

PROTECTION OF LENDER'S INTEREST IN THE PROPERTY AND RIGHTS UNDER THE SECURITY DOCUMENT

You may do whatever is reasonable to protect your interest in My Homestead, including protecting or assessing the value of My Homestead, and securing or repairing My Homestead. You may do this when:

a. I fail to perform the promises and agreements contained in the Loan Agreement;
b. a legal proceeding might significantly affect your interest in My Homestead or rights under the Loan Agreement (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may have priority over the Loan Agreement or to enforce laws or regulations); or
c. I abandon My Homestead.

In order to protect your interest in My Homestead, you may:

a. pay amounts that are secured by a lien on My Homestead which has or will have priority over the Loan Agreement;
b. appear in court; or
c. pay reasonable attorneys' fees.

You may enter My Homestead to secure it. To secure My Homestead, you may make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off. You have no duty to secure My Homestead. You are not liable for failing to take any action listed in this Section. Any amounts you pay under this Section will become my additional debt secured by the Loan Agreement. These amounts will earn interest at the rate specified in the Loan Agreement. The interest will begin on the date the amounts are paid. You will give me notice requesting payment of these amounts. If the Loan Agreement is on a leasehold, I will comply with the lease.

ASSIGNMENT OF MISCELLANEOUS PROCEEDS AND FORFEITURE

Any Miscellaneous Proceeds will be assigned and paid to you. If My Homestead is damaged, Miscellaneous Proceeds will be applied to restore or repair My Homestead. You will only do this if your interest in My Homestead will not be reduced and if the work will be economically reasonable to perform. You will have the right to hold Miscellaneous Proceeds until you inspect My Homestead to ensure the work has been completed to your satisfaction. You must make the inspection promptly. You may release proceeds for the work in a single payment or in multiple payments as the work is completed. You are not required to pay me any interest on the Miscellaneous Proceeds. The Miscellaneous Proceeds will be applied to the amount I owe if your interest in My Homestead will be reduced or the work will be economically unreasonable to perform. You will pay me any excess Miscellaneous Proceeds. You will apply Miscellaneous Proceeds in the order provided by the Loan Agreement.

You will apply all Miscellaneous Proceeds to the amount I owe in the event of a total taking, destruction, or loss in value of My Homestead. You will apply the Miscellaneous Proceeds even if all payments are current. You will give any excess Miscellaneous Proceeds to me.

A partial loss can include a taking, destruction, or loss in value. In the event of a partial loss, the Miscellaneous Proceeds will be applied in one of two ways:

a. If the fair market value of My Homestead immediately before the partial loss is less than the amount I owe immediately before the partial loss, then you will apply all Miscellaneous Proceeds to the amount I owe even if all payments are current.
b. If the fair market value of My Homestead immediately before the partial loss is equal to or greater than the amount I owe immediately before the partial loss, then you will apply Miscellaneous Proceeds to the amount I owe in the following manner:
    1. The amount of Miscellaneous Proceeds multiplied by the result of,
    2. The amount I owe immediately before the partial loss divided by the fair market value of My Homestead immediately before the partial loss.

You and I can agree otherwise in writing. You will give any excess Miscellaneous Proceeds to me.

If I abandon My Homestead you may apply Miscellaneous Proceeds either to restore or repair My Homestead, or to the amount I owe.

Damage to My Homestead caused by a third party may result in a civil proceeding. If you give me notice that the third party offers to settle a claim for damages to My Homestead and I fail to respond to you within thirty days, you may accept the offer and apply the Miscellaneous Proceeds either to restore or

repair My Homestead or to the amount I owe. If the proceeding results in an award of damages, you will apply the Miscellaneous Proceeds according to this Section.

FORBEARANCE NOT A WAIVER

My successors and I will not be released from liability if you extend the time for payment or modify the payment schedule. If I pay late, you will not have to sue me or my successor to require timely future payments. You may refuse to extend time for payment or modify this Loan Agreement even if I request it. If you do not enforce your rights every time, you may enforce them later.

JOINT AND SEVERAL LIABILITY, SECURITY DOCUMENT EXECUTION, SUCCESSORS OBLIGATED

I understand that you may seek payment from me without first looking to any other person who signed the Note. Any person who signs this Security Document, but not the Note:

a. has no duty to pay the sums secured by this Security Document;
b. is not a surety or guarantor;
c. only grants the person's interest in My Homestead under the terms of this Security Document; and
d. grants the person's interest in My Homestead to comply with the requirements of Section 50(a)(6)(A), Article XVI of the Texas Constitution.

The lien against My Homestead is a voluntary lien and is a written agreement that shows the consent of each owner and each owner's spouse. You and I may extend, modify, or make any arrangements with respect to the terms of the Loan Agreement. Upon your approval, my successor who assumes my duties in writing will receive all of my rights and benefits under the Loan Agreement. I still will be responsible under the Loan Agreement unless you release me in writing. The Loan Agreement will extend to your assigns or successors.

EXTENSION OF CREDIT CHARGES

If an Applicable Law that sets a maximum charge is finally interpreted so that the interest, loan charges, or fees collected or to be collected with the Loan Agreement exceed the permitted amount, then you will:

a. reduce the amount to the amount permitted; or
b. refund the excessive amount to [~~the~~] me.

You may choose to apply this refund to the amount I owe or pay it directly to me. If you apply the refund to the amount I owe, the refund will be treated as a partial prepayment.

If I default, you will be able to charge me reasonable fees paid to an attorney who is not your employee to protect your interest in My Homestead.

DELIVERY OF NOTICES

Under the Loan Agreement, you and I will give notices to each other in writing. Any notice under the Loan Agreement will be considered given to me when it is mailed by first class mail or when actually delivered to me at my address if given by another means. You will give notice to My Homestead address unless I provide you a different address. I will notify you promptly of any change of address. I will comply with any reasonable procedure for giving a change of address that you provide. There will only be one address for notice under the Loan Agreement. Notice to me will be considered notice to all persons who are obligated under the Loan Agreement unless Applicable Law requires a separate notice. I may give you notice by delivering or mailing it by first class mail to the address provided by you, unless you require a different procedure. You, however, will not receive notice under the Loan Agreement until you actually receive it. Legal requirements governing notices subject to the Loan Agreement will prevail over conditions in the Loan Agreement.

GOVERNING LAW AND SEVERABILITY

The Loan Agreement will be governed by Texas and federal law. If any provision in the Loan Agreement conflicts with any legal requirement, all non-conflicting provisions will remain effective.

RULES OF CONSTRUCTION

As used in the Loan Agreement:

a. words in the singular will mean and include the plural and vice versa; and
b. the word "may" gives sole discretion without imposing any duty to take action.

LOAN AGREEMENT COPIES

At the time the Loan Agreement is made, you will give me copies of all documents I sign.

TRANSFER OF INTEREST IN PROPERTY

"Interest in My Homestead" means any legal or beneficial interest. This term includes those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement (the intent of which is the transfer of title by me at a future date to a purchaser). If any part of My Homestead is sold or transferred without your prior written permission, you may require immediate payment of all I owe. You will not exercise this option if disallowed by Applicable Law. If you accelerate, you will give me notice. The notice of acceleration will allow me at least 21 days from the date the notice is given to pay all I owe. If I fail to timely pay all I owe, you may pursue any remedy allowed by the Loan Agreement without further notice or demand.

BORROWER'S RIGHT TO REINSTATE AFTER ACCELERATION

I have the right to stop you from enforcing the Loan Agreement any time before the earliest of:

a. 5 days before sale of My Homestead under any power of sale included in the Loan Agreement;
b. the day required by Applicable Law for the termination of my right to reinstate; or
c. the entry of a judgment enforcing the Loan Agreement.

I can stop the enforcement of the Loan Agreement and reinstate the Loan Agreement if all the following conditions are met:

a. You are paid what I owe under the Loan Agreement as if no acceleration had occurred;
b. I cure any default of any promise or agreement;
c. You are paid all expenses allowed by Applicable Law, including reasonable attorneys' fees and other fees incurred for the purpose of protecting your interest in My Homestead and rights under the Loan Agreement;
d. I comply with any reasonable requirement to assure you that your interest in My Homestead will remain intact; and
e. I comply with any reasonable requirement to assure you that my ability to pay what I owe will remain intact.

You may require me to pay for the reinstatement in one or more of the following forms:

a. cash;
b. money order;
c. certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are federally insured; or
d. Electronic Funds Transfer.

Upon reinstatement, the Loan Agreement will remain effective as if no acceleration had occurred. However, this right to reinstate will not apply if I sell or transfer any interest in My Homestead without your permission.

SALE OF NOTE, CHANGE OF LOAN SERVICER, NOTICE OF GRIEVANCE, LENDER'S RIGHT TO COMPLY

A full or partial interest in the Loan Agreement can be sold one or more times without prior notice to me. The sale may result in a change of the company servicing or handling the Loan Agreement. The company servicing or handling the Loan Agreement will collect my monthly payment and will comply with other servicing conditions required by the Loan Agreement or Applicable Law. In some cases, the company servicing or handling the Loan Agreement may change even if the Loan Agreement is not sold. If the company servicing or handling the Loan Agreement is changed, I will be given written notice of the change. The notice will state the name and address of the new company, the address to which my payments should be made, and any other information required by RESPA. If a different company services the Loan Agreement, the servicing duties to me will be transferred.

You or I must give notice of any violation of the Loan Agreement to the other and the opportunity to address the alleged violation before starting or joining any legal action. You and I will give each other a reasonable amount of time to address the alleged violation. If the law provides a specified time period that must be given to address a violation, that time period will be a reasonable time for purposes of this paragraph. Any notice of acceleration and opportunity to cure under the Loan Agreement will satisfy the notice and opportunity to address the alleged violation provisions of this Section.

You and I intend to strictly follow the provisions of the Texas Constitution that relate to the Loan Agreement (Section 50(a)(6), Article XVI of the Texas Constitution).

No agreement between you and me or any third party will limit your ability to comply with your duties under the Loan Agreement and the Applicable Law. The Loan Agreement is being made on the condition that you have a reasonable amount of time to correct any violation of Applicable Law. I will notify you of any violation and give you a reasonable amount of time to comply before taking any action. I will cooperate with your reasonable effort to correct the Loan Agreement. You will forfeit all principal and interest as required by Applicable Law if you have:

a. received my notice;
b. had a reasonable amount of time to correct the violation; and
c. failed to correct the violation.

You and I are limiting all agreements so that all current or future interest or fees in connection with this Loan Agreement will not be greater than the highest amount allowed by Applicable Law.

You and I intend to conform the Loan Agreement to the provisions of the Texas Constitution and Texas law. If any promise, payment, duty or provision of the Loan Agreement is in conflict with the Applicable Law, then the promise, payment, duty or provision will be corrected or removed. This correction will be automatic and will not require any amendment or new document. Your right to correct any violation will survive my paying off the Loan Agreement. My right to correct will override any conflicting provision of the Loan Agreement.

Your right-to-comply as provided in this Section will survive the payoff of the Loan Agreement. The provisions of this Section will supersede any inconsistent provision of the Loan Agreement.

HAZARDOUS SUBSTANCES

Hazardous Substance

a. "Hazardous Substances" means those substances defined as toxic or hazardous substances, pollutants, or wastes by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials;
b. "Environmental Law" means federal laws and laws of the jurisdiction where My Homestead is located that relate to health, safety or environmental protection;

c. "Environmental Cleanup" includes any response action, remedial action, or removal action, as defined in Environmental Law; and
d. "Environmental Condition" means a condition that can cause, contribute to, or otherwise trigger an Environmental Cleanup.

I will not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances, or threaten to release any Hazardous Substances, on or in My Homestead. I will not do or allow anyone else to do, anything affecting My Homestead

a. that is in violation of any Environmental Law,
b. that creates an Environmental Condition, or
c. that, due to the presence, use, or release of a Hazardous Substance, creates a condition that adversely affects the value of My Homestead.

The presence, use, or storage on My Homestead of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and for the maintenance of My Homestead are allowed. This includes Hazardous Substances found in consumer products.

I will promptly give you written notice of:

a. any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving My Homestead and any Hazardous Substance or Environmental Law of which I have actual knowledge;
b. any Environmental Condition, including any spilling, leaking, discharge, release or threat of release of any Hazardous Substance; and
c. any condition caused by the presence, use or release of a Hazardous Substance which adversely affects the value of My Homestead.

If I learn that, or am notified by any governmental or regulatory authority, or any private party, that any removal or other remediation of any Hazardous Substance affecting My Homestead is necessary, I promptly will take all necessary remedial actions in accordance with Environmental Law. You will have no obligation for an Environmental Cleanup.

ACCELERATION AND REMEDIES

You will give me notice prior to acceleration if I am in default under the Loan Agreement. The notice will specify:

a. the default;
b. the action required to cure the default;
c. a date, not less than 21 days from the date you give me notice, to cure the default; and
d. that my failure to cure the default on or before the specified date will result in acceleration of all that I owe under the Loan Agreement and sale of My Homestead.

You will inform me of my right to reinstate after acceleration and my right to bring a court action to contest the alleged default or to assert any other defense to the acceleration and sale. If the default is not cured before the specified date, you have the option to require immediate payment in full of all I owe. If you are not paid all I owe, you may sell My Homestead or seek other remedies allowed by Applicable Law without further notice. You may collect your reasonable expenses incurred in seeking the remedies provided in this Section. These expenses may include court costs, attorneys' fees, and costs of title search.

This lien against My Homestead may be foreclosed upon only by a court order. You may, at your option, follow any rules of civil procedure for expedited foreclosure proceedings related to the foreclosure of liens under Section 50(a)(6), Article XVI of the Texas Constitution ("Rules"). The power of sale granted by the Loan Agreement will be exercised according to the Rules. I understand the power of sale is not a confession of judgment or a power of attorney to confess judgment or an appearance by me in a judicial proceeding.

POWER OF SALE

You have a fully enforceable lien on My Homestead. Your remedies for my default include an efficient means of foreclosure under the law. You and the Trustee have all powers to conduct a foreclosure except as limited by the Texas Supreme Court. If you choose to use the power of sale, you will give me notice of the time, place and terms of the sale by posting and filing notice at least 21 days before the sale as provided by law. You will give me notice by mail as required by law. The sale will be conducted at a public place. The sale will be held:

a. on the first Tuesday of a month;
b. at a time stated in the notice or no later than 3 hours after the time; and
c. between 10:00 a.m. and 4:00 p.m.

I allow the Trustee to sell My Homestead to the highest bidder for cash in one or more parcels and in any order the Trustee determines. You may purchase My Homestead at any sale. The Rules will prevail in a conflict between the procedures and the Rules. If a conflict arises, the conflicting provision will be corrected in order to comply.

Trustee will give a Trustee's deed to the foreclosure sale purchaser. A Trustee's deed will convey:

a. good title to My Homestead that cannot be defeated; and
b. title with promises of general warranty from me.

I will defend the purchaser's title to My Homestead against all claims and demands. The description of facts contained in the Trustee's deed will be sufficient to legally prove the truth of the statements made in the deed. Trustee will apply the proceeds of the sale in the following order:

a. to all expenses of the sale, including court costs and reasonable Trustee's and attorneys' fees;
b. what I owe; and
c. any excess to the person or persons legally entitled to it.

If My Homestead is sold through a foreclosure sale governed by this Section, I or any person in possession of My Homestead through me, will give up possession of My Homestead without delay. A person who does not give up possession is a holdover and may be removed by a court order.

RELEASE

You will cancel and return the Note to and give me, in recordable form, a release of lien securing the Loan Agreement or a copy of any endorsement of the Note and assignment of the lien to a lender that is refinancing the Loan Agreement. I will pay only the cost of recording the release of lien. My acceptance of the release or endorsement and assignment will end all of your duties under section 50(a)(6), Article XVI of the Texas Constitution.

NON-RECOURSE LIABILITY

You are entitled to all rights, superior title, liens and equities owned or claimed by any grantor or holder of any liens and debts due before the signing of the Loan Agreement. You are entitled to these rights whether you acquire the liens or debts by assignment or the holder releases them upon payment.

Each person who signs the Security Document is responsible for each promise and duty in the Security Document, subject to limitation of personal liability described below. The Texas Constitution provides that the Loan Agreement is given without personal liability against each owner of My Homestead and against the spouse of each owner. Personal liability may be obtained if the Loan Agreement was obtained by actual fraud. This means that, unless actual fraud is found by a court, you are only able to enforce your rights under the Loan Agreement against My Homestead. You are not able to seek personal liability against the owner of My Homestead or the spouse of an owner. If the Loan Agreement is obtained by actual fraud, then I will be personally liable for the payment of any amounts due under the Loan Agreement. This means that a personal judgment could be obtained against me for a deficiency as a result of a foreclosure sale of My Homestead. A personal judgment would subject my other assets for the payment of the debt.

Unless prohibited by the Texas Constitution, this Section will not:

a. impair in any way the Loan Agreement or your right to collect all that I owe under the Loan Agreement;
b. affect your right to any promise or condition of the Loan Agreement.

PROCEEDS

I am not required to apply the proceeds of the Loan Agreement to repay another debt except a debt secured by My Homestead or a debt to another lender.

NO ASSIGNMENT OF WAGES

I have not assigned wages as security for the Loan Agreement.

ACKNOWLEDGMENT OF FAIR MARKET VALUE

You and I agreed in writing to the fair market value of My Homestead on the date of the Loan Agreement.

TRUSTEES AND TRUSTEE LIABILITY

One or more Trustees acting alone or together may exercise or perform all rights, remedies and duties of the Trustee under the Loan Agreement. You may remove or change any Trustee (e.g., add one or more Trustees or appoint a successor Trustee to any Trustee). This removal or change of Trustee must be in writing and may be:

a. at your option;
b. with or without cause; and
c. by power of attorney or otherwise.

The substitute, additional or successor Trustee will receive, without any further act, the title, rights, remedies, powers and duties under the Loan Agreement and Applicable Law.

Trustee may rely, without liability, upon any notice, request, consent, demand, statement or other document reasonably believed by Trustee to be valid. Trustee will not be liable for any act or omission unless the act or omission is willful.

WAIVER OF ADDITIONAL COLLATERAL

I agree that you waive all terms in any of your current or future loan documentation that:

a. creates a default of the Loan Agreement by a default of another obligation that is not secured by My Homestead;
b. provides for collateral other than My Homestead (including cross collateralization or dragnet provisions);
c. creates personal liability for me for the Loan Agreement (unless this loan was obtained by actual fraud); or
d. creates a personal guaranty.

DEFAULT

Any default of my agreements with you will be a default of this Security document.

BY SIGNING BELOW, I accept and agree to the terms and promises contained in the Loan Agreement and in any Rider I sign which is recorded with it. (DO NOT SIGN IF THERE ARE BLANKS LEFT TO BE COMPLETED IN THIS DOCUMENT. THIS DOCUMENT MUST BE SIGNED AT THE OFFICE OF LENDER, AN ATTORNEY AT LAW OR A TITLE COMPANY. I MUST RECEIVE A COPY OF ANY DOCUMENT I SIGN.)

I MAY, WITHIN 3 DAYS AFTER CLOSING, RESCIND THE LOAN AGREEMENT WITHOUT PENALTY OR CHARGE.

_____ _____(seal)
-Borrower

Printed Name:_____
(Please Complete)

_____(seal)
-Borrower

_____

_____(seal)
-Borrower

_____(seal)
-Borrower

(Acknowledgment on following page)

Figure: 7 TAC §1.1237(a)(7)

PURCHASE MONEY NOTE
(Fixed Rate – Second Lien)

ACCOUNT/CONTRACT NO. _____
CREDITOR/LENDER _____
ADDRESS _____
_____

DATE OF NOTE _____
BORROWER _____
ADDRESS _____
_____

PROPERTY ADDRESS: _____

A word like "I" or "me" means each person who signs as a Borrower. A word like "you" or "your" means the Lender or "Note Holder."

The Lender is _____. The Lender may sell or transfer this Note. The Lender or anyone who is entitled to receive payments under this Note is called the "Note Holder." You will tell me in writing who is to receive my payments.

ANNUAL PERCENTAGE RATE The cost of my credit as a yearly rate.	**FINANCE CHARGE** The dollar amount the credit will cost me.	**Amount Financed** The amount of credit provided to me or on my behalf.	**Total of Payments** The amount I will have paid after I have made all payments as scheduled.
%	$	$	$

My Payment Schedule will be:

Number of Payments	Amount of Payments	When Payments Are Due

Security: You will have a security interest in the property.
Late Charge: (Scheduled Installment Earnings Method): If any part of a payment is unpaid for 10 days after it is due, I may be charged 5% of the amount of payment.
Prepayment:(Scheduled Installment Earnings Method): If I pay off early, I may be entitled to a refund of part of the Finance Charge and I will not have to pay a penalty. **(True Daily Earnings Method):** If I pay off early, I will not have to pay a penalty.
Additional Information: See the contract documents for any additional information about nonpayment, default, any required repayment in full before the scheduled date, and prepayment refunds and penalties.

~~[ITEMIZATION OF AMOUNT FINANCED~~

~~1. Amount Financed (2+3+4) $_____~~

~~2. Amount given to me directly $_____~~

~~3. Amount paid on my account (Net Balance Prior Account) $_____~~

~~4. Amount paid to others on my behalf (A+B+C+D+E) $_____~~

~~A. Cost of hazard/property insurance paid to insurance company $_____~~
~~B. Cost of optional credit insurance paid to insurance company or companies~~
~~Life $_____~~
~~Disability $_____~~
~~Total B: $_____~~
~~C. Title Insurance paid to insurance Company $_____~~
~~D. Official fees paid to government Agencies $_____~~
~~E. Payable to: $_____~~
~~Payable to: $_____~~
~~Payable to: $_____~~
~~Total E: $_____~~

~~5. Prepaid Finance Charge $_____]~~

1. BORROWER'S PROMISE TO PAY

Scheduled Installment Earnings Method: I promise to pay the Total of Payments to the order of you.[The "principal" or "cash advance" is $_____. This amount plus interest must be paid by _____ (maturity date).] I will make payments to you at the address above or as you direct. I will make the payments on the dates and in the amounts shown in the Payment Schedule. True Daily Earnings Method: I promise to pay the cash advance plus the accrued interest to the order of you. (The "principal" or "cash advance" is $_____. This amount plus interest must be paid by _____ (maturity date).) I will make payments to you at the address above or as you direct. I will make the payments on the dates and in the amounts shown in the Payment Schedule.

2. LATE CHARGE

Scheduled Installment Earnings Method: If I don't pay all of a payment within 10 days after it is due, you can charge me a late charge. The late charge will be 5% of the scheduled payment.

3. AFTER MATURITY INTEREST

If I don't pay all I owe when the final payment becomes due, I will pay interest on the amount that is still unpaid. That interest will be the higher of the rate of 18% per year or the maximum rate allowed by law. That interest will begin the day after the final payment becomes due.

4. PREPAYMENT

Scheduled Installment Earnings Method: I can make a whole payment early. Unless you agree otherwise in writing, I may not skip payments. If I make a payment early, my next payment will still be due as scheduled. True Daily Earnings Method: I can make any payment early. Unless you agree otherwise in writing, I may not skip payments. If I make a payment early, my next payment will still be due as scheduled.

5. FINANCE CHARGE AND REFUND METHOD

For contracts using Scheduled Installment Earnings Method - Section 342.301 rate loans: The annual rate of interest is ___%. This interest rate may not be the same as the Annual Percentage Rate. You figure the Finance Charge by applying the scheduled installment earnings method as defined by the Texas Finance Code to the unpaid cash advance. The unpaid cash advance does not include the administrative fee, late charges, and returned check charges. If I prepay my loan in full before the final payment is due, I may save a portion of the Finance Charge. I will not be paid a refund if the refund would be less than $1.00. You base the Finance Charge and Total of Payments as if I will make each payment on the day it is due. My final payment may be larger or smaller than my regular payment.

I have paid any points, administrative fee, or loan origination fee as prepaid interest. The administrative fee is earned at the time the loan is made and is not subject to refund. If I pay the loan in full early, you will refund any prepaid interest that would make the interest rate exceed the maximum rate allowed by law. Any refund will be credited to my account.

Any payment(s) that you accept after the final payment becomes due is not a renewal or extension of this Loan Agreement unless you agree in writing.

You will apply my payments in the following order: (1) interest that is due, (2) principal, (3) any other charges I owe.

For contracts using Scheduled Installment Earnings Method with prepayments option - Section 342.301 rate loans: The annual rate of interest is ___%. This interest rate may not be the same as the Annual Percentage Rate. You figure the Finance Charge by applying the scheduled installment earnings method as defined by the Texas Finance Code to the unpaid cash advance. I may make a full or partial payment early without paying a penalty. My early payments will reduce the principal that I owe. The unpaid cash advance does not include the administrative fee, late charges, or return check charges. If I make an early partial payment, the due date and amount of my next payment will not change unless you agree in writing.

I have paid any points, administrative fee, or loan origination fee as prepaid interest. The administrative fee is earned at the time the loan is made and is not subject to refund. If I pay the loan in full early, you will refund any prepaid interest that would make the interest rate exceed the maximum rate allowed by law. Any refund will be credited to my account.

Any payment(s) that you accept after the final payment becomes due is not a renewal or extension of this Loan Agreement unless you agree in writing.

You will apply my scheduled payments in the following order: (1) interest that is due, (2) principal, (3) any other charges I owe.

For contracts using True Daily Earnings Method - Section 342.301 rate loans: The annual rate of interest is ___%. This interest rate may not be the same as the Annual Percentage Rate. You figure the Finance Charge by applying the true daily earnings method as defined by the Texas Finance Code to the unpaid portion of the cash advance. The unpaid cash advance does not include the administrative fee and return check charges. You base the Finance Charge and Total of Payments as if I will make each payment on the day it is due. You will apply payments on the date they are received. This may result in a different Finance Charge or Total of Payments. My final payment may be larger or smaller than my regular payment.

I have paid any points, administrative fee, or loan origination fee as prepaid interest. The administrative fee is earned at the time the loan is made and is not subject to refund. If I pay the loan in full early, you will refund any prepaid interest that would make the interest rate exceed the maximum rate allowed by law. Any refund will be credited to my account.

Any payment(s) that you accept after the final payment becomes due is not a renewal or extension of this Loan Agreement unless you agree in writing.

You will apply my payments as follows: (1) interest that is due, (2) principal, (3) any charges I owe.

6. DISHONORED CHECK FEE

I agree to pay you a fee of up to $30 for a returned check. You may add the fee to the amount I owe or collect it separately.

7. DEFAULT

I will be in default if:

a. I do not timely make a payment to the person or place you direct;
b. I break any promise I made in the Loan Agreement;
c. I allow a lien to be entered against the Property unless you agree in writing;
d. I sell, lease, or dispose of the Property;
e. I use the Property for an illegal purpose; or
f. you believe in good faith I am not going to keep any of my promises.

If there is more than one Borrower, each Borrower agrees to keep all of the promises in the Loan Agreement.

If I am in default, you will send me a written notice telling me how to cure the default. You must give me at least 21 days after the date on which the notice is mailed or delivered to cure the default. You may not demand that I pay the loan in full solely because I default under any debt not secured by the Property.

8. PROPERTY INSURANCE

PROPERTY INSURANCE: I must keep the Property insured against damage or loss in at least the amount I owe. I may obtain property insurance from anyone I want or provide proof of insurance I already have. The insurer must be authorized to do business in Texas.

☐ **If this box is checked, the premium is not fixed or approved by the Texas Department of Insurance.**

I agree to give you proof of property insurance. I must name you as the person to be paid under the policy in the event of damage or loss. If I obtain the insurance through you, I will pay the premium shown below. However, I have 5 days from the date of this loan to furnish like (equivalent) coverage from another source. If I fail to meet any of these requirements, you may obtain collateral protection insurance at my expense. You will insure the Property for the lesser amount of the value of the Property or the amount of the debt. If you obtain collateral protection insurance, you will mail notice to my last known address.

☐ Property Insurance $_____ Term _____

9. CREDIT INSURANCE

Credit insurance is optional. Credit life insurance and credit disability insurance are not required to obtain credit. This insurance will not be provided unless I sign and agree to pay the extra cost. I will look to the insurance policy or certificate for the terms and description of benefits, exclusions, and premium rates.

Single Premium

Credit Life, one borrower $_____ Credit Life, both borrowers $_____ Term _____

Credit Disability, one borrower $_____ Credit Disability, both borrowers $_____ Term _____

☐ **If this box is marked, the premium for the insurance coverage(s) above is not fixed or approved by the Texas Insurance Commissioner.**

I want the insurance above.

Borrower's Signature: _____ Date: _____

Co-Borrower's Signature: _____ Date: _____

Monthly Premium

If I want credit life or credit disability insurance, I must sign below and pay the monthly premium. The monthly premium will be added to the monthly loan payment. If I do not pay the monthly premium, I will not have the insurance coverage.

I request the following insurance:

_____

Borrower's Signature Date

Premium Due with the First Month's Loan Payment	First Year Premium	Insurance Type:
$	$	
$	$	
$	$	

_____

Co-Borrower's Signature Date

The first year's premiums are based on an assumption that monthly loan payments are timely made. All unpaid premiums are due at the time of the final payment. The insurance may be canceled if I do not pay the premiums. ** I may cancel any of the optional insurance products offered at any time. The optional insurance will be canceled upon the earliest of the following occurrences:

(1) your receipt of my written request for cancellation;
(2) cancellation under the insurance certificate or policy;
(3) payment in full of my loan; and
(4) my death.

**Optional language: The insurance will cancel on the date when the total past due premiums equal or exceed ((four)) times the first month premium.

10. MAILING OF NOTICES TO BORROWER

You or I may mail or deliver any notice to the address above. You or I may change the notice address by giving written notice. Your duty to give me notice will be satisfied when you mail it.

11. DUE ON SALE CLAUSE, NOTICE OF INTENT TO ACCELERATE, AND NOTICE OF ACCELERATION

If all or any interest in the Property is sold or transferred without your prior written consent, you may require immediate payment in full of all that I owe under this Loan Agreement. You will not exercise this option if prohibited by law.

If you exercise this option, you will give me notice that you are demanding immediate payment of all that I owe. This notice will give me a period of not less than 21 days from the date of the notice within which I must pay all that I owe under this Loan Agreement. If I fail to pay all that I owe before the end of this period, you may use any remedy allowed by the Loan Agreement.

12. NO WAIVER OF LENDER'S RIGHTS
If you don't enforce your rights every time, you can still enforce them later.

13. COLLECTION EXPENSES
If you require me to pay all that I owe at once, you will have the right to be paid back by me for all of your costs and expenses in enforcing this Loan Agreement to the extent not prohibited by Applicable law. These expenses include, for example, reasonable attorneys' fees.

14. JOINT LIABILITY
I understand that you may seek payment from only me without first looking to any other Borrower.

15. USURY SAVINGS CLAUSE
I do not have to pay interest or other amounts that are more than Applicable Law allows.

16. SAVINGS CLAUSE
If any part of this Loan Agreement is declared invalid, the rest of the Loan Agreement remains valid. If any part of this Loan Agreement conflicts with law, that law will control. The part of the Loan Agreement that conflicts with the law will be modified to comply with the law. The rest of the Loan Agreement remains valid.

17. PRIOR AGREEMENTS
This written Loan Agreement is the final agreement between you and me and may not be changed by prior, current, or future oral agreements between you and me. There are no oral agreements between you and me relating to this Loan Agreement. Any change to this agreement must be in writing. Both you and I have to sign written agreements.

18. THIS NOTE SECURED BY A DEED OF TRUST
In addition to the protections given to the Note Holder under this Note, a Security Document, dated _____, protects the Note Holder from possible losses that might result if I do not keep the promises that I make in this Note. The Security Document describes how and under what conditions I may be required to make immediate payment in full of any amounts that I owe under this Note.

19. APPLICATION OF LAW
Federal law and Texas law apply to this Loan Agreement.

20. COMPLAINTS AND INQUIRIES NOTICE
The (name of Lender or Note Holder) is licensed and examined under the laws of the State of Texas and by state law is subject to regulatory oversight by the Office of Consumer Credit Commissioner. Any consumer wishing to file a complaint against the (name of Lender or Note Holder) should contract the Office of Consumer Credit Commissioner through one of the means indicated below:

In Person or U.S. Mail: 2601 North Lamar Boulevard, Austin, Texas 78705-4207
Telephone No.: (800) 538-1579
Fax No.: (512) 936-7610
E-mail: consumer.complaints@occc.state.tx.us
Website: www.occc.state.tx.us

21. COLLATERAL
The collateral described above by the property address is subject to the lien of the Security Document.

Do not sign if there are blanks left to be completed in this document.

I must receive a copy of this document after I have signed it. I agree to the terms of this Loan Agreement.

_____(Seal)
-Borrower
_____(Seal)
-Borrower

_____(Seal)
-Borrower
_____(Seal)
-Borrower

(*Sign Original Only*)

(Option for witness signatures)

Figure: 7 TAC §1.1237(a)(8)

NOTICE OF CONFIDENTIALITY RIGHTS: I MAY REMOVE OR STRIKE MY SOCIAL SECURITY NUMBER OR MY DRIVER'S LICENSE NUMBER FROM THIS DOCUMENT BEFORE IT IS FILED IN THE PUBLIC RECORDS.

PURCHASE MONEY SECURITY DOCUMENT
(Second Lien)

DEFINITIONS

(A) "Loan Agreement" means the Note, Security Document, deed of trust, any other related document, or any combination of those documents, under which you have made a loan to me.

(B) "Security Document" means this document, which is dated _____, together with all Riders to this document.

(C) "I" or "me" means _____, the grantor under this Security Document and the person who signed the Note ("Borrower").

(D) "You" means _____, the Lender and any holder entitled to receive payments under the Note. Your address is _____. You are the beneficiary under this Security Document.

(E) "Trustee" is _____. Trustee's address is _____.

(F) "Note" means the Purchase Money Note signed by me and dated _____. The Note states that the amount I owe you is _____ Dollars (U.S. $_____) plus interest. I have promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than _____.

(G) The "Property" means the real estate that is described below under the heading "Transfer of Rights in the Property."

(H) "Riders" means all Riders to this Security Document that I execute. The Riders include *(check box as applicable):*

☐ Texas Purchase Money Condominium Rider
☐ Texas Purchase Money Planned Unit Development Rider
☐ Other: _____

(I) "Applicable Law" means all controlling applicable federal, Texas and state constitutions, statutes, regulations, administrative rules, local ordinances and judicial and administrative orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.

(J) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other charges that are imposed on me or the Property by a condominium association, homeowners association or similar organization.

(K) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. The term includes point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.

(L) "Escrow Items" means those items that are described in Section _____ of this Security Document.

(M) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than proceeds paid under my insurance) for: damage or destruction of the Property; condemnation or other taking of all or any part of the Property; conveyance instead of condemnation; or misrepresentations or omissions related to the value or condition of the Property.

(N) "Periodic Payment" means the regularly scheduled amount due for principal and interest under the Note plus any amounts under this Security Document.

(O) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. §2601 *et seq.*) and Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Document, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan Agreement does not qualify as a "federally related mortgage loan" under RESPA.

(P) "Successor in Interest of me" means any party that has taken title to the Property, whether or not that party has assumed my obligations under the Loan Agreement.

(Q) "Ground Rents" means amounts I owe if I rented the real property under the buildings covered by this Security Document. One of the arrangements usually takes the form of a long-term "ground lease."

SECURED AGREEMENT

To secure this Loan Agreement I give you a security interest in the Property including existing and future improvements, easements, fixtures, attachments, replacements and additions to the Property, insurance refunds, and proceeds.

TRANSFER OF RIGHTS IN THE PROPERTY

I give to the Trustee, in trust, with power of sale, the Property located in _____ County at *(Street Address) (City) (State) (Zip Code)* and further described as:

(Legal Description)

The security interest in the Property includes existing and future improvements, easements, fixtures, attachments, replacements and additions to the Property, insurance refunds, and proceeds.

This Security Document secures:

a. repayment of the Note, and all extensions and modifications of the Note; and
b. the completion of my promises and agreements under the Loan Agreement.

I promise that I own the Property and have the right to grant you an interest in it. I also promise that the Property is free of any lien, except liens that are publicly recorded. I promise that I will generally defend the title to the Property. I will be responsible for your losses that result from a conflicting ownership right in the Property. Any default under my agreements with you will be a default of this Security Document.

YOU AND I PROMISE:

PAYMENT OF LATE CHARGES AND PREPAYMENT

I will timely pay the principal, interest, and any other amounts due under the Loan Agreement. I will comply with the requirements of my escrow account under the Loan Agreement. I will make payments in U.S. currency. If any check is returned to you unpaid, you may select the form of future payments including:

a. cash;
b. money order;
c. certified check, bank check, treasurer's check or cashier's check drawn upon an institution whose deposits are federally insured; or
d. Electronic Funds Transfer.

I will make payments to the location as you direct. You will apply my payments against the Loan Agreement only when they are received at the designated location. You may change the location for payments if you give me notice.

You may return any partial payment that does not bring the account current. You may accept any payment or partial payment that does not bring the account current without losing your rights to refuse full or partial payments in the future. I will not use any offset or claim against you to relieve me from my duty to make payments under the Loan Agreement.

FUNDS FOR ESCROW ITEMS

I will pay you an amount ("Funds") for:

a. taxes and assessments and other items that can take priority over your security interest in the Property under the Loan Agreement;
b. leasehold payments or Ground Rents on the Property, if any; and
c. premiums for any insurance you require under the Loan Agreement.

These items are called "Escrow Items." At any time during the term of the Loan Agreement, you may require me to pay Community Association Dues, Fees, and Assessments, if any, as an Escrow Item.

I will promptly give you all notices of amounts to be paid. I will pay you the Funds for Escrow Items unless you, at any time, waive my duty to pay you. Any escrow waiver must be in writing. If you waive my duty to pay you the Funds, I will pay, at your direction, the amounts due for waived Escrow Items. If you require, I will give you receipts showing timely payment. My duty to make Escrow Item payments and to provide receipts is an independent promise in the Loan Agreement.

If you grant me an escrow waiver, you may require me to pay the waived Escrow Items. If I fail to directly pay the waived Escrow Items, you may use any right given to you in the Loan Agreement. You may pay waived Escrow Items and require me to repay you. You may cancel the waiver for Escrow Items at any time by a notice that complies with the Loan Agreement. If you cancel the waiver, I will pay you all Funds that are then required under this Section.

At any time you may collect and hold Funds in an amount:

a. to permit you to apply the Funds at the time specified under RESPA, and
b. not to exceed the maximum amount you may require under RESPA.

You will estimate the amount of Funds due on the basis of current data and reasonable estimates of future expenses for Escrow Items or otherwise, according to Applicable Law. The Funds will be held in an institution whose deposits are federally insured (including you, if your deposits are insured) or in any Federal Home Loan Bank.

You will timely pay Escrow Items as required by RESPA. You will not charge me a fee for maintaining or handling my escrow account. You are not required to pay me any interest on the amounts in my escrow account. You will give me an annual accounting of the Funds as required by RESPA. If there is a surplus in my escrow account, you will follow RESPA. If there is a shortage or deficiency, as defined by RESPA, you will notify me, and I will pay you

the amount necessary to make up the shortage or deficiency. I will repay the shortage or deficiency in no more than twelve monthly payments. You will promptly return to me any Funds after I paid the Loan Agreement in full.

CHARGES AND LIENS

I will timely pay all taxes, assessments, charges, and fines relating to the Property that can take priority over this Security Document. I also will timely pay leasehold payments or Ground Rents on the Property, if any, and Community Association Dues, Fees, and Assessments, if any. If these items are Escrow Items, I will pay them as required by the Loan Agreement. I will promptly satisfy any lien that has priority over this Security Document unless I:

a. agree in writing to pay the amount secured by the lien in a manner acceptable to you and only so long as I comply with my agreement;
b. contest the lien in good faith by stopping the enforcement of the lien through legal proceedings (this contest must be satisfactory to you); or
c. obtain an agreement from the holder of the lien that is satisfactory to you.

If you determine that any part of the Property is subject to a lien that can take priority over this Security Document, you may give me a notice identifying the lien. I will satisfy the lien or take one or more of the actions described above in this section within 10 days of the date of the notice.

PROPERTY INSURANCE

I will insure the current and future improvements to the Property against loss by fire, hazards included within the term "extended coverage," and any other hazards including earthquakes and floods, as you may require. I will keep this insurance in the amounts (including deductible levels) and for the periods that you require. You may change these insurance requirements during the term of the Loan Agreement. I have the right to choose an insurance carrier that is acceptable to you. You will exercise your right to disapprove reasonably.

I will pay any fee charged by the Federal Emergency Management Agency for the review of any flood zone determination. You may require me to pay either:

a. a one-time charge for flood zone determination, certification and tracking services; or
b. a one-time charge for flood zone determination and certification services; and subsequent charges each time re-mappings or similar changes occur that reasonably might affect the determination or certification.

If I do not keep any required insurance, you may obtain insurance at your option and at my expense. You are not required to purchase any type or amount of insurance. Any insurance you buy will always protect you, but may not protect me, my equity in the Property, my contents in the Property or protect me from certain hazards or liability. I understand that this insurance may cost significantly more than insurance I can purchase. I will owe you for the cost of any insurance that you buy under this section. Interest will be charged on this amount at the interest rate used by the Note. The interest will be charged from the date you made the payment. You will give me notice of the amounts I owe under this Section.

You may disapprove any insurance policy or renewal. Any insurance policy must include a standard mortgage clause, and must name you as mortgagee or a loss payee. I will give you all insurance premium receipts and renewal notices, if you request. If I obtain any optional insurance to cover damage or destruction of the Property, I will name you as a loss payee. In the event of loss, I will give notice to you and the insurance company. You may file a claim if I do not file one promptly. You will apply insurance proceeds to repair or restore the Property unless your interest will be reduced or it will be economically unreasonable to perform the work. You may hold the insurance proceeds until you have had an opportunity to inspect the work and you consider the work to be acceptable. The insurance proceeds may be given in a single payment or multiple payments as the work is completed. You will not pay any interest on the insurance proceeds. If I hire a public adjuster or other third party, I am responsible for the fee. It will not be paid from the insurance proceeds. The insurance proceeds will be applied to the amount I owe if your interest will be reduced or if the work will be economically unreasonable to perform. You will pay me any excess insurance proceeds. You will apply insurance proceeds in the order provided by the Loan Agreement.

If I abandon the Property you may file, negotiate, and settle any insurance claim. If the insurance company offers to settle a claim and I do not respond within thirty days to a notice from you, then you may settle the claim. The 30-day period will begin when the notice is given. If I abandon the Property, fail to respond to the offer of settlement, or you foreclose on the Property, I assign to you:

a. my rights to any insurance proceeds in an amount not greater than what I owe; and
b. any of my other rights under insurance policies covering the Property.

You may apply the proceeds to repair or restore the Property or to the amount that I owe.

PRESERVATION, MAINTENANCE, PROTECTION, AND INSPECTION OF THE PROPERTY

I will not destroy, damage or impair the Property, allow it to deteriorate, or commit waste. Whether or not I live in the Property, I will maintain it in order to prevent it from deteriorating or decreasing in value due to its condition. I will promptly repair the damage to the Property to avoid further deterioration or damage unless you and I agree in writing that it is economically unreasonable. I will be responsible for repairing or restoring the Property only if you release the insurance or condemnation proceeds for the damage to or the taking of the Property. You may release proceeds for the repairs and restoration in a single payment or in a series of payments as the work is completed. I still am obligated to complete repairs or restoration of the Property even if there are not enough proceeds to complete the work. If this Security Document secures a unit in a condominium or planned unit development, I will perform all of my obligations under the declaration or covenants creating or governing the condominium or planned unit development, and any other relevant document. You or your agent may inspect the Property. You may inspect the interior of the Property with reasonable cause. You will give me notice stating reasonable cause when or before the interior inspection occurs.

PROTECTION OF LENDER'S INTEREST IN THE PROPERTY AND RIGHTS UNDER THE SECURITY DOCUMENT

You may do whatever is reasonable to protect your interest in the Property, including protecting or assessing the value of the Property, and securing or repairing the Property. You may do this when:

a. I fail to perform the promises and agreements contained in the Loan Agreement;
b. a legal proceeding might significantly affect your interest in the Property or rights under the Loan Agreement (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may have priority over the Loan Agreement or to enforce laws or regulations); or
c. I abandon the Property.

In order to protect your interest in the Property, you may:

a. pay amounts that are secured by a lien on the Property which has or will have priority over the Loan Agreement;
b. appear in court; or
c. pay reasonable attorneys' fees.

You may enter the Property to secure it. To secure the Property, you may make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off. You have no duty to secure the Property. You are not liable for failing to take any action listed in this Section. Any amounts you pay under this Section will become my additional debt secured by the Loan Agreement. These amounts will earn interest at the rate specified in the Loan Agreement. The interest will begin on the date the amounts are paid. You will give me notice requesting payment of these amounts. If the Loan Agreement is on a leasehold, I will comply with the lease.

ASSIGNMENT OF MISCELLANEOUS PROCEEDS AND FORFEITURE

Any Miscellaneous Proceeds will be assigned and paid to you. If the Property is damaged, Miscellaneous Proceeds will be applied to restore or repair the Property. You will only do this if your interest in the Property will not be reduced and if the work will be economically reasonable to perform. You will have the right to hold Miscellaneous Proceeds until you inspect the Property to ensure the work has been completed to your satisfaction. You must make the inspection promptly. You may release proceeds for the work in a single payment or in multiple payments as the work is completed. You are not required to pay me any interest on the Miscellaneous Proceeds. The Miscellaneous Proceeds will be applied to the amount I owe if your interest in the Property will be reduced or the work will be economically unreasonable to perform. You will pay me any excess Miscellaneous Proceeds. You will apply Miscellaneous Proceeds in the order provided by the Loan Agreement.

You will apply all Miscellaneous Proceeds to the amount I owe in the event of a total taking, destruction, or loss in value of the Property. You will apply the Miscellaneous Proceeds even if all payments are current. You will give any excess Miscellaneous Proceeds to me.

A partial loss can include a taking, destruction, or loss in value. In the event of a partial loss, the Miscellaneous Proceeds will be applied in one of two ways:

a. If the fair market value of the Property immediately before the partial loss is less than the amount I owe immediately before the partial loss, then you will apply all Miscellaneous Proceeds to the amount I owe even if all payments are current.
b. If the fair market value of the Property immediately before the partial loss is equal to or greater than the amount I owe immediately before the partial loss, then you will apply Miscellaneous Proceeds to the amount I owe in the following manner:
    1. The amount of Miscellaneous Proceeds multiplied by the result of,
    2. The amount I owe immediately before the partial loss divided by the fair market value of the Property immediately before the partial loss.

You and I can agree otherwise in writing. You will give any excess Miscellaneous Proceeds to me.

If I abandon the Property, you may apply Miscellaneous Proceeds either to restore or repair the Property, or to the amount I owe.

Damage to the Property caused by a third party may result in a civil proceeding. If you give me notice that the third party offers to settle a claim for damages to the Property and I fail to respond to you within thirty days, you may accept the offer and apply the Miscellaneous Proceeds either to restore or repair the Property or to the amount I owe. If the proceeding results in an award of damages, you will apply the Miscellaneous Proceeds according to this Section.

FORBEARANCE NOT A WAIVER

My successors and I will not be released from liability if you extend the time for payment or modify the payment schedule. If I pay late, you will not have to sue me or my successor to require timely future payments. You may refuse to extend time for payment or modify this Loan Agreement even if I request it. If you do not enforce your rights every time, you may enforce them later.

JOINT AND SEVERAL LIABILITY, SECURITY DOCUMENT EXECUTION, SUCCESSORS OBLIGATED

I understand that you may seek payment from me without first looking to any other person who signed the Note. Any person who signs this Security Document, but not the Note:

a. has no duty to pay the sums secured by this Security Document;
b. is not a surety or guarantor; and,
c. only grants the person's interest in the Property under the terms of this Security Document.

The lien against the Property is a voluntary lien and is a written agreement that shows the consent of each owner. You and I may extend, modify, or make any arrangements with respect to the terms of the Loan Agreement. Upon your approval, my successor who assumes my duties in writing will receive all of my rights and benefits under the Loan Agreement. I still will be responsible under the Loan Agreement unless you release me in writing. The Loan Agreement will extend to your assigns or successors.

EXTENSION OF CREDIT CHARGES

If an Applicable Law that sets a maximum charge is finally interpreted so that the interest, loan charges, or fees collected or to be collected with the Loan Agreement exceed the permitted amount, then you will:

a. reduce the amount to the amount permitted; or
b. refund the excessive amount to me.

You may choose to apply this refund to the amount I owe or pay it directly to me. If you apply the refund to the amount I owe, the refund will be treated as a partial prepayment.

If I default, you will be able to charge me reasonable fees paid to an attorney who is not your employee to protect your interest in the Property.

DELIVERY OF NOTICES

Under the Loan Agreement, you and I will give notices to each other in writing. Any notice under the Loan Agreement will be considered given to me when it is mailed by first class mail or when actually delivered to me at my address if given by another means. You will give notice to the Property address unless I provide you a different address. I will notify you promptly of any change of address. I will comply with any reasonable procedure for giving a change of address that you provide. There will only be one address for notice under the Loan Agreement. Notice to me will be considered notice to all persons who are obligated under the Loan Agreement unless Applicable Law requires a separate notice. I may give you notice by delivering or mailing it by first class mail to the address provided by you, unless you require a different procedure. You, however, will not receive notice under the Loan Agreement until you actually receive it. Legal requirements governing notices subject to the Loan Agreement will prevail over conditions in the Loan Agreement.

GOVERNING LAW AND SEVERABILITY

The Loan Agreement will be governed by Texas and federal law. If any provision in the Loan Agreement conflicts with any legal requirement, all non-conflicting provisions will remain effective.

RULES OF CONSTRUCTION

As used in the Loan Agreement:

a. words in the singular will mean and include the plural and vice versa; and
b. the word "may" gives sole discretion without imposing any duty to take action.

LOAN AGREEMENT COPIES

At the time the Loan Agreement is made, you will give me copies of all documents I sign.

TRANSFER OF INTEREST IN PROPERTY

"Interest in the Property" means any legal or beneficial interest. This term includes those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement (the intent of which is the transfer of title by me at a future date to a purchaser). If any part of the Property is sold or transferred without your prior written permission, you may require immediate payment of all I owe. You will not exercise this option if disallowed by Applicable Law. If you accelerate, you will give me notice. The notice of acceleration will allow me at least 21 days from the date the notice is given to pay all I owe. If I fail to timely pay all I owe, you may pursue any remedy allowed by the Loan Agreement without further notice or demand.

BORROWER'S RIGHT TO REINSTATE AFTER ACCELERATION

I have the right to stop you from enforcing the Loan Agreement any time before the earliest of:

a. 5 days before sale of the Property under any power of sale included in the Loan Agreement;
b. the day required by Applicable Law for the termination of my right to reinstate; or
c. the entry of a judgment enforcing the Loan Agreement.

I can stop the enforcement of the Loan Agreement and reinstate the Loan Agreement if all the following conditions are met:

a. You are paid what I owe under the Loan Agreement as if no acceleration had occurred;
b. I cure any default of any promise or agreement;
c. You are paid all expenses allowed by Applicable Law, including reasonable attorneys' fees and other fees incurred for the purpose of protecting your interest in the Property and rights under the Loan Agreement;
d. I comply with any reasonable requirement to assure you that your interest in the Property will remain intact; and
e. I comply with any reasonable requirement to assure you that my ability to pay what I owe will remain intact.

You may require me to pay for the reinstatement in one or more of the following forms:

a. cash;
b. money order;
c. certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are federally insured; or

d. Electronic Funds Transfer.

Upon reinstatement, the Loan Agreement will remain effective as if no acceleration had occurred. However, this right to reinstate will not apply if I sell or transfer any interest in the Property without your permission.

SALE OF NOTE, CHANGE OF LOAN SERVICER, NOTICE OF GRIEVANCE, LENDER'S RIGHT TO COMPLY

A full or partial interest in the Loan Agreement can be sold one or more times without prior notice to me. The sale may result in a change of the company servicing or handling the Loan Agreement. The company servicing or handling the Loan Agreement will collect my monthly payment and will comply with other servicing conditions required by the Loan Agreement or Applicable Law. In some cases, the company servicing or handling the Loan Agreement may change even if the Loan Agreement is not sold. If the company servicing or handling the Loan Agreement is changed, I will be given written notice of the change. The notice will state the name and address of the new company, the address to which my payments should be made, and any other information required by RESPA.

Any notice of acceleration and opportunity to cure under the Loan Agreement will satisfy the notice and opportunity to address the alleged violation provisions of this Section.

No agreement between you and me or any third party will limit your ability to comply with your duties under the Loan Agreement and the Applicable Law.

You and I are limiting all agreements so that all current or future interest or fees in connection with this Loan Agreement will not be greater than the highest amount allowed by Applicable Law.

You and I intend to conform the Loan Agreement to the provisions of Applicable Law. If any part of the Loan Agreement is in conflict with the Applicable Law, then that part will be corrected or removed. This correction will be automatic and will not require any amendment or new document. Your right to correct any violation will survive my paying off the Loan Agreement. My right to correct will override any conflicting provision of the Loan Agreement.

Your right-to-comply as provided in this Section will survive the payoff of the Loan Agreement. The provisions of this Section will supersede any inconsistent provision of the Loan Agreement.

HAZARDOUS SUBSTANCES

Hazardous Substances

a. "Hazardous Substances" means those substances defined as toxic or hazardous substances, pollutants, or wastes by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials;
b. "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection;
c. "Environmental Cleanup" includes any response action, remedial action, or removal action, as defined in Environmental Law; and
d. "Environmental Condition" means a condition that can cause, contribute to, or otherwise trigger an Environmental Cleanup.

I will not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances, or threaten to release any Hazardous Substances, on or in the Property. I will not do, or allow anyone else to do, anything affecting the Property:

a. that is in violation of any Environmental Law;
b. that creates an Environmental Condition; or,
c. that, due to the presence, use, or release of a Hazardous Substance, creates a condition that adversely affects the value of the Property.

The presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and for the maintenance of the Property are allowed. This includes Hazardous Substances found in consumer products.

I will promptly give you written notice of:

a. any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which I have actual knowledge;
b. any Environmental Condition, including any spilling, leaking, discharge, release or threat of release of any Hazardous Substance; and
c. any condition caused by the presence, use or release of a Hazardous Substance which adversely affects the value of the Property.

If I learn that, or am notified by any governmental or regulatory authority, or any private party that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, I promptly will take all necessary remedial actions in accordance with Environmental Law. You will have no obligation for an Environmental Cleanup.

ACCELERATION AND REMEDIES

You will give me notice prior to acceleration if I am in default under the Loan Agreement. The notice will specify:

a. the default;
b. the action required to cure the default;
c. a date, not less than 21 days from the date you give me notice, to cure the default; and
d. that my failure to cure the default on or before the specified date will result in acceleration of all that I owe under the Loan Agreement and sale of the Property.

You will inform me of my right to reinstate after acceleration. If the default is not cured before the specified date, you have the option to require immediate payment in full of all I owe. If you are not paid all I owe, you may sell the Property or seek other remedies allowed by Applicable Law without further notice. You may collect your reasonable expenses incurred in seeking the remedies provided in this Section. These expenses may include court costs, attorneys' fees, and costs of title search.

I understand the power of sale is not a confession of judgment or a power of attorney to confess judgment or an appearance by me in a judicial proceeding. If the Property is sold under this section I or my successors will immediately give possession of the Property to the purchaser. If I do not, I or anyone residing on the Property may be removed by writ of possession.

ASSIGNMENT OF RENTS, APPOINTMENT OF RECEIVER, LENDER IN POSSESSION

As additional security, I assign to you the rents of the Property, provided that I have the right, prior to acceleration or abandonment of the Property, to collect and retain the rents as they become due.

Upon acceleration or abandonment, you, by agent or by court-appointed receiver, will be entitled to enter, take possession, manage the Property, and collect due and past due rents. All rents you or the court-appointed receiver collect will be applied first to payment of the costs of management of the Property and collection of rents, including receiver's fees, premiums on receiver's bonds, and reasonable attorneys' fees, and then to the sums secured by this Security Document. You and the receiver will be liable to account only for rents received.

You have a fully enforceable lien on the Property. Your remedies for my default include an efficient means of foreclosure under the law. You and the Trustee have all powers to conduct a foreclosure. If you choose to use the power of sale, you will give me notice of the time, place and terms of the sale by posting and filing notice at least 21 days before the sale as provided by law. You will give me notice by mail as required by law. Failure to cure default on or before the date in the notice may result in acceleration of the amount that I owe under this Loan Agreement. The notice will inform me of my right to reinstate after acceleration and assert in court that I am not in default or any other defense to acceleration or sale. If I do not cure the default on or before the date in the notice, you, at your option, may declare all that I owe under this Loan Agreement to be immediately due and payable and may invoke the power of sale and any other remedies permitted by Applicable Law. The sale will be conducted at a public place. The sale will be held:

a. on the first Tuesday of a month;
b. at a time stated in the notice or no later than 3 hours after the time; and
c. between 10:00 a.m. and 4:00 p.m.

I allow the Trustee to sell the Property to the highest bidder for cash in one or more pieces and in any order the Trustee determines. You may purchase the Property at any sale.

Trustee will give a Trustee's deed to the foreclosure sale purchaser. A Trustee's deed will convey:

a. good title to the Property; and
b. title with promises of general warranty from me.

I will defend the purchaser's title to the Property against all claims and demands. The description of facts contained in the Trustee's deed will be sufficient to legally prove the truth of the statements made in the deed. Trustee will apply the proceeds of the sale in the following order:

a. to all expenses of the sale, including court costs and reasonable Trustee's and attorneys' fees;
b. what I owe; and
c. any excess to the person or persons legally entitled to it.

If the Property is sold through a foreclosure sale governed by this Section, I or any person in possession of the Property through me, will give up possession of the Property without delay. A person who does not give up possession is a holdover and may be removed by a court order.

RELEASE

Upon payment of all that I owe under this Loan Agreement, you will cancel and return the Note to me and give me, in recordable form, a release of lien securing the Loan Agreement or a copy of any endorsement of the Note and assignment of the lien to a lender that is refinancing the Loan Agreement. If you cannot, you will provide me with a discharge and release of all obligation under the loan. I will pay only the cost of recording the release of lien.

LENDER'S RIGHTS AND BORROWER'S RESPONSIBILITIES

You are entitled to all rights, superior title, liens and equities owned or claimed by any grantor or holder of any liens and debts due before the signing of the Loan Agreement. You may acquire these rights by assignment or the holder may release them upon payment.

Each person who signs the Security Document is responsible for each promise and duty in the Security Document.

Unless prohibited by Applicable Law, this Section will not:

a. impair in any way the Loan Agreement or your right to collect all that I owe under the Loan Agreement;
b. affect your right to any promise or condition of the Loan Agreement.

TRUSTEES AND TRUSTEE LIABILITY

One or more Trustees acting alone or together may exercise or perform all rights, remedies and duties of the Trustee under the Loan Agreement. You may remove or change any Trustee (e.g., add one or more Trustees or appoint a successor Trustee to any Trustee). This removal or change of Trustee must be in writing and may be:

a. at your option;
b. with or without cause; and
c. by power of attorney or otherwise.

The substitute, additional or successor Trustee will receive, the title, rights, remedies, powers and duties under the Loan Agreement and Applicable Law.

Trustee may rely, upon any notice, request, consent, demand, statement or other document reasonably believed by Trustee to be valid. Trustee will not be liable for any act or omission unless the act or omission is willful.

DEFAULT

Any default of my agreements with you will be a default of this Security Document.

SUBROGATION

If I ask, you will use proceeds from the Loan Agreement to pay off all valid outstanding liens against the Property. You will then own all rights, superior titles, liens, and interests owned or claimed by any owner or holder of an outstanding lien or debt. You own these things whether the lien or debt is transferred to you or whether it is released by the holder upon payment.

PARTIAL INVALIDITY

If any portion of the sums secured by this Security Document cannot be lawfully secured, payments minus those sums will be applied first to the portions not secured. If any charge provided for in this Loan Agreement, separately or together with other charges that are considered part of this Loan Agreement, violates Applicable Law, the charge is reduced to the extent necessary to eliminate the violation. At your option, you will refund the amount of interest or other charges paid to you in excess of the amount permitted by Applicable Law to reduce the principal of the debt or apply it to reduce the principal of the debt.

REQUEST FOR NOTICE OF DEFAULT
AND FORECLOSURE UNDER SUPERIOR
MORTGAGES OR SECURITY DOCUMENTS

You and I request that the holder of any mortgage, security document or other claim with a lien that has priority over this Security Document give you Notice, at your address listed on page 1 of this Security Document, of any default under the superior claim and of any sale or other foreclosure action.

BY SIGNING BELOW, I accept and agree to the terms and promises contained in the Loan Agreement and in any Rider I sign which is recorded with it. (DO NOT SIGN IF THERE ARE BLANKS LEFT TO BE COMPLETED IN THIS DOCUMENT. I MUST RECEIVE A COPY OF ANY DOCUMENT I SIGN.)

_____ _____(seal)
-Borrower

Printed Name:_____
(Please Complete)

_____(seal)
-Borrower

_____

Printed Name:_____
(Please Complete)

_____(seal)
-Borrower

_____(seal)
-Borrower

STATE OF TEXAS
County of _____

Before me, a notary public, on this day personally appeared _____, known to me (or proved to me on the oath of _____ or through _____ _____) to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that _____ executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this _____ day of _____, 20____.

(Seal)

_____
Notary Public

Figure: 7 TAC §1.1247(a)(12)

NOTICE OF CONFIDENTIALITY RIGHTS: I MAY REMOVE OR STRIKE MY SOCIAL SECURITY NUMBER OR MY DRIVER'S LICENSE NUMBER FROM THIS DOCUMENT BEFORE IT IS FILED IN THE PUBLIC RECORDS.

TEXAS HOME IMPROVEMENT MECHANIC'S LIEN CONTRACT FOR IMPROVEMENT AND POWER OF SALE

(Second Lien)

DATE_____

ACCOUNT/CONTRACT NO. _____

DEFINITIONS

(A) "Owner" means (name of owner), whose address is (address of owner, including county). If Owner and Maker are not the same person, the word "Owner" includes Maker. "I" or "me" means the Owner.

(B) "Contractor" means (name of contractor), whose address is (address of contractor, including county) and includes those to whom the Contractor has assigned or transferred Contractor's rights and remedies. "You" or "your" means the Contractor.

(C) "Lender" means (name of lender), whose address is (address of lender, including county) and includes those to whom the Lender has assigned or transferred Lender's rights and remedies.

(D) "Trustee" means (name of Trustee), whose address is (address of Trustee, including county).

(E) "Property" means the Property at (list address of the property), whose legal description is (list legal description of the Property).

(F) "Work" means the construction project as agreed to in writing between the Owner and Contractor.

(G) "Completion Date" means (date on which the Work will be completed).

(H) "Contract" means this Texas Home Improvement Mechanic's Lien Contract for Improvement and Power of Sale.

CONSTRUCTION OF IMPROVEMENTS

You agree to furnish and pay for all labor and materials needed to complete the Work within _____ days from the date of this Contract. The Work will be performed on the Property in a good and workmanlike manner.

CONTRACT PRICE

I agree to pay, or cause to be paid, to you, or to your order, the sum of _____Dollars (U.S. $_____) when the Work is completed.

TRANSFER OF LIEN

You transfer to Lender all of your rights and interests in this Contract.

COMPLETION BY CONTRACTOR, BUT NOT LENDER

You will complete the Work by the Completion Date. Lender is not responsible for completing the Work. Lender is not a guarantor of your performance. You will indemnify and hold Lender harmless against all claims related to the Work.

PARTIAL LIEN

If you do not complete the Work by the Completion Date in a good and workmanlike manner, then Lender will have a valid lien for the contract price, less the amount reasonably necessary to complete the Work. As an alternative, Lender may choose to complete the Work and the lien will be valid for the contract price.

CHANGES AND EXTRAS

All labor or material furnished outside of this Contract must be agreed upon in writing or it will be considered as performed under the original Contract and you will receive no extra money.

RECEIPTS AND RELEASES

If I ask, you will give me valid receipts and releases for the Work from any subcontractor, worker, and supplier.

NO WORK COMMENCED

This Contract is executed, acknowledged, and delivered before any labor has been performed and any material has been furnished for the Work.

TRUSTEE'S DUTIES

If you ask Trustee to foreclose this lien, Trustee will:

1. give notice of the foreclosure sale as required by the Texas Property Code;
2. sell and grant all or part of the Property "AS IS":
   a. to the highest bidder for cash;
   b. subject to prior liens and exceptions to conveyance and warranty; and,
   c. without representation or warranty;
3. pay the proceeds of the sale, in this order:
   a. expenses of foreclosure, including Trustee's reasonable fee;
   b. the unpaid amount of principal, interest, attorney's fees, and other charges due you;
   c. any amount required by law to be paid; and
   d. any balance to me; and
4. be indemnified by you for all costs, expenses, and liabilities incurred by Trustee in performance of Trustee's duties under this Contract.

NOTICE

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

Note: The following notice complies with Texas Property Code §41.007. In this notice, the terms "you" and "your" refer to the Owner.

IMPORTANT NOTICE: YOU AND YOUR CONTRACTOR ARE RESPONSIBLE FOR MEETING THE TERMS AND CONDITIONS OF THIS CONTRACT. IF YOU SIGN THIS CONTRACT AND YOU FAIL TO MEET THE TERMS AND CONDITIONS OF THIS CONTRACT, YOU MAY LOSE YOUR LEGAL OWNERSHIP RIGHTS IN YOUR HOME. KNOW YOUR RIGHTS AND DUTIES UNDER THE LAW.

_____
Owner

_____
Owner

_____
Contractor

STATE OF TEXAS
COUNTY OF _____

Sworn to and subscribed before me on the _____ day of _____, 20 ____ by __(name of owner)_____.

_____
Notary Public

(Seal)

STATE OF TEXAS
COUNTY OF _____

Sworn to and subscribed before me on the _____ day of _____, 20 ____ by __(name of contractor)_____.

_____
Notary Public

(Seal)

ASSIGNMENT

This lien is transferred and assigned to __(third party lender)_____.

_____
Contractor

STATE OF TEXAS
COUNTY OF _____

Sworn to and subscribed before me on the _____ day of _____, 20 ____ by __(name of contractor)_____.

_____
Notary Public

(Seal)

Figure: 7 TAC §1.1247(a)(13)

Mechanic's Lien Note
(Second Lien- Home Improvement)

ACCOUNT/CONTRACT NO. _____
CREDITOR/LENDER _____
ADDRESS (include county) _____
_____

DATE OF NOTE _____
BORROWER _____
ADDRESS (include county) _____
_____

PROPERTY ADDRESS: [include county] _____

A word like "I" or "me" means each person who signs as a Borrower. A word like "you" or "your" means the Lender or "Note Holder."

The Lender is _____. The Lender may sell or transfer this Note. The Lender or anyone who is entitled to receive payments under this Note is called the "Note Holder." You will tell me in writing who is to receive my payments.

Principal Amount: _____

Terms of Payment (principal and interest): _____

ANNUAL PERCENTAGE RATE The cost of my credit as a yearly rate.	**FINANCE CHARGE** The dollar amount the credit will cost me.	**Amount Financed** The amount of credit provided to me or on my behalf.	**Total of Payments** The amount I will have paid after I have made all payments as scheduled.
%	$	$	$

My Payment Schedule will be:

Number of Payments	Amount of Payments	When Payments Are Due

Security: You will have a security interest in the following described property: (property description)_____

Late Charge: If any part of a payment is unpaid for 10 days after it is due, I may be charged 5% of the amount of payment.

Prepayment: (Scheduled Installment Earnings Method): If I pay off early, I may be entitled to a refund of part of the Finance Charge and I will not have to pay a penalty.

(True Daily Earnings Method): If I pay off early, I will not have to pay a penalty.

Additional Information: See the contract documents for any additional information about nonpayment, default, any required repayment in full before the scheduled date, and prepayment refunds and penalties.

~~[ITEMIZATION OF AMOUNT FINANCED~~

~~1. Amount Financed (2+3+4) $_____~~

~~2. Amount given to me directly $_____~~

~~3. Amount paid on my account (Net Balance Prior Account) $_____~~

~~4. Amount paid to others on my behalf (A+B+C+D+E) $_____~~

~~A. Cost of hazard/property insurance paid to insurance company $_____~~

~~B. Cost of optional credit insurance paid to insurance company or companies~~

~~Life $_____~~

~~Disability $_____~~

~~Total B: $_____~~

~~C. Title Insurance paid to insurance Company $_____~~

~~D. Official fees paid to government Agencies $_____~~

~~E. Payable to: _____ $_____~~

~~Payable to: _____ $_____~~

~~Payable to: _____ $_____~~

~~Total E: $_____~~

~~5. Prepaid Finance Charge $_____]~~

SECURITY FOR PAYMENT

Liens created in the Contract secure this Note.

DEFINITIONS

(A) "Owner" means (name of owner), whose address is (address of owner, including county). If Owner and Maker are not the same person, the word "Owner" includes Maker.

(B) "Contractor" means (name of contractor), whose address is (address of contractor, including county) and includes those to whom the Contractor has assigned or transferred Contractor's rights and remedies.

(C) "Contract" means the Texas Home Improvement Mechanic's Lien Contract for Improvement and Power of Sale dated _____ between Contractor and Owner.

(D) "Property" means the Property at (list address of the property), whose legal description is (list legal description of the Property).

(E) "Note" means the Texas Home Improvement Mechanic's Lien Note signed by me and dated_____ and includes all amounts secured by this Contract. The Note states that the amount I owe you is _____ Dollars (U.S. $_____) plus interest. I have promised to pay this debt in regular periodic payments and to pay the debt in full not later than _____.

BORROWER'S PROMISE TO PAY

Scheduled Installment Earnings Method:
I promise to pay the Total of Payments to the order of you. [The "principal" or "cash advance" is $_____. This amount plus interest must be paid by _____ (maturity date).] I will make payments to you at the address above or as you direct. I will make the payments on the dates and in the amounts shown in the Payment Schedule.

True Daily Earnings Method:
I promise to pay the cash advance plus the accrued interest to the order of you. (The "principal" or "cash advance" is $_____. This amount plus interest must be paid by _____ (maturity date).) I will make payments to you at the address above or as you direct. I will make the payments on the dates and in the amounts shown in the Payment Schedule.

LATE CHARGE

If I don't pay all of a payment within 10 days after it is due, you can charge me a late charge. The late charge will be 5% of the scheduled payment.

AFTER MATURITY INTEREST

If I don't pay all I owe when the final payment becomes due, I will pay interest on the amount that is still unpaid. That interest will be the higher of the rate of 18% per year or the maximum rate allowed by law. That interest will begin the day after the final payment becomes due.

PREPAYMENT

Scheduled Installment Earnings Method: I can make a whole payment early. Unless you agree otherwise in writing, I may not skip payments. If I make a payment early, my next payment will still be due as scheduled.

True Daily Earnings Method: I can make any payment early. Unless you agree otherwise in writing, I may not skip payments. If I make a payment early, my next payment will still be due as scheduled.

FINANCE CHARGE AND REFUND METHOD

For contracts using Scheduled Installment Earnings Method - Section 342.301 rate loans: The annual rate of interest is ___%. This interest rate may not be the same as the Annual Percentage Rate. You figure the Finance Charge by applying the scheduled installment earnings method as defined by the Texas Finance Code to the unpaid cash advance. The unpaid cash advance does not include the administrative fee, late charges, and returned check charges. If I prepay my loan in full before the final payment is due, I may save a portion of the Finance Charge. I will not be paid a refund if the refund would be less than $1.00. You base the Finance Charge and Total of Payments as if I will make each payment on the day it is due. My final payment may be larger or smaller than my regular payment.

I have paid any points, administrative fee, or loan origination fee as prepaid interest. The administrative fee is earned at the time the loan is made and is not subject to refund. If I pay the loan in full early, you will refund any prepaid interest that would make the interest rate exceed the maximum rate allowed by law. Any refund will be credited to my account.

Any payment(s) that you accept after the final payment becomes due is not a renewal or extension of this loan agreement unless you agree in writing.

You will apply my payments in the following order: (1) interest that is due, (2) principal, (3) any other charges I owe.

For contracts using Scheduled Installment Earnings Method with prepayments option - Section 342.301 rate loans: The annual rate of interest is ___%. This interest rate may not be the same as the Annual Percentage Rate. You figure the Finance Charge by applying the scheduled installment earnings method as defined by the Texas Finance Code to the unpaid cash advance. I may make a full or partial payment early without paying a penalty. My early payments will reduce the principal that I owe. The unpaid cash advance does not include the administrative fee, late charges, or return check charges. If I make an early partial payment, the due date and amount of my next payment will not change unless you agree in writing.

I have paid any points, administrative fee, or loan origination fee as prepaid interest. The administrative fee is earned at the time the loan is made and is not subject to refund. If I pay the loan in full early, you will refund any prepaid interest that would make the interest rate exceed the maximum rate allowed by law. Any refund will be credited to my account.

Any payment(s) that you accept after the final payment becomes due is not a renewal or extension of this loan agreement unless you agree in writing.

You will apply my scheduled payments in the following order: (1) interest that is due, (2) principal, (3) any other charges I owe.

For contracts using True Daily Earnings Method - Section 342.301 rate loans: The annual rate of interest is ___%. This interest rate may not be the same as the Annual Percentage Rate. You figure the Finance Charge by applying the true daily earnings method as defined by the Texas Finance Code to the unpaid portion of the cash advance. The unpaid cash advance does not include the administrative fee, late charges, and return check charges. You base the Finance Charge and Total of Payments as if I will make each payment on the day it is due. You will apply payments on the date they are received. This may result in a different Finance Charge or Total of Payments. My final payment may be larger or smaller than my regular payment.

I have paid any points, administrative fee, or loan origination fee as prepaid interest. The administrative fee is earned at the time the loan is made and is not subject to refund. If I pay the loan in full early, you will refund any prepaid interest that would make the interest rate exceed the maximum rate allowed by law. Any refund will be credited to my account.

Any payment(s) that you accept after the final payment becomes due is not a renewal or extension of this loan agreement unless you agree in writing.

You will apply my payments as follows: (1) interest that is due, (2) principal, (3) any charges I owe.

DEFERMENT

If I ask for more time to make any payment and you agree, I will pay more interest to extend the payment. The extra interest will be figured under the Finance Commission rules.

DISHONORED CHECK FEE

I agree to pay you a fee of up to $30 for a returned check. You may add the fee to the amount I owe or collect it separately.

DEFAULT

I will be in default if:

a. I do not timely make a payment to the person or place you direct;
b. I break any promise I made in the loan agreement;
c. I allow a lien to be entered against the Property unless you agree in writing;
d. I sell, lease, or dispose of the Property;
e. I use the Property for an illegal purpose; or
f. you believe in good faith I am not going to keep any of my promises.

If there is more than one Borrower, each Borrower agrees to keep all of the promises in the loan agreement.

If I am in default, you will send me a written notice telling me how to cure the default. You must give me at least 21 days after the date on which the notice is mailed or delivered to cure the default.

PROPERTY INSURANCE

PROPERTY INSURANCE: I must keep the Property insured against damage or loss in at least the amount I owe. I may obtain property insurance from anyone I want or provide proof of insurance I already have. The insurer must be authorized to do business in Texas.

☐ **If this box is checked, the premium is not fixed or approved by the Texas Department of Insurance.**

I agree to give you proof of property insurance. I must name you as the person to be paid under the policy in the event of damage or loss. If I obtain the insurance through you, I will pay the premium shown below. However, I have 5 days from the date of this loan to furnish like (equivalent) coverage from another source. If I fail to meet any of these requirements, you may obtain collateral protection insurance at my expense. You will insure the Property for the lesser amount of the value of the Property or the amount of the debt. If you obtain collateral protection insurance, you will mail notice to my last known address.

☐ Property Insurance $_____ Term _____

CREDIT INSURANCE

Credit insurance is optional. Credit life insurance and credit disability insurance are not required to obtain credit. This insurance will not be provided unless I sign and agree to pay the extra cost. I will look to the insurance policy or certificate for the terms and description of benefits, exclusions, and premium rates.

Single Premium

Credit Life, one borrower $_____ Credit Life, both borrowers $_____ Term _____

Credit Disability, one borrower $_____ Credit Disability, both borrowers $_____ Term _____

☐ **If this box is marked, the premium for the insurance coverage(s) above is not fixed or approved by the Texas Insurance Commissioner.**

I want the insurance above.

Borrower's Signature: _____ Date: _____

Co-Borrower's Signature: _____ Date: _____

Monthly Premium

If I want credit life or credit disability insurance, I must sign below and pay the monthly premium. The monthly premium will be added to the monthly loan payment. If I do not pay the monthly premium, I will not have the insurance coverage.

I request the following insurance:

_____

Borrower's Signature Date

Premium Due with the First Month's Loan Payment	First Year Premium	Insurance Type:
$	$	
$	$	
$	$	

_____

Co-Borrower's Signature Date

The first year's premiums are based on an assumption that monthly loan payments are timely made. All unpaid premiums are due at the time of the final payment. The insurance may be canceled if I do not pay the premiums. ** I may cancel any of the optional insurance products offered at any time. The optional insurance will be canceled upon the earliest of the following occurrences:

(1) your receipt of my written request for cancellation;
(2) cancellation under the insurance certificate or policy;
(3) payment in full of my loan; and
(4) my death.

**Optional language: The insurance will cancel on the date when the total past due premiums equal or exceed ((four)) times the first month premium.

MAILING OF NOTICES TO BORROWER

You or I may mail or deliver any notice to the address above. You or I may change the notice address by giving written notice. Your duty to give me notice will be satisfied when you mail it.

STATEMENT OF TRUTHFUL INFORMATION

I promise that all information I gave you is true.

DUE ON SALE CLAUSE, NOTICE OF INTENT TO ACCELERATE, AND NOTICE OF ACCELERATION

If all or any interest in the Property is sold or transferred without your prior written consent, you may require immediate payment in full of all that I owe under this loan agreement. You will not exercise this option if prohibited by law.

If you exercise this option, you will give me notice that you are demanding payment of all that I owe. This notice will give me a period of not less than 21 days from the date of the notice within which I must pay all that I owe under this loan agreement. If I fail to pay all that I owe before the end of this period, you may use any remedy allowed by the loan agreement.

NO WAIVER OF LENDER'S RIGHTS

If you don't enforce your rights every time, you can still enforce them later.

COLLECTION EXPENSES

If you require me to pay all that I owe at once, you will have the right to be paid back by me for all of your costs and expenses in enforcing this loan agreement to the extent not prohibited by applicable law. These expenses include, for example, reasonable attorneys' fees.

JOINT LIABILITY

I understand that you may seek payment from only me without first looking to any other Borrower.

USURY SAVINGS CLAUSE

I do not have to pay interest or other amounts that are more than applicable law allows.

SAVINGS CLAUSE

If any part of this loan agreement is declared invalid, the rest of the loan agreement remains valid. If any part of this loan agreement conflicts with any law, that law will control. The part of the loan agreement that conflicts with the law will be modified to comply with the law. The rest of the loan agreement remains valid.

PRIOR AGREEMENTS

This written loan agreement is the final agreement between you and me. It may not be changed by prior, current, or future oral agreements and there are none. Any change to this loan agreement must be in writing. Both you and I have to sign written agreements.

APPLICATION OF LAW

Federal law and Texas law apply to this loan agreement.

COMPLAINTS AND INQUIRIES NOTICE

The (name of lender or note holder) is licensed and examined under the laws of the State of Texas and by state law is subject to regulatory oversight by the Office of Consumer Credit Commissioner. Any consumer wishing to file a complaint against the (name of lender or note holder) should contact the Office of Consumer Credit Commissioner through one of the means indicated below:

Office of Consumer Credit Commissioner
2601 North Lamar Boulevard, Austin, Texas 78705-4207
www.occc.state.tx.us
(512) 936-7600 – (800) 538-1579

COLLATERAL

The Property is subject to the Contract lien.

I am responsible for all obligations in this Note.

NOTICE

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF, RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

Do not sign if there are blanks left to be completed in this document.

I must receive a copy of this document after I have signed it. I agree to the terms of this loan agreement.

_____(Seal)
-Borrower

_____(Seal)
-Borrower

_____(Seal)
-Borrower

_____(Seal)
-Borrower

[Sign Original Only]

Figure: 7 TAC §1.1247(a)(15)

Mechanic's Lien Note
(Second Lien- Home Improvement)

ACCOUNT/CONTRACT NO. _____
CREDITOR/LENDER_____
ADDRESS (include county)_____
_____

DATE OF NOTE _____
BORROWER_____
ADDRESS (include county)_____
_____

PROPERTY ADDRESS: [include county] _____

A word like "I" or "me" means each person who signs as a Borrower. A word like "you" or "your" means the Lender or "Note Holder."

The Lender is _____. The Lender may sell or transfer this Note. The Lender or anyone who is entitled to receive payments under this Note is called the "Note Holder." You will tell me in writing who is to receive my payments.

Principal Amount:_____

Terms of Payment (principal and interest): _____

ANNUAL PERCENTAGE RATE The cost of my credit as a yearly rate.	**FINANCE CHARGE** The dollar amount the credit will cost me.	**Amount Financed** The amount of credit provided to me or on my behalf.	**Total of Payments** The amount I will have paid after I have made all payments as scheduled.
%	$	$	$

My Payment Schedule will be:

Number of Payments	Amount of Payments	When Payments Are Due

Security: You will have a security interest in the following described property: (property description)_____
Late Charge: If any part of a payment is unpaid for 10 days after it is due, I may be charged 5% of the amount of payment.
Prepayment: (Scheduled Installment Earnings Method): If I pay off early, I may be entitled to a refund of part of the Finance Charge and I will not have to pay a penalty. **(True Daily Earnings Method):** If I pay off early, I will not have to pay a penalty.
Additional Information: See the contract documents for any additional information about nonpayment, default, any required repayment in full before the scheduled date, and prepayment refunds and penalties.

~~**[ITEMIZATION OF AMOUNT FINANCED**~~

~~1. Amount Financed (2+3+4) $_____~~

~~2. Amount given to me directly $_____~~

~~3. Amount paid on my account (Net Balance Prior Account) $_____~~

~~4. Amount paid to others on my behalf (A+B+C+D+E) $_____~~

~~A. Cost of hazard/property insurance paid to insurance company $_____~~
~~B. Cost of optional credit insurance paid to insurance company or companies~~
~~Life $_____~~
~~Disability $_____~~
~~Total B: $_____~~
~~C. Title Insurance paid to insurance Company $_____~~
~~D. Official fees paid to government Agencies $_____~~
~~E. Payable to: $_____~~
~~Payable to: $_____~~
~~Payable to: $_____~~
~~Total E: $_____~~

~~5. Prepaid Finance Charge $_____]~~

SECURITY FOR PAYMENT

The Deed of Trust and the Lien created in the Contract secure this Note.

DEFINITIONS

(A) "Owner" means (name of owner), whose address is (address of owner, including county). If Owner and Maker are not the same person, the word "Owner" includes Maker. "I" or "me" means the Owner.

(B) "Contractor" means (name of contractor), whose address is (address of contractor, including county) and includes those to whom the Contractor has assigned or transferred Contractor's rights and remedies. "You" or "your" means the Contractor.

(C) "Lender" means (name of lender), whose address is (address of lender, including county) and includes those to whom the Lender has assigned or transferred Lender's rights and remedies.

(D) "Trustee" means (name of Trustee), whose address is (address of Trustee, including county).

(E) "Property" means the Property at (list address of the property), whose legal description is (list legal description of the Property).

(F) "Work" means the construction project as agreed in writing between the Owner and Contractor.

(G) "Completion Date" means (date on which the Work will be completed).

(H) "Contract" means this Texas Home Improvement Mechanic's Lien Contract for Improvement, Power of Sale, and Deed of Trust.

(I) "Note" means the Texas Home Improvement Mechanic's Lien Note signed by me and dated _____ and includes all amounts secured by this Contract. The Note states that the amount I owe you is _____ Dollars (U.S. $_____) plus interest.

(J) "Loan Agreement" means the Note, Contract, and any other related document under which Lender has made a loan to me.

(K) "Applicable Law" means all controlling applicable federal, state, and local law.

(L) "Tenant at Sufferance" means a person who continues to possess the Property with no current right to possess it.

(M) "Forcible Detainer" means a lawsuit to remove a person from the Property.

(N) "Periodic Payment" means the regularly scheduled amount due for principal and interest under the Note plus any amount under this Contract.

(O) "Successor in Interest" means any party that has taken title to the Property.

(P) "Lien" means the Mechanic's and Materialman's lien on the Property that results from the Contract and the Work performed. The Lien includes all existing and future improvements, easements, and rights in the Property.

BORROWER'S PROMISE TO PAY

Scheduled Installment Earnings Method: I promise to pay the Total of Payments to the order of you. [The "principal" or "cash advance" is $_____. This amount plus interest must be paid by _____ (maturity date).] I will make payments to you at the address above or as you direct. I will make the payments on the dates and in the amounts shown in the Payment Schedule.

True Daily Earnings Method: I promise to pay the cash advance plus the accrued interest to the order of you. (The "principal" or "cash advance" is $_____. This amount plus interest must be paid by _____ (maturity date).) I will make payments to you at the address above or as you direct. I will make the payments on the dates and in the amounts shown in the Payment Schedule.

LATE CHARGE

If I don't pay all of a payment within 10 days after it is due, you can charge me a late charge. The late charge will be 5% of the scheduled payment.

AFTER MATURITY INTEREST

If I don't pay all I owe when the final payment becomes due, I will pay interest on the amount that is still unpaid. That interest will be the higher of the rate of 18% per year or the maximum rate allowed by law. That interest will begin the day after the final payment becomes due.

PREPAYMENT

Scheduled Installment Earnings Method: I can make a whole payment early. Unless you agree otherwise in writing, I may not skip payments. If I make a payment early, my next payment will still be due as scheduled.

True Daily Earnings Method: I can make any payment early. Unless you agree otherwise in writing, I may not skip payments. If I make a payment early, my next payment will still be due as scheduled.

FINANCE CHARGE AND REFUND METHOD

For contracts using Scheduled Installment Earnings Method - Section 342.301 rate loans: The annual rate of interest is ___%. This interest rate may not be the same as the Annual Percentage Rate. You figure the Finance Charge by applying the scheduled installment earnings method as defined by the Texas Finance Code to the unpaid cash advance. The unpaid cash advance does not include the administrative fee, late charges, and returned check charges. If I prepay my loan in full before the final payment is due, I may save a portion of the Finance Charge. I will not be paid a refund if the refund would be less than $1.00. You base the Finance Charge and Total of Payments as if I will make each payment on the day it is due. My final payment may be larger or smaller than my regular payment.

I have paid any points, administrative fee, or loan origination fee as prepaid interest. The administrative fee is earned at the time the loan is made and is not subject to refund. If I pay the loan in full early, you will refund any prepaid interest that would make the interest rate exceed the maximum rate allowed by law. Any refund will be credited to my account.

Any payment(s) that you accept after the final payment becomes due is not a renewal or extension of this Loan Agreement unless you agree in writing.

You will apply my payments in the following order: (1) interest that is due, (2) principal, (3) any other charges I owe.

For contracts using Scheduled Installment Earnings Method with prepayments option - Section 342.301 rate loans: The annual rate of interest is ___%. This interest rate may not be the same as the Annual Percentage Rate. You figure the Finance Charge by applying the scheduled installment earnings method as defined by the Texas Finance Code to the unpaid cash advance. I may make a full or partial payment early without paying a penalty. My early payments will reduce the principal that I owe. The unpaid cash advance does not include the administrative fee, late charges, or return check charges. If I make an early partial payment, the due date and amount of my next payment will not change unless you agree in writing.

I have paid any points, administrative fee, or loan origination fee as prepaid interest. The administrative fee is earned at the time the loan is made and is not subject to refund. If I pay the loan in full early, you will refund any prepaid interest that would make the interest rate exceed the maximum rate allowed by law. Any refund will be credited to my account.

Any payment(s) that you accept after the final payment becomes due is not a renewal or extension of this Loan Agreement unless you agree in writing.

You will apply my scheduled payments in the following order: (1) interest that is due, (2) principal, (3) any other charges I owe.

For contracts using True Daily Earnings Method - Section 342.301 rate loans: The annual rate of interest is ___%. This interest rate may not be the same as the Annual Percentage Rate. You figure the Finance Charge by applying the true daily earnings method as defined by the Texas Finance Code to the unpaid portion of the cash advance. The unpaid cash advance does not include the administrative fee, late charges, and return check charges. You base the Finance Charge and Total of Payments as if I will make each payment on the day it is due. You will apply payments on the date they are received. This may result in a different Finance Charge or Total of Payments. My final payment may be larger or smaller than my regular payment.

I have paid any points, administrative fee, or loan origination fee as prepaid interest. The administrative fee is earned at the time the loan is made and is not subject to refund. If I pay the loan in full early, you will refund any prepaid interest that would make the interest rate exceed the maximum rate allowed by law. Any refund will be credited to my account.

Any payment(s) that you accept after the final payment becomes due is not a renewal or extension of this Loan Agreement unless you agree in writing.

You will apply my payments as follows: (1) interest that is due, (2) principal, (3) any charges I owe.

DEFERMENT

If I ask for more time to make any payment and you agree, I will pay more interest to extend the payment. The extra interest will be figured under the Finance Commission rules.

DISHONORED CHECK FEE

I agree to pay you a fee of up to $30 for a returned check. You may add the fee to the amount I owe or collect it separately.

DEFAULT

I will be in default if:

a. I do not timely make a payment to the person or place you direct;
b. I break any promise I made in the Loan Agreement;
c. I allow a lien to be entered against the Property unless you agree in writing;
d. I sell, lease, or dispose of the Property;
e. I use the Property for an illegal purpose; or
f. you believe in good faith I am not going to keep any of my promises.

If there is more than one Borrower, each Borrower agrees to keep all of the promises in the Loan Agreement.

If I am in default, you will send me a written notice telling me how to cure the default. You must give me at least 21 days after the date on which the notice is mailed or delivered to cure the default.

PROPERTY INSURANCE

PROPERTY INSURANCE: I must keep the Property insured against damage or loss in at least the amount I owe. I may obtain property insurance from anyone I want or provide proof of insurance I already have. The insurer must be authorized to do business in Texas.

☐ **If this box is checked, the premium is not fixed or approved by the Texas Department of Insurance.**

I agree to give you proof of property insurance. I must name you as the person to be paid under the policy in the event of damage or loss. If I obtain the insurance through you, I will pay the premium shown below. However, I have 5 days from the date of this loan to furnish like (equivalent) coverage from another source. If I fail to meet any of these requirements, you may obtain collateral protection insurance at my expense. You will insure the Property for the lesser amount of the value of the Property or the amount of the debt. If you obtain collateral protection insurance, you will mail notice to my last known address.

☐ Property Insurance **$**_____ Term _____

CREDIT INSURANCE

Credit insurance is optional. Credit life insurance and credit disability insurance are not required to obtain credit. This insurance will not be provided unless I sign and agree to pay the extra cost. I will look to the insurance policy or certificate for the terms and description of benefits, exclusions, and premium rates.

Single Premium

Credit Life, one borrower $_____ Credit Life, both borrowers $_____ Term _____

Credit Disability, one borrower $_____ Credit Disability, both borrowers $_____ Term _____

☐ **If this box is marked, the premium for the insurance coverage(s) above is not fixed or approved by the Texas Insurance Commissioner.**

I want the insurance above.

Borrower's Signature: _____ Date: _____

Co-Borrower's Signature: _____ Date: _____

Monthly Premium

If I want credit life or credit disability insurance, I must sign below and pay the monthly premium. The monthly premium will be added to the monthly loan payment. If I do not pay the monthly premium, I will not have the insurance coverage.

I request the following insurance:

_____

Borrower's Signature Date

Premium Due with the First Month's Loan Payment	First Year Premium	Insurance Type:
$	$	
$	$	
$	$	

_____

Co-Borrower's Signature Date

The first year's premiums are based on an assumption that monthly loan payments are timely made. All unpaid premiums are due at the time of the final payment. The insurance may be canceled if I do not pay the premiums. ** I may cancel any of the optional insurance products offered at any time. The optional insurance will be canceled upon the earliest of the following occurrences:

(1) Your receipt of my written request for cancellation;
(2) Cancellation under the insurance certificate or policy;
(3) Payment in full of my loan; and
(4) my death.

**Optional language: The insurance will cancel on the date when the total past due premiums equal or exceed ((four)) times the first month premium.

MAILING OF NOTICES TO BORROWER

You or I may mail or deliver any notice to the address above. You or I may change the notice address by giving written notice. Your duty to give me notice will be satisfied when you mail it.

STATEMENT OF TRUTHFUL INFORMATION

I promise that all information I gave you is true.

DUE ON SALE CLAUSE, NOTICE OF INTENT TO ACCELERATE, AND NOTICE OF ACCELERATION

If all or any interest in the Property is sold or transferred without your prior written consent, you may require immediate payment in full of all that I owe under this Loan Agreement. You will not exercise this option if prohibited by law.

If you exercise this option, you will give me notice that you are demanding payment of all that I owe. This notice will give me a period of not less than 21 days from the date of the notice within which I must pay all that I owe under this Loan Agreement. If I fail to pay all that I owe before the end of this period, you may use any remedy allowed by the Loan Agreement.

NO WAIVER OF LENDER'S RIGHTS

If you don't enforce your rights every time, you can still enforce them later.

COLLECTION EXPENSES

If you require me to pay all that I owe at once, you will have the right to be paid back by me for all of your costs and expenses in enforcing this Loan Agreement to the extent not prohibited by Applicable Law. These expenses include, for example, reasonable attorneys' fees.

JOINT LIABILITY

I understand that you may seek payment from only me without first looking to any other Borrower.

USURY SAVINGS CLAUSE

I do not have to pay interest or other amounts that are more than Applicable Law allows.

SAVINGS CLAUSE

If any part of this Loan Agreement is declared invalid, the rest of the Loan Agreement remains valid. If any part of this Loan Agreement conflicts with any law, that law will control. The part of the Loan Agreement that conflicts with the law will be modified to comply with the law. The rest of the Loan Agreement remains valid.

PRIOR AGREEMENTS

This written Loan Agreement is the final agreement between you and me. It may not be changed by prior, current, or future oral agreements and there are none. Any change to this Loan Agreement must be in writing. Both you and I have to sign written agreements.

THIS NOTE SECURED BY A DEED OF TRUST

In addition to this Note, the Deed of Trust protects the Note holder from losses that might result if I do not keep the promises that I make in this Note. The Deed of Trust describes how and under what conditions I may have to make immediate payment of all that I owe under this Note.

APPLICATION OF LAW

Federal law and Texas law apply to this Loan Agreement.

COMPLAINTS AND INQUIRIES NOTICE

The (name of lender or note holder) is licensed and examined under the laws of the State of Texas and by state law is subject to regulatory oversight by the Office of Consumer Credit Commissioner. Any consumer wishing to file a complaint against the (name of lender or note holder) should contact the Office of Consumer Credit Commissioner through one of the means indicated below:

Office of Consumer Credit Commissioner
2601 North Lamar Boulevard, Austin, Texas 78705-4207
www.occc.state.tx.us
(512) 936-7600 – (800) 538-1579

COLLATERAL

The Property is subject to the Contract lien.

I am responsible for all obligations in this Note.

NOTICE

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

Do not sign if there are blanks left to be completed in this document.

I must receive a copy of this document after I have signed it. I agree to the terms of this Loan Agreement.

_____(Seal)
-Borrower

_____(Seal)
-Borrower

_____(Seal)
-Borrower

_____(Seal)
-Borrower

[Sign Original Only]

Figure: 7 TAC §1.1247(a)(16)

NOTICE OF CONFIDENTIALITY RIGHTS: I MAY REMOVE OR STRIKE MY SOCIAL SECURITY NUMBER OR MY DRIVER'S LICENSE NUMBER FROM THIS DOCUMENT BEFORE IT IS FILED IN THE PUBLIC RECORDS.

TEXAS HOME IMPROVEMENT
DEED OF TRUST
ASSIGNMENT OF CONTRACTOR'S LIEN
(Second Lien)

DEFINITIONS

(A) "Borrower" is _____. Borrower"s address is _____.

(B) "Contractor" is _____. Contractor's address is _____.

(C) "Lender" is _____. Lender's address is _____.

(D) "Trustee" is _____. Trustee's address is _____.

(E) "I" or "me" means _____, the grantor under this Deed of Trust and the person who signed the Note ("Borrower").

(F) "Loan Agreement" means the Contract, Note, Security Document, Deed of Trust, any other related document, or any combination of those documents, under which Lender has made a loan to me.

(G) "Deed of Trust" means this document, which is dated _____, together with all riders to this document.

(H) "Note" means the Texas Home Improvement Mechanic's Lien Note signed by me and dated _____ and includes all amounts secured by this Contract. The Note states that the amount I owe Lender is _____ Dollars (U.S. $_____) plus interest.

(I) "Property" means the property at (list address of the property), whose legal description is (list legal description of the Property).

(J) "Applicable Law" means all controlling applicable federal, state, and local law.

(L) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other charges that are imposed on me or the Property by a condominium association, homeowners association, or similar organization.

(M) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. The term includes point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.

(N) "Escrow Items" means those items that are described in Section ___ of this Deed of Trust.

(O) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than proceeds paid under my insurance) for: (i) damage or destruction of the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance instead of condemnation; or (iv) misrepresentations or omissions related to the value or condition of the Property.

(P) "Periodic Payment" means the regularly scheduled amount due for (i) principal and interest under the Note plus (ii) any amounts under this Deed of Trust.

(Q) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. §2601 et seq.) and Regulation X (24 C.F .R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Deed of Trust, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan Agreement does not qualify as a "federally related mortgage loan" under RESPA.

(R) "Successor in Interest" means any party that has taken title to the Property.

(S) "Ground Rents" means amounts I owe if I rented the real property under the buildings covered by this Deed of Trust. One of the arrangements usually takes the form of a long-term "ground lease."

(T) "Contract" means the Texas Home Improvement Mechanic's Lien Contract for Improvement, Power of Sale, and Deed of Trust.

(U) "Lien" means the Mechanic's and Materialman's lien on the Property that results from the Contract and the Work performed. The Lien includes all existing and future improvements, easements, and rights in the Property.

TRANSFER OF RIGHTS IN THE PROPERTY

I give the Property to Trustee to ensure Lender is repaid the debt evidenced by my Note dated _____ and any renewal or extension, to ensure Lender is repaid any sums (with interest) Lender advances to protect the security of this Deed of Trust, and to guarantee my promises. I give to the Trustee, in trust, with power of sale, the Property located in _____ County at *(Street Address) (City) (State) (Zip Code)* and further described as:

(Legal Description)

The security interest in the Property includes existing and future improvements, easements, fixtures, attachments, replacements and additions to the Property, insurance refunds, and proceeds.

I promise that I own the Property and have the right to grant Lender an interest in it. I also promise that the Property is free of any lien, except liens that are publicly recorded. I promise that I will generally defend the title to the Property. I will be responsible for Lender's losses that result from a conflicting ownership right in the Property. Any default under my agreements with Lender will be a default of this Deed of Trust.

LENDER AND I PROMISE:

PAYMENT OF LATE CHARGES AND PREPAYMENT

I will timely pay the principal, interest, and any other amounts due under the Loan Agreement. I will comply with the requirements of my escrow account under the Loan Agreement. I will make payments in U.S. currency. If any check is returned to Lender unpaid, Lender may select the form of future payments including:

a. cash;
b. money order;
c. certified check, bank check, treasurer's check or cashier's check drawn upon an institution whose deposits are federally insured; or
d. Electronic Funds Transfer.

I will make payments to the location as Lender directs. Lender will apply my payments against the Loan Agreement only when they are received at the designated location. Lender may change the location for payments if Lender gives me notice.

Lender may return any partial payment that does not bring the account current. Lender may accept any payment or partial payment that does not bring the account current without losing Lender's rights to refuse full or partial payments in the future. I will not use any offset or claim against Lender to relieve me from my duty to make payments under the Loan Agreement.

FUNDS FOR ESCROW ITEMS

I will pay Lender an amount ("Funds") for:

a. taxes and assessments and other items that can take priority over Lender's security interest in the Property under the Loan Agreement;
b. leasehold payments or Ground Rents on the Property, if any; and
c. premiums for any insurance Lender requires under the Loan Agreement.

These items are called "Escrow Items." At any time during the term of the Loan Agreement, Lender may require me to pay Community Association Dues, Fees, and Assessments, if any, as an Escrow Item.

I will promptly give Lender all notices of amounts to be paid. I will pay Lender the Funds for Escrow Items unless Lender, at any time, waives my duty to pay Lender. Any escrow waiver must be in writing. If Lender waives my duty to pay Lender the Funds, I will pay, at Lender's direction, the amounts due for waived Escrow Items. If Lender requires, I will give Lender receipts showing timely payment. My duty to make Escrow Item payments and to provide receipts is an independent promise in the Loan Agreement.

If Lender grants me an escrow waiver, Lender may require me to pay the waived Escrow Items. If I fail to directly pay the waived Escrow Items, Lender may use any right given to Lender in the Loan Agreement. Lender may pay waived Escrow Items and require me to repay Lender. Lender may cancel the waiver for Escrow Items at any time by a notice that complies with the Loan Agreement. If Lender cancels the waiver, I will pay Lender all Funds that are then required under this Section.

At any time Lender may collect and hold Funds in an amount:

a. to permit Lender to apply the Funds at the time specified under RESPA, and
b. not to exceed the maximum amount Lender may require under RESPA.

Lender will estimate the amount of Funds due on the basis of current data and reasonable estimates of future expenses for Escrow Items or otherwise, according to Applicable Law. The Funds will be held in an institution whose deposits are federally insured (including Lender, if Lender's deposits are insured) or in any Federal Home Loan Bank.

Lender will timely pay Escrow Items as required by RESPA. Lender will not charge me a fee for maintaining or handling my escrow account. Lender is not required to pay me any interest on the amounts in my escrow account. Lender will give me an annual accounting of the Funds as required by RESPA. If there is a surplus in my escrow account, Lender will follow RESPA. If there is a shortage or deficiency, as defined by RESPA, Lender will notify me, and I will pay Lender the amount necessary to make up the shortage or deficiency. I will repay the shortage or deficiency in no more than twelve monthly payments. Lender will promptly return to me any Funds after I paid the Loan Agreement in full.

CHARGES AND LIENS

I will timely pay all taxes, assessments, charges, and fines relating to the Property that can take priority over this Deed of Trust. I also will timely pay leasehold payments or Ground Rents on the Property, if any, and Community Association Dues, Fees, and Assessments, if any. If these items are Escrow Items, I will pay them as required by the Loan Agreement. I will promptly satisfy any lien that has priority over this Deed of Trust unless I:

a. agree in writing to pay the amount secured by the lien in a manner acceptable to Lender and only so long as I comply with my agreement;
b. contest the lien in good faith by stopping the enforcement of the lien through legal proceedings (this contest must be satisfactory to Lender); or
c. obtain an agreement from the holder of the lien that is satisfactory to Lender.

If Lender determines that any part of the Property is subject to a lien that can take priority over this Deed of Trust, Lender may give me a notice identifying the lien. I will satisfy the lien or take one or more of the actions described above in this section within 10 days of the date of the notice.

PROPERTY INSURANCE

I WILL INSURE THE CURRENT AND FUTURE IMPROVEMENTS TO THE PROPERTY AGAINST LOSS BY FIRE, HAZARDS INCLUDED WITHIN THE TERM "EXTENDED COVERAGE," AND ANY OTHER HAZARDS INCLUDING EARTHQUAKES AND FLOODS, AS LENDER MAY REQUIRE. I WILL KEEP THIS INSURANCE IN THE AMOUNTS (INCLUDING DEDUCTIBLE LEVELS) AND FOR THE PERIODS THAT LENDER REQUIRES. LENDER MAY CHANGE THESE INSURANCE REQUIREMENTS DURING THE TERM OF THE LOAN AGREEMENT. I HAVE THE RIGHT TO CHOOSE AN INSURANCE CARRIER THAT IS ACCEPTABLE TO LENDER. LENDER WILL EXERCISE LENDER'S RIGHT TO DISAPPROVE REASONABLY. I MAY PROVIDE ANY INSURANCE REQUIRED BY THIS DEED OF TRUST EITHER THROUGH EXISTING POLICIES OWNED OR CONTROLLED BY BORROWER OR THROUGH EQUIVALENT COVERAGE FROM ANY INSURANCE COMPANY AUTHORIZED TO TRANSACT BUSINESS IN TEXAS.

I will pay any fee charged by the Federal Emergency Management Agency for the review of any flood zone determination. Lender may require me to pay either:

a. a one-time charge for flood zone determination, certification and tracking services; or
b. a one-time charge for flood zone determination and certification services; and subsequent charges each time re-mappings or similar changes occur that reasonably might affect the determination or certification.

If I do not keep any required insurance, Lender may obtain insurance at Lender's option and at my expense. Lender is not required to purchase any type or amount of insurance. Any insurance Lender buys will always protect Lender, but may not protect me, my equity in the Property, my contents in the Property or protect me from certain hazards or liability. I understand that this insurance may cost significantly more than insurance I can purchase. I will owe Lender for the cost of any insurance that Lender buys under this section. Interest will be charged on this amount at the interest rate used by the Note. The interest will be charged from the date Lender made the payment. Lender will give me notice of the amounts I owe under this Section.

Lender may disapprove any insurance policy or renewal. Any insurance policy must include a standard mortgage clause, and must name Lender as mortgagee or a loss payee. I will give Lender all insurance premium receipts and renewal notices, if Lender requests. If I obtain any optional insurance to cover damage or destruction of the Property, I will name Lender as a loss payee. In the event of loss, I will give notice to Lender and the insurance company. Lender may file a claim if I do not file one promptly. Lender will apply insurance proceeds to repair or restore the Property unless Lender's interest will be reduced or it will be economically unreasonable to perform the Work. Lender may hold the insurance proceeds until Lender has had an opportunity to inspect the Work and Lender considers the Work to be acceptable. The insurance proceeds may be given in a single payment or multiple payments as the Work is completed. Lender will not pay any interest on the insurance proceeds. If I hire a public adjuster or other third party, I am responsible for the fee. It will not be paid from the insurance proceeds. The insurance proceeds will be applied to the amount I owe if Lender's interest will be reduced or if the Work will be economically unreasonable to perform. Lender will pay me any excess insurance proceeds. Lender will apply insurance proceeds in the order provided by the Loan Agreement.

If I abandon the Property Lender may file, negotiate, and settle any insurance claim. If the insurance company offers to settle a claim and I do not respond within thirty days to a notice from Lender, then Lender may settle the claim. The 30-day period will begin when the notice is given. If I abandon the Property, fail to respond to the offer of settlement, or Lender forecloses on the Property, I assign to Lender:

a. my rights to any insurance proceeds in an amount not greater than what I owe; and
b. any of my other rights under insurance policies covering the Property.

Lender may apply the proceeds to repair or restore the Property or to the amount that I owe.

PRESERVATION, MAINTENANCE, PROTECTION, AND INSPECTION OF THE PROPERTY

I will not destroy, damage, or impair the Property, allow it to deteriorate, or commit waste. Whether or not I live in the Property, I will maintain it in order to prevent it from deteriorating or decreasing in value due to its condition. I will promptly repair the damage to the Property to avoid further deterioration or damage unless Lender and I agree in writing that it is economically unreasonable. I will be responsible for repairing or restoring the Property only if Lender releases the insurance or condemnation proceeds for the damage to or the taking of the Property. Lender may release proceeds for the repairs and restoration in a single payment or in a series of payments as the Work is completed. I still am obligated to complete repairs or restoration of the Property even if there are not enough proceeds to complete the Work. If this Deed of Trust secures a unit in a condominium or planned unit development, I will perform all of my obligations under the declaration or covenants creating or governing the condominium or planned unit development, and any other relevant document. Lender or Lender's agent may inspect the Property. Lender may inspect the interior of the Property with reasonable cause. Lender will give me notice stating reasonable cause when or before the interior inspection occurs.

PROTECTION OF LENDER'S INTEREST IN THE PROPERTY AND RIGHTS UNDER THE DEED OF TRUST

Lender may do whatever is reasonable to protect Lender's interest in the Property, including protecting or assessing the value of the Property, and securing or repairing the Property. Lender may do this when:

a. I fail to perform the promises and agreements contained in the Loan Agreement;
b. a legal proceeding might significantly affect Lender's interest in the Property or rights under the Loan Agreement (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may have priority over the Loan Agreement or to enforce laws or regulations); or
c. I abandon the Property.

In order to protect Lender's interest in the Property, Lender may:

a. pay amounts that are secured by a lien on the Property which has or will have priority over the Loan Agreement;
b. appear in court; or
c. pay reasonable attorneys' fees.

Lender may enter the Property to secure it. To secure the Property, Lender may make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off. Lender has no duty to secure the Property. Lender is not liable for failing to take any action listed in this Section. Any amounts Lender pays under this Section will become my additional debt secured by the Loan Agreement. These amounts will earn interest at the rate specified in the Loan Agreement. The interest will begin on the date the amounts are paid. Lender will give me notice requesting payment of these amounts. If the Loan Agreement is on a leasehold, I will comply with the lease.

ASSIGNMENT OF MISCELLANEOUS PROCEEDS AND FORFEITURE

Any Miscellaneous Proceeds will be assigned and paid to Lender. If the Property is damaged, Miscellaneous Proceeds will be applied to restore or repair the Property. Lender will only do this if Lender's interest in the Property will not be reduced and if the work will be economically reasonable to perform. Lender will have the right to hold Miscellaneous Proceeds until Lender inspects the Property to ensure the work has been completed to Lender's satisfaction. Lender must make the inspection promptly. Lender may release proceeds for the work in a single payment or in multiple payments as the work is completed. Lender is not required to pay me any interest on the Miscellaneous Proceeds. The Miscellaneous Proceeds will be applied to the amount I owe if Lender's interest in the Property will be reduced or the work will be economically unreasonable to perform. Lender will pay me any excess Miscellaneous Proceeds. Lender will apply Miscellaneous Proceeds in the order provided by the Loan Agreement.

Lender will apply all Miscellaneous Proceeds to the amount I owe in the event of a total taking, destruction, or loss in value of the Property. Lender will apply the Miscellaneous Proceeds even if all payments are current. Lender will give any excess Miscellaneous Proceeds to me.

A partial loss can include a taking, destruction, or loss in value. In the event of a partial loss, the Miscellaneous Proceeds will be applied in one of two ways:

a. If the fair market value of the Property immediately before the partial loss is less than the amount I owe immediately before the partial loss, then Lender will apply all Miscellaneous Proceeds to the amount I owe even if all payments are current.
b. If the fair market value of the Property immediately before the partial loss is equal to or greater than the amount I owe immediately before the partial loss, then Lender will apply Miscellaneous Proceeds to the amount I owe in the following manner:
    1. The amount of Miscellaneous Proceeds multiplied by the result of,
    2. The amount I owe immediately before the partial loss divided by the fair market value of the Property immediately before the partial loss.

Lender and I can agree otherwise in writing. Lender will give any excess Miscellaneous Proceeds to me.

If I abandon the Property, Lender may apply Miscellaneous Proceeds either to restore or repair the Property, or to the amount I owe.

Damage to the Property caused by a third party may result in a civil proceeding. If Lender gives me notice that the third party offers to settle a claim for damages to the Property and I fail to respond to Lender within thirty days, Lender may accept the offer and apply the Miscellaneous Proceeds either to restore or repair the Property or to the amount I owe. If the proceeding results in an award of damages, Lender will apply the Miscellaneous Proceeds according to this Section.

FORBEARANCE NOT A WAIVER

If Lender doesn't enforce Lender's rights every time, Lender can still enforce them later.

JOINT AND SEVERAL LIABILITY, DEED OF TRUST EXECUTION, SUCCESSORS OBLIGATED

I understand that Lender may seek payment from only me without first looking to any other Borrower.

Any person who signs this Deed of Trust, but not the Note:

a. will not have to repay the Note;
b. is not a surety or guarantor; and,
c. only gives a security interest in the Property under this Deed of Trust.

The Lien against the Property is voluntary. Each owner and each owner's spouse consent to the Lien. Lender and I may modify the Loan Agreement in writing. Lender must approve my successor in writing. My successor will receive all of my rights and benefits under the Loan Agreement. I still will be responsible under the Loan Agreement unless Lender releases me in writing. The Loan Agreement will extend to Lender's assigns or successors.

USURY SAVINGS CLAUSE

I do not have to pay interest or other amounts that are more than Applicable Law allows.

MAILING OF NOTICES TO BORROWER

Lender or I may mail or deliver any notice to the address above. Lender or I may change the notice address by giving written notice. Lender's duty to give me notice will be satisfied when Lender mails it.

APPLICATION OF LAW

Federal law and Texas law apply to this Loan Agreement.

RULES OF CONSTRUCTION

As used in the Loan Agreement:

a. words in the singular will mean and include the plural and vice versa; and
b. the word "may" gives discretion without imposing any duty to take action.

LOAN AGREEMENT COPIES

At the time the Loan Agreement is made, Lender will give me copies of all documents I sign.

DUE ON SALE CLAUSE, NOTICE OF INTENT TO ACCELERATE, AND NOTICE OF ACCELERATION

If all or any interest in the Property is sold or transferred without Lender's prior written consent, Lender may require immediate payment in full of all that I owe under this Loan Agreement. Lender will not exercise this option if Applicable Law prohibits.

If Lender exercises this option, Lender will give me notice that Lender is demanding payment of all that I owe. This notice will give me a period of not less than twenty-one days from the date of the notice within which I must pay all that I owe under this Loan Agreement. If I fail to pay all that I owe before the end of this period, Lender may use any remedy allowed by the Loan Agreement.

LENDER, CONTRACTOR, AND I PROMISE AND AGREE:

ACCELERATION AND REMEDIES

Lender will give me notice prior to acceleration if I am in default under the Loan Agreement. The notice will specify:

a. the default;
b. the action required to cure the default;
c. a date, not less than 21 days from the date Lender gives me notice, to cure the default; and

d. that my failure to cure the default on or before the specified date will result in acceleration of all that I owe under the Loan Agreement and sale of the Property.

Lender will inform me of my right to reinstate after acceleration. If the default is not cured before the specified date, Lender has the option to require immediate payment in full of all I owe. If Lender is not paid all I owe, Lender may sell the Property or seek other remedies allowed by Applicable Law without further notice. Lender may collect Lender's reasonable expenses incurred in seeking the remedies provided in this Section. These expenses may include court costs, attorneys' fees, and costs of title search.

I understand the power of sale is not a confession of judgment or a power of attorney to confess judgment or an appearance by me in a judicial proceeding. If the Property is sold under this section I or my successors will immediately give possession of the Property to the purchaser. If I do not, I or anyone residing on the Property may be removed by writ of possession.

POWER OF SALE

Lender has a fully enforceable lien on the Property. Lender's remedies for my default include an efficient means of foreclosure under the law. Lender and the Trustee have all powers to conduct a foreclosure. If Lender chooses to use the power of sale, Lender will give me notice of the time, place and terms of the sale by posting and filing notice at least 21 days before the sale as provided by law. Lender will give me notice by mail as required by law. Failure to cure default on or before the date in the notice may result in acceleration of the amount that I owe under this Loan Agreement. The notice will inform me of my right to reinstate after acceleration and assert in court that I am not in default or any other defense to acceleration or sale. If I do not cure the default on or before the date in the notice, Lender, at Lender's option, may declare all that I owe under this Loan Agreement to be immediately due and payable and may invoke the power of sale and any other remedies permitted by Applicable Law. The sale will be conducted at a public place. The sale will be held:

a. on the first Tuesday of a month;
b. at a time stated in the notice or no later than 3 hours after the time; and
c. between 10:00 a.m. and 4:00 p.m.

I allow the Trustee to sell the Property to the highest bidder for cash in one or more pieces and in any order the Trustee determines. Lender may purchase the Property at any sale.

Trustee will give a Trustee's deed to the foreclosure sale purchaser. A Trustee's deed will convey:

a. good title to the Property; and
b. title with promises of general warranty from me.

I will defend the purchaser's title to the Property against all claims and demands. The description of facts contained in the Trustee's deed will be sufficient to legally prove the truth of the statements made in the deed. Trustee will apply the proceeds of the sale in the following order:

a. to all expenses of the sale, including court costs and reasonable Trustee's and attorneys' fees;
b. what I owe; and
c. any excess to the person or persons legally entitled to it.

If the Property is sold through a foreclosure sale governed by this Section, I or any person in possession of the Property through me, will give up possession of the Property without delay. A person who does not give up possession is a holdover and may be removed by a court order.

BORROWER'S RIGHT TO REINSTATE AFTER ACCELERATION

I have the right to stop Lender from enforcing the Loan Agreement any time before the earliest of:

a. 5 days before sale of the Property under any power of sale included in the Loan Agreement;
b. the day required by Applicable Law for the termination of my right to reinstate; or
c. the entry of a judgment enforcing the Loan Agreement.

I can stop the enforcement of the Loan Agreement and reinstate the Loan Agreement if all the following conditions are met:

a. Lender is paid what I owe under the Loan Agreement as if no acceleration had occurred;
b. I cure any default of any promise or agreement;
c. Lender is paid all expenses allowed by Applicable Law, including reasonable attorneys' fees and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under the Loan Agreement;
d. I comply with any reasonable requirement to assure Lender that Lender's interest in the Property will remain intact; and
e. I comply with any reasonable requirement to assure Lender that my ability to pay what I owe will remain intact.

Lender may require me to pay for the reinstatement in one or more of the following forms:

a. cash;
b. money order;
c. certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are federally insured; or
d. Electronic Funds Transfer.

Upon reinstatement, the Loan Agreement will remain effective as if no acceleration had occurred. However, this right to reinstate will not apply if I sell or transfer any interest in the Property without Lender's permission.

ASSIGNMENT OF RENTS, APPOINTMENT OF RECEIVER, LENDER IN POSSESSION

As additional security, I assign to you the rents of the Property, provided that you have the right, prior to acceleration or abandonment of the Property, to collect and retain the rents as they become due. Upon acceleration or abandonment, you, by agent or by court-appointed receiver, will be entitled to enter, take possession, manage the Property, and collect due and past due rents. All rents you or the court-appointed receiver collect will be applied first to payment of the cost of management of the Property and collection of rents, including receiver's fees, premiums on receiver's bonds, and reasonable attorneys' fees, and then to the sums secured by this Deed of Trust. You and the receiver will be liable to account only for rents received.

RELEASE

Lender will cancel and return the Note to me and give me, in recordable form, a release of lien securing the Loan Agreement or a copy of any endorsement of the Note and assignment of the Lien to a Lender that is refinancing the Loan Agreement. I will pay only the cost of recording the release of lien.

TRUSTEES AND TRUSTEE LIABILITY

One or more Trustees acting alone or together may exercise or perform all rights, remedies and duties of the Trustee under the Loan Agreement. Lender may remove or change any Trustee (e.g., add one or more Trustees or appoint a successor Trustee to any Trustee). This removal or change of Trustee must be in writing and may be:

a. at Lender's option;
b. with or without cause; and
c. by power of attorney or otherwise.

The substitute, additional, or successor Trustee will receive the title, rights, remedies, powers, and duties under the Loan Agreement and Applicable Law.

Trustee may rely upon any notice, request, consent, demand, statement, or other document reasonably believed by Trustee to be valid. Trustee will not be liable for any act or omission unless the act or omission is willful.

ASSIGNMENT OF CONTRACTOR'S LIEN, COMMENCEMENT OF WORK

Contractor and I have entered into the Contract for improvements to be made to the Property. I will perform my duties under the Contract. Under the Contract, I gave Contractor a lien on the Property. Contractor permanently transfers the Lien and any other interest Contractor has in the Property to Lender. As additional security, Contractor also agrees that the Lien created by this Deed of Trust has priority over the Lien. The purpose of the Note is to pay in whole or in part the improvements to be made to the property by the Contractor. Contractor and I agree that the Lien is for Lender's sole benefit. Any other interest Contractor has in the Property will be merged with the Lien, and may be enforced by Lender according to the terms of this Deed of Trust. Contractor and I further agree that no Work was performed or materials delivered before the Contract was executed.

SUBROGATION

If I ask, Lender will use proceeds from the Loan Agreement to pay off all valid outstanding liens against the Property. Lender will then own all rights, superior titles, liens, and interests owned or claimed by any owner or holder of an outstanding lien or debt. Lender owns these things whether the lien or debt is transferred to Lender or whether it is released by the holder upon payment.

PARTIAL INVALIDITY

If any portion of the sums secured by this Deed of Trust cannot be lawfully secured, payments minus those sums will be applied first to the portions not secured. If any charge provided for in this Loan Agreement, separately or together with other charges that are considered part of this Loan Agreement, violates Applicable Law, the charge is reduced to the extent necessary to eliminate the violation. At Lender's option, Lender will refund the amount of interest or other charges paid to Lender in excess of the amount permitted by Applicable Law to reduce the principal of the debt or apply it to reduce the principal of the debt.

RENEWAL AND EXTENSION

The Note secured by this Deed of Trust is renewed and extended, but not in extinguishment of the debt under the Contract identified in the paragraph entitled "Assignment of Contractor's Lien, Commencement of Work" and the Note.

SALE OF NOTE, CHANGE OF LOAN SERVICER, NOTICE OF GRIEVANCE, LENDER'S RIGHT TO COMPLY

A full or partial interest in the Loan Agreement can be sold one or more times without prior notice to me. The sale may result in a change of the company servicing or handling the Loan Agreement. The company servicing or handling the Loan Agreement will collect my monthly payment and will comply with other servicing conditions required by the Loan Agreement or Applicable Law. In some cases, the company servicing or handling the Loan Agreement may change even if the Loan Agreement is not sold. If the company servicing or handling the Loan Agreement is changed, I will be given written notice of the change. The notice will state the name and address of the new company, the address to which my payments should be made, and any other information required by RESPA.

Any notice of acceleration and opportunity to cure under the Loan Agreement will satisfy the notice and opportunity to address the alleged violation provisions of this Section.

No agreement between Lender and me or any third party will limit Lender's ability to comply with Lender's duties under the Loan Agreement and the Applicable Law.

Lender and I are limiting all agreements so that all current or future interest or fees in connection with this Loan Agreement will not be greater than the highest amount allowed by Applicable Law.

Lender and I intend to conform the Loan Agreement to the provisions of Applicable Law. If any part of the Loan Agreement is in conflict with the Applicable Law, then that part will be corrected or removed. This correction will be automatic and will not require any amendment or new document. Lender's right to cure any violation will survive my paying off the Loan Agreement. My right to cure will override any conflicting provision of the Loan Agreement.

Lender's right-to-comply as provided in this section will survive the payoff of the Loan Agreement. The provisions of this section will supersede any inconsistent provision of the Loan Agreement.

HAZARDOUS SUBSTANCES

Hazardous Substances

a. "Hazardous Substances" means those substances defined as toxic or hazardous substances, pollutants, or wastes by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials;
b. "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection;
c. "Environmental Cleanup" includes any response action, remedial action, or removal action, as defined in Environmental Law; and
d. "Environmental Condition" means a condition that can cause, contribute to, or otherwise trigger an Environmental Cleanup.

I will not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances, or threaten to release any Hazardous Substances, on or in the Property. I will not do, or allow anyone else to do, anything affecting the Property:

a. that is in violation of any Environmental Law;
b. that creates an Environmental Condition; or,

c. that, due to the presence, use, or release of a Hazardous Substance, creates a condition that adversely affects the value of the Property.

The presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and for the maintenance of the Property are allowed. This includes Hazardous Substances found in consumer products.

I will promptly give Lender written notice of:

a. any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which I have actual knowledge;
b. any Environmental Condition, including any spilling, leaking, discharge, release or threat of release of any Hazardous Substance; and
c. any condition caused by the presence, use or release of a Hazardous Substance which adversely affects the value of the Property.

If I learn that, or am notified by any governmental or regulatory authority, or any private party that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, I promptly will take all necessary remedial actions in accordance with Environmental Law. Lender will have no obligation for an Environmental Cleanup.

LENDER'S RIGHTS AND BORROWER'S RESPONSIBILITIES

Lender is entitled to all rights, superior title, liens, and equities owned or claimed by any grantor or holder of any liens and debts due before the signing of the Loan Agreement. Lender may acquire these rights by assignment or the holder may release them upon payment.

Each person who signs the Deed of Trust is responsible for each promise and duty in the Deed of Trust.

Unless prohibited by Applicable Law, this Section will not:

a. impair in any way the Loan Agreement or Lender's right to collect all that I owe under the Loan Agreement;
b. affect Lender's right to any promise or condition of the Loan Agreement.

DEFAULT

Any default of my agreements with Lender will be a default of this Deed of Trust.

REQUEST FOR NOTICE OF DEFAULT
AND FORECLOSURE UNDER SUPERIOR MORTGAGES OR DEEDS OF TRUST

Lender and I request that the holder of any mortgage, deed of trust or other claim with a lien that has priority over this Deed of Trust gives Lender Notice, at Lender's address listed on this Deed of Trust, of any default under the superior claim and of any sale or other foreclosure action.

BY SIGNING BELOW, I accept and agree to the terms and promises contained in the Loan Agreement and in any rider I sign which is recorded with it. (DO NOT SIGN IF THERE ARE BLANKS LEFT TO BE COMPLETED IN THIS DOCUMENT. I MUST RECEIVE A COPY OF ANY DOCUMENT I SIGN.)

IN WITNESS WHEREOF, Borrower and Contractor have executed this Deed of Trust and Assignment of Contractor's Lien.

-Contractor

By:_____

_____

Printed Name:_____
(Please Complete)

_____

Printed Name:_____
(Please Complete)

_____(Seal)
-Borrower

_____(Seal)
-Borrower

_____(Seal)
-Borrower

_____(Seal)
-Borrower

STATE OF TEXAS

COUNTY OF _____

Sworn to and subscribed before me on the _____ day of _____, 20 ____ by (name of owner)_____.

_____
Notary Public

(Seal)

STATE OF TEXAS
COUNTY OF _____

Sworn to and subscribed before me on the _____ day of _____, 20 ____ by (name of contractor)_____.

_____
Notary Public

(Seal)

Figure: 7 TAC §1.1308(8)(A)

ITEMIZATION OF AMOUNT FINANCED

1. Cash price [Optional additional description: "(including any accessories, services, and taxes)"] $_____(1)

2. Downpayment =
[*If netting add*: (if negative, enter "0" and see Line 4.A. below)]
Gross trade-in $_____
- payoff by seller $_____
= net trade-in $_____
[*If not netting add*: (if negative enter "0" and see Line 4.A. below)]
+ cash $_____
+ Mfrs. Rebate $_____
+ other (describe) _____ $_____
Total downpayment $_____(2)

3. Unpaid balance of cash price (1 minus 2) $_____(3)

4. Other charges including amounts paid to others on my [~~your~~] behalf (Seller may keep part of these amounts.):
   A. Net trade-in payoff [*Alternative caption*: "prior credit or lease balance"] to _____ $_____
   B. Cost of physical damage insurance paid to insurance company $_____
   C. Cost of optional coverages with physical damage insurance paid to insurance company $_____
   D. Cost of optional credit insurance paid to insurance company or companies $_____
      Life
      Disability
   E. Other insurance paid to the insurance company $_____
   F. Official fees paid to government agencies $_____
   G. Dealer's inventory tax [*Optional addition*: (if not included in cash price)] $_____
   H. Sales tax [*Optional addition*: (if not included in cash price)] $_____
   I. Other taxes [*Optional addition*: (if not included in cash price)] $_____
   J. Government license and/or registration fees $_____
   K. Government certificate of title fee $_____
   L. Government vehicle inspection fees $_____
   M. Deputy service fee paid to dealer $_____
   N. **Documentary fee. A documentary fee is not an official fee. A documentary fee is not required by law, but may be charged to buyers for handling documents and performing services relating to the closing of a sale. A documentary fee may not exceed $50. This notice is required by law.** [***Option to insert Spanish translation of disclosure here.***] $_____
   O. Other charges (Seller must identify who is paid and describe purpose)
      to_____for_____ $_____
      to_____for_____ $_____
      to_____for_____ $_____
   Total other charges and amounts paid to others on my [~~your~~] behalf $_____(4)

5. **Amount Financed** (3 + 4) $_____(5)

[*Optional Caption*: Taxes, title fee, license fee, and any state inspection fee (*except for $5.00 of each such inspection fee that will be retained by Seller*) will be paid by Seller to government agencies. Documentary fee and deputy service fee will be retained by Seller and the seller may also retain parts of the insurance, service contracts, and other charges.]

[***Note: A creditor may delete portions of the figure applicable to any insurance premiums that are not financed in the contract and may also delete other inapplicable portions.***]

Figure: 7 TAC §1.1308(8)(B)

ITEMIZATION OF AMOUNT FINANCED

1. Cash price [Optional additional description: "(including any accessories, services, and taxes)"] $_____(1)

2. Downpayment (A + B) =
   A. [*If netting add*: (if negative, enter "0" and see Line 4.A. below)]
   Gross trade-in $_____
   - payoff by seller $_____
   = net trade-in $_____
   B. [*If not netting add*: (if negative enter "0" and see Line 4.A. below)]
   + cash $_____
   + Mfrs. Rebate $_____
   + other (describe) _____ $_____
   Total downpayment $_____(2)

3. Unpaid balance of cash price (1 minus 2) $_____(3)

4. Other charges including amounts paid to others on my [~~your~~] behalf (Seller may keep part of these amounts.):
   A. Net trade-in payoff [*Alternative caption*: "prior credit or lease balance"] to _____ $_____
   B. Cost of physical damage insurance paid to insurance company $_____
   C. Cost of optional coverages with physical damage insurance paid to insurance company $_____
   D. Cost of optional credit insurance paid to insurance company or companies $_____
      Life
      Disability
   E. Other insurance paid to the insurance company $_____
   F. Official fees paid to government agencies $_____
   G. Dealer's inventory tax [*Optional addition*: (if not included in cash price)] $_____
   H. Other taxes [*Optional addition*: (if not included in cash price)] $_____
   I. Government license and/or registration fees $_____
   J. Government certificate of title fee $_____
   K. Government vehicle inspection fees $_____
   L. Deputy service fee paid to dealer $_____
   M. **Documentary fee. A documentary fee is not an official fee. A documentary fee is not required by law, but may be charged to buyers for handling documents and performing services relating to the closing of a sale. A documentary fee may not exceed $50. This notice is required by law. [*Option to insert Spanish translation of disclosure here.*]** $_____
   N. Other charges (Seller must identify who is paid and describe purpose)
      to_____for_____ $_____
      to_____for_____ $_____
      to_____for_____ $_____
   Total Itemized Charges upon which the Finance Charge is assessed $_____(4)

5. Total Unpaid Balance Plus Itemized Charges Upon which the Finance Charge is assessed. (3+4) $_____(5)

6. Total Sales Tax (Upon Which No Finance Charge is Assessed) $_____(6)

7. **Amount Financed** ([~~3+4+~~]5+6) $_____(7)

Finance Charge (Not Assessed Upon Sales Tax) $_____

[*Optional Caption*: Taxes, title fee, license fee, and any state inspection fee (*except for $5.00 of each such inspection fee that will be retained by Seller*) will be paid by Seller to government agencies. Documentary fee and deputy service fee will be retained by Seller.]

[Note: A creditor may delete portions of the figure applicable to any insurance premiums that are not financed in the contract and may also delete other inapplicable portions.]

Figure: 7 TAC §81.2(a)(5)

Form A
Conditional Qualification Letter

Date:

Prospective Applicant:

Mortgage Banker

Registration Number _____

Address _____

Phone # _____

Loan (describe as follows):

Loan Amount:

Qualifying Interest Rate:

Term:

Maximum Loan-to-Value Ratio:

Loan Type and Description:

Mortgage Banker __ has __ has not received a signed application for the Loan from the Prospective Applicant

Mortgage Banker __ has __ has not reviewed the Prospective Applicant's credit report

Mortgage Banker __ has __ has not reviewed the Prospective Applicant's credit score

Mortgage Banker has reviewed the following additional items (list):

The Prospective Applicant has provided the Mortgage Banker ___verbally ___in writing with the following information about the Prospective Applicant:

Income	_____Yes	____No	____Not Applicable
Available cash for down payment and payment of closing costs	_____Yes	____No	____Not Applicable
Debts	_____Yes	____No	____Not Applicable
Other Assets	_____Yes	____No	____Not Applicable

Based on the information that the Prospective Applicant has provided to the Mortgage Banker, as described above, the Mortgage Banker has determined that the Prospective Applicant is eligible and qualified to meet the financial requirements of the Loan.

This is not an approval for the Loan. Approval of the Loan requires: (1) the Mortgage Banker to verify the information that the Prospective Applicant has provided; (2) the Prospective Applicant's financial status and credit report to remain substantially the same until the Loan closes; (3) the collateral for the Loan (the subject property) to satisfy the lender's requirements (for example, appraisal, title, survey, condition, and insurance); (4) the Loan type and terms, as described, to remain available in the market; (5) the Prospective Applicant to execute loan documents the lender requires, and (6) the following additional items (list):

_____

Mortgage Banker or Loan Officer

Figure: 7 TAC §81.2(b)(6)

Form B
Conditional Approval Letter

Date:

Applicant:

Mortgage Banker:

Registration Number _____

Address _____

Phone # _____

Loan (describe as follows):

1. Loan Amount:
2. Interest Rate:
3. Interest Rate Lock Expires (if applicable):
4. Maximum Loan-to-Value Ratio:
5. Loan Type and Program:

Secondary financing terms (if applicable):

Optional Information: *Points:*
Origination: _____
Discount: _____
Commitment: _____
Other (describe): _____

Subject Property:

Mortgage Banker has received a signed application from the Applicant.

Mortgage Banker has:

Reviewed applicant credit report and credit score	_____Yes	____No	____Not Applicable
Verified applicant's income	_____Yes	____No	____Not Applicable

Verified applicant's available cash for down payment and closing costs	_____Yes	____No	____Not Applicable
Reviewed applicant's debts and other assets	_____Yes	____No	____Not Applicable

Applicant is approved for the Loan provided that the Applicant's creditworthiness and financial position do not materially change prior to closing and provided that the following additional conditions are fully satisfied:

1. The Subject Property is appraised for an amount not less than $_____:
2. The Mortgage Banker does not object to encumbrances to title shown in the title commitment or survey;
3. The Subject Property's condition meets Mortgage Banker's requirements;
4. The Subject Property is insured in accordance with the Mortgage Banker's requirements;
5. The Applicant executes the loan documents the Mortgage Banker requires and abides by closing instructions; and
6. The following additional conditions are complied with (list):

This Conditional Approval expires on _____.

_____
Mortgage Banker

Figure 1: 30 TAC Chapter 113--Preamble

40 CFR Part 63 Subpart (Chapter 113, Section)	Section Title	Original Incorporation (Commission Adoption)
A (§113.100)	General Provisions	June 25, 1997
F (§113.110)	Synthetic Organic Chemical Manufacturing Industry	June 25, 1997
G (§113.120)	Synthetic Organic Chemical Manufacturing Industry for Process Vents, Storage Vessels, Transfer Operations, and Wastewater	June 25, 1997
H (§113.130)	Organic Hazardous Air Pollutants for Equipment Leaks	June 25, 1997
I (§113.140)	Certain Processes Subject to the Negotiated Regulations for Equipment Leaks	June 25, 1997
L (§113.170)	Coke Oven Batteries	July 14, 1999
M (§113.180)	Perchloroethylene Dry Cleaning Facilities	October 15, 1997
N (§113.190)	Chromium Emissions from Hard and Decorative Chromium Electroplating and Chromium Anodizing Tanks	October 15, 1997
O (§113.200)	Ethylene Oxide Emissions Standards for Sterilization Facilities	October 15, 1997
Q (§113.220)	Industrial Process Cooling Towers	June 25, 1997
R (§113.230)	Gasoline Distribution Facilities	June 25, 1997
S (§113.240)	Pulp and Paper Industry	July 14, 1999
T (§113.250)	Halogenated Solvent Cleaning	June 25, 1997
U (§113.260)	Group I Polymers and Resins	October 7, 1998
W (§113.280)	Epoxy Resins Production and Non-Nylon Polyamides Production	October 15, 1997
X (§113.290)	Secondary Lead Smelting	June 25, 1997
Y (§113.300)	Marine Vessel Loading	June 25, 1997
AA (§113.320)	Phosphoric Acid Manufacturing Plants	June 14, 2000
BB (§113.330)	Phosphate Fertilizers Production Plants	June 14, 2000
CC (§113.340)	Petroleum Refineries	October 15, 1997
DD (§113.350)	Off-Site Waste and Recovery Operations	October 7, 1998

40 CFR Part 63 Subpart (Chapter 113, Section)	Section Title	Original Incorporation (Commission Adoption)
EE (§113.360)	Magnetic Tape Manufacturing Operations	June 25, 2997
GG (§113.380)	Aerospace Manufacturing and Rework Facilities	October 15, 1997
HH (§113.390)	Oil and Natural Gas Production Facilities	June 14, 2000
II (§113.400)	Shipbuilding and Ship Repair (Surface Coating)	October 7, 1998
JJ (§113.410)	Wood Furniture Manufacturing Operations	July 14, 1999
KK (§113.420)	Printing and Publishing	October 7, 1998
LL (§113.430)	Primary Aluminum Reduction Plants	July 14, 1999
MM (§113.440)	Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite, and Stand-Alone Semichemical Pulp Mills	June 18, 2003
OO (§113.460)	Tanks Level 1	July 14, 1999
PP (§113.470)	Containers	July 14, 1999
QQ (§113.480)	Surface Impoundments	July 14, 1999
RR (§113.490)	Individual Drain Systems	July 14, 1999
VV (§113.530)	Oil Water Separators and Organic-Water Separators	July 15, 1999
CCC (§113.600)	Steel Pickling - HCl Process Facilities and Hydrochloric Acid Regeneration Plants	June 14, 2000
DDD (§113.610)	Mineral Wool Production	June 14, 2000
EEE (§113.620)	Hazardous Waste Combustors	July 14, 1999
GGG (§113.640)	Pharmaceuticals Production	July 14, 1999
HHH (§113.650)	Natural Gas Transmission and Storage Facilities	June 14, 2000
III (§113.660)	Flexible Polyurethane Foam Production	July 14, 1999
JJJ (§113.670)	Group IV Polymers and Resins	October 7, 1998
LLL (§113.690)	Portland Cement Manufacturing Industry	June 14, 2000
MMM (§113.700)	Pesticide Active Ingredient Production	June 14, 2000
NNN (§113.710)	Wool Fiberglass Manufacturing	June 14, 2000
OOO (§113.720)	Manufacture of Amino/Phenolic Resins	June 14, 2000
PPP (§113.730)	Polyether Polyols Production	June 14, 2000

40 CFR Part 63 Subpart (Chapter 113, Section)	Section Title	Original Incorporation (Commission Adoption)
RRR (§113.750)	Secondary Aluminum Production	June 18, 2003
TTT (§113.770)	Primary Lead Smelting	June 14, 2000
VVV (§113.790)	Publicly Owned Treatment Works	June 14, 2000
XXX (§113.810)	Ferroalloys Production: Ferromanganese and Silicomanganese	June 14, 2000

Figure 2: 30 TAC Chapter 113--Preamble

40 CFR Part 63 Subpart (Chapter 113 Section)	Section Title
B (§113.105)	Requirements for Control Technology Determinations for Major Sources in Accordance with Clean Air Act, Section 112(j)
C (§113.106)	List of Hazardous Air Pollutants, Petitions Process, Lesser Quantity Designations, Source Category List
EEEE (§113.880)	Organic Liquids Distribution (Non-Gasoline)
FFFF (§113.890)	Miscellaneous Organic Chemical Manufacturing
IIII (§113.920)	Surface Coating of Automobiles and Light-Duty Trucks
KKKK (§113.940)	Surface Coating of Metal Cans
MMMM (§113.960)	Surface Coating of Miscellaneous Metal Parts and Products
OOOO (§113.980)	Printing, Coating, and Dyeing of Fabrics and Other Textiles
PPPP (§113.990)	Surface Coating of Plastic Parts and Products
QQQQ (§113.1000)	Surface Coating of Wood Building Products
RRRR (§113.1010)	Surface Coating of Metal Furniture
WWWW (§113.1060)	Reinforced Plastic Composites Production
YYYY (§113.1080)	Stationary Combustion Turbines
ZZZZ (§113.1090)	Stationary Reciprocating Internal Combustion Engines
AAAAA (§113.1100)	Lime Manufacturing Plants
BBBBB (§113.1110)	Semiconductor Manufacturing
CCCCC (§113.1120)	Coke Ovens: Pushing, Quenching, and Battery Stacks
EEEEE (§113.1140)	Iron and Steel Foundries
FFFFF (§113.1150)	Integrated Iron and Steel Manufacturing Facilities
GGGGG (§113.1160)	Site Remediation
HHHHH (§113.1170)	Miscellaneous Coating Manufacturing
IIIII (§113.1180)	Mercury Emissions from Mercury Cell Chlor-Alkali Plants
JJJJJ (§113.1190)	Brick and Structural Clay Products Manufacturing
KKKKK (§113.1200)	Clay Ceramics Manufacturing
LLLLL (§113.1210)	Asphalt Processing and Asphalt Roofing Manufacturing

40 CFR Part 63 Subpart (Chapter 113 Section)	Section Title
MMMMM (§113.1220)	Flexible Polyurethane Foam Fabrication Operations
NNNNN (§113.1230)	Hydrochloric Acid Production
PPPPP (§113.1250)	Engine Test Cells/Stands
RRRRR (§113.1270)	Taconite Iron Ore Processing
SSSSS (§113.1280)	Refractory Products Manufacturing
TTTTT (§113.1290)	Primary Magnesium Refining

Figure: 30 TAC §290.275(1)

Appendix A--Converting Maximum Contaminant Level Compliance Values for Consumer Confidence Reports

Key

AL =	Action Level
MCL =	Maximum Contaminant Level
MCLG =	Maximum Contaminant Level Goal
MFL =	million fibers per liter
mrem/year =	millirems per year (a measure of radiation absorbed by the body)
NTU =	Nephelometric Turbidity Units
pCi/L =	picocuries per liter (a measure of radioactivity)
ppm =	parts per million, or milligrams per liter (mg/L)
ppb =	parts per billion, or micrograms per liter (µg/L)
ppt =	parts per trillion, or nanograms per liter
ppq =	parts per quadrillion, or picograms per liter
TT =	Treatment Technique

Contaminant	MCL in compliance units (mg/L)	multiply by . . .	MCL in CCR units	MCLG in CCR units
Microbiological Contaminants				
1. Total Coliform Bacteria			For systems that collect 40 or more samples per month - Presence of coliform bacteria in more than 5% of monthly samples. For systems that collect fewer than 40 samples per month - Presence of coliform bacteria in more than 1 sample per month.	0
2. Fecal coliform and E. coli			A routine sample and a repeat sample are total coliform positive, and one is also fecal coliform or E. coli positive.	0
3. Total organic carbon			TT (ppm)	n/a
4. Turbidity			TT (NTU)	n/a
Radioactive Contaminants				
5. Beta/photon emitters	4 mrem/yr		4 mrem/yr	0
6. Alpha emitters	15 pCi/L		15 pCi/L	0
7. Combined radium	5 pCi/L		5 pCi/L	0
8. Uranium	30 µg/L		30 µg/L	0
Inorganic Contaminants				
9. Antimony	.006	1000	6 ppb	6
10. Arsenic	.05/.010[1]	1000	50/10[1] ppb	n/a
11. Asbestos	7 MFL		7 MFL	7

Contaminant	MCL in compliance units (mg/L)	multiply by . . .	MCL in CCR units	MCLG in CCR units
12. Barium	2		2 ppm	2
13. Beryllium	.004	1000	4 ppb	4
14. Bromate	.010	1000	10 ppb	0
15. Cadmium	.005	1000	5 ppb	5
16. Chloramines	MRDL=4		MRDL=4 ppm	4
17. Chlorine	MRDL=4		MRDL=4 ppm	4
18. Chlorine Dioxide	MRDL=.8	1000	MRDL=800 ppb	800
19. Chlorite	1.0		1 ppm	0.8
20. Chromium	.1	1000	100 ppb	100
21. Copper	AL=1.3		AL=1.3 ppm.	1.3
22. Cyanide	.2	1000	200 ppb	200
23. Fluoride	4		4 ppm	4
24. Lead	AL=.015	1000	AL=15 ppb	0
25. Mercury (inorganic)	.002	1000	2 ppb	2
26. Nitrate (as Nitrogen)	10		10 ppm	10
27. Nitrite (as Nitrogen)	1		1 ppm	1
28. Selenium	.05	1000	50 ppb	50
29. Thallium	.002	1000	2 ppb	0.5
Synthetic Organic Contaminants including Pesticides and Herbicides				
30. 2,4-D	.07	1000	70 ppb	70
31. 2,4,5-TP (Silvex)	.05	1000	50 ppb	50

Contaminant	MCL in compliance units (mg/L)	multiply by . . .	MCL in CCR units	MCLG in CCR units
32. Acrylamide			TT	0
33. Alachlor	.002	1000	2 ppb	0
34. Atrazine	.003	1000	3 ppb	3
35. Benzo(a)pyrene (PAH)	.0002	1,000,000	200 ppt	0
36. Carbofuran	.04	1000	40 ppb	40
37. Chlordane	.002	1000	2 ppb	0
38. Dalapon	.2	1000	200 ppb	200
39. Di(2-ethylhexyl)adipate	.4	1000	400 ppb	400
40. Di(2-ethylhexyl) phthalate	.006	1000	6 ppb	0
41. Dibromochloropropane	.0002	1,000,000	200 ppt	0
42. Dinoseb	.007	1000	7 ppb	7
43. Diquat	.02	1000	20 ppb	20
44. Dioxin (2,3,7,8-TCDD)	.00000003	1,000,000,000	30 ppq	0
45. Endothall	.1	1000	100 ppb	100
46. Endrin	.002	1000	2 ppb	2
47. Epichlorohydrin			TT	0
48. Ethylene dibromide	.00005	1,000,000	50 ppt	0
49. Glyphosate	.7	1000	700 ppb	700
50. Heptachlor	.0004	1,000,000	400 ppt	0
51. Heptachlor epoxide	.0002	1,000,000	200 ppt	0
52. Hexachlorobenzene	.001	1000	1 ppb	0
53. Hexachloro-cyclopentadiene	.05	1000	50 ppb	50

Contaminant	MCL in compliance units (mg/L)	multiply by . . .	MCL in CCR units	MCLG in CCR units
54. Lindane	.0002	1,000,000	200 ppt	200
55. Methoxychlor	.04	1000	40 ppb	40
56. Oxamyl (Vydate)	.2	1000	200 ppb	200
57. PCBs (Polychlorinated biphenyls)	.0005	1,000,000	500 ppt	0
58. Pentachlorophenol	.001	1000	1 ppb	0
59. Picloram	.5	1000	500 ppb	500
60. Simazine	.004	1000	4 ppb	4
61. Toxaphene	.003	1000	3 ppb	0
Volatile Organic Contaminants				
62. Benzene	.005	1000	5 ppb	0
63. Carbon tetrachloride	.005	1000	5 ppb	0
64. Chlorobenzene	.1	1000	100 ppb	100
65. o-Dichlorobenzene	.6	1000	600 ppb	600
66. p-Dichlorobenzene	.075	1000	75 ppb	75
67. 1,2-Dichloroethane	.005	1000	5 ppb	0
68. 1,1-Dichloroethylene	.007	1000	7 ppb	7
69. cis-1,2-Dichloroethylene	.07	1000	70 ppb	70
70. trans-1,2-Dichloroethylene	.1	1000	100 ppb	100
71. Dichloromethane	.005	1000	5 ppb	0
72. 1,2-Dichloropropane	.005	1000	5 ppb	0
73. Ethylbenzene	.7	1000	700 ppb	700

Contaminant	MCL in compliance units (mg/L)	multiply by . . .	MCL in CCR units	MCLG in CCR units
74. Haloacetic acids	0.060	1000	60 ppb	n/a
75. Styrene	.1	1000	100 ppb	100
76. Tetrachloroethylene	.005	1000	5 ppb	0
77. 1,2,4-Trichlorobenzene	.07	1000	70 ppb	70
78. 1,1,1-Trichloroethane	.2	1000	200 ppb	200
79. 1,1,2-Trichloroethane	.005	1000	5 ppb	3
80. Trichloroethylene	.005	1000	5 ppb	0
81. TTHMs (Total trihalomethanes)	.10	1000	100 ppb	n/a
82. Toluene	1		1 ppm	1
83. Vinyl Chloride	.002	1000	2 ppb	0
84. Xylenes	10		10 ppm	10

[1] The .010 mg/L and 10 ppb arsenic levels are effective January 23, 2006. Until then, the MCL is 0.05 mg/L and there is no MCLG.

Figure: 30 TAC §290.275(2)

Appendix B--Sources of Regulated Contaminants

Key

AL =	Action Level
MCL =	Maximum Contaminant Level
MCLG =	Maximum Contaminant Level Goal
MFL =	million fibers per liter
mrem/year =	millirems per year (a measure of radiation absorbed by the body)
NTU =	Nephelometric Turbidity Units
pCi/L =	picocuries per liter (a measure of radioactivity)
ppm =	parts per million, or milligrams per liter (mg/L)
ppb =	parts per billion, or micrograms per liter (µg/L)
ppt =	parts per trillion, or nanograms per liter
ppq =	parts per quadrillion, or picograms per liter
TT =	Treatment Technique

Contaminant (units)	MCLG	MCL	Major sources in drinking water
Microbiological Contaminants			
1. Total Coliform Bacteria	0	For systems that collect 40 or more samples per month - Presence of coliform bacteria in more than 5% of monthly samples. For systems that collect fewer than 40 samples per month - Presence of coliform bacteria in more than 1 sample per month.	Naturally present in the environment.
2. Fecal coliform and E. coli	0	A routine sample and a repeat sample are total coliform positive, and one is also fecal coliform or E. coli positive.	Human and animal fecal waste.
3. Total organic carbon (ppm)	n/a	TT	Naturally present in the environment.
4. Turbidity	n/a	TT	Soil runoff.
Radioactive Contaminants			
5. Beta/photon emitters (mrem/yr)	0	4	Decay of natural and man-made deposits.
6. Alpha emitters (pCi/L)	0	15	Erosion of natural deposits.
7. Combined radium (µg/L)	0	5	Erosion of natural deposits.

Contaminant (units)	MCLG	MCL	Major sources in drinking water
Inorganic Contaminants			
8. Uranium (µg/L)	0	30	Erosion of natural deposits.
9. Antimony (ppb)	6	6	Discharge from petroleum refineries; fire retardants; ceramics; electronics; solder.
10. Arsenic (ppb)	n/a	50/10[1]	Erosion of natural deposits; Runoff from orchards; Runoff from glass and electronics production wastes.
11. Asbestos (MFL)	7	7	Decay of asbestos cement water mains; Erosion of natural deposits.
12. Barium (ppm)	2	2	Discharge of drilling wastes; Discharge from metal refineries; Erosion of natural deposits.
13. Beryllium (ppb)	4	4	Discharge from metal refineries and coal-burning factories; Discharge from electrical, aerospace, and defense industries.
14. Bromate (ppb)	0	10	By-product of drinking water disinfection.
15. Cadmium (ppb)	5	5	Corrosion of galvanized pipes; Erosion of natural deposits; Discharge from metal refineries; runoff from waste batteries and paints.
16. Chloramines (ppm)	MRDLG=4	MRDL=4	Water additive used to control microbes.
17. Chlorine (ppm)	MRDLG=4	MRDL=4	Water additive used to control microbes.
18. Chlorine Dioxide (ppb)	800	800	Water additive used to control microbes.
19. Chlorite (ppm)	1.0	1.0	By-product of drinking water disinfection.
20. Chromium (ppb)	100	100	Discharge from steel and pulp mills; Erosion of natural deposits.
21. Copper (ppm)	1.3	AL=1.3	Corrosion of household plumbing systems; Erosion of natural deposits.
22. Cyanide (ppb)	200	200	Discharge from steel/metal factories; Discharge from plastic and fertilizer factories.

Contaminant (units)	MCLG	MCL	Major sources in drinking water
23. Fluoride (ppm)	4	4	Erosion of natural deposits; Water additive which promotes strong teeth; Discharge from fertilizer and aluminum factories.
24. Lead (ppb)	0	AL=15	Corrosion of household plumbing systems; Erosion of natural deposits.
25. Mercury (inorganic) (ppb)	2	2	Erosion of natural deposits; Discharge from refineries and factories; Runoff from landfills; Runoff from cropland.
26. Nitrate (as Nitrogen) (ppm)	10	10	Runoff from fertilizer use; Leaching from septic tanks, sewage; Erosion of natural deposits.
27. Nitrite (as Nitrogen) (ppm)	1	1	Runoff from fertilizer use; Leaching from septic tanks, sewage; Erosion of natural deposits.
28. Selenium (ppb)	50	50	Discharge from petroleum and metal refineries; Erosion of natural deposits; Discharge from mines.
29. Thallium (ppb)	0.5	2	Leaching from ore-processing sites; Discharge from electronics, glass, and drug factories.
Synthetic Organic Contaminants including Pesticides and Herbicides			
30. 2,4-D (ppb)	70	70	Runoff from herbicide used on row crops.
31. 2,4,5-TP (Silvex) (ppb)	50	50	Residue of banned herbicide.
32. Acrylamide	0	TT	Added to water during sewage/wastewater treatment.
33. Alachlor (ppb)	0	2	Runoff from herbicide used on row crops.
34. Atrazine (ppb)	3	3	Runoff from herbicide used on row crops.
35. Benzo(a)pyrene (PAH) (nanograms/L)	0	200	Leaching from linings of water storage tanks and distribution lines.
36. Carbofuran (ppb)	40	40	Leaching of soil fumigant used on rice and alfalfa.

Contaminant (units)	MCLG	MCL	Major sources in drinking water
37. Chlordane (ppb)	0	2	Residue of banned termiticide.
38. Dalapon (ppb)	200	200	Runoff from herbicide used on rights of way.
39. Di(2-ethylhexyl) adipate (ppb)	400	400	Discharge from chemical factories.
40. Di(2-ethylhexyl) phthalate (ppb)	0	6	Discharge from rubber and chemical factories.
41. Dibromochloropropane (ppt)	0	200	Runoff/leaching from soil fumigant used on soybeans, cotton, pineapples, and orchards.
42. Dinoseb (ppb)	7	7	Runoff from herbicide used on soybeans and vegetables.
43. Diquat (ppb)	20	20	Runoff from herbicide use.
44. Dioxin (2,3,7,8-TCDD) (ppq)	0	30	Emissions from waste incineration and other combustion; Discharge from chemical factories.
45. Endothall (ppb)	100	100	Runoff from herbicide use.
46. Endrin (ppb)	2	2	Residue of banned insecticide.
47. Epichlorohydrin	0	TT	Discharge from industrial chemical factories; An impurity of some water treatment chemicals.
48. Ethylene dibromide (ppt)	0	50	Discharge from petroleum refineries.
49. Glyphosate (ppb)	700	700	Runoff from herbicide use.
50. Heptachlor (ppt)	0	400	Residue of banned termiticide.
51. Heptachlor epoxide (ppt)	0	200	Breakdown of heptachlor.
52. Hexachlorobenzene (ppb)	0	1	Discharge from metal refineries and agricultural chemical factories.
53. Hexachlorocyclopentadiene (ppb)	50	50	Discharge from chemical factories.
54. Lindane (ppt)	200	200	Runoff/leaching from insecticide used on cattle, lumber, gardens.
55. Methoxychlor (ppb)	40	40	Runoff/leaching from insecticide used on fruits, vegetables, alfalfa, livestock.

Contaminant (units)	MCLG	MCL	Major sources in drinking water
56. Oxamyl (Vydate) (ppb)	200	200	Runoff/leaching from insecticide used on apples, potatoes, and tomatoes.
57. PCBs (Polychlorinated biphenyls) (ppt)	0	500	Runoff from landfills; Discharge of waste chemicals.
58. Pentachlorophenol (ppb)	0	1	Discharge from wood preserving factories.
59. Picloram (ppb)	500	500	Herbicide runoff.
60. Simazine (ppb)	4	4	Herbicide runoff.
61. Toxaphene (ppb)	0	3	Runoff/leaching from insecticide used on cotton and cattle.
Volatile Organic Compounds			
62. Benzene (ppb)	0	5	Discharge from factories; Leaching from gas storage tanks and landfills.
63. Carbon tetrachloride (ppb)	0	5	Discharge from chemical plants and other industrial activities.
64. Chlorobenzene (ppb)	100	100	Discharge from chemical and agricultural chemical factories.
65. o-Dichlorobenzene (ppb)	600	600	Discharge from industrial chemical factories.
66. p-Dichlorobenzene (ppb)	75	75	Discharge from industrial chemical factories.
67. 1,2-Dichloroethane (ppb)	0	5	Discharge from industrial chemical factories.
68. 1,1-Dichloroethylene (ppb)	7	7	Discharge from industrial chemical factories.
69. cis-1,2-Dichloroethylene (ppb)	70	70	Discharge from industrial chemical factories.
70. trans-1,2-Dichloroethylene (ppb)	100	100	Discharge from industrial chemical factories.
71. Dichloromethane (ppb)	0	5	Discharge from pharmaceutical and chemical factories.
72. 1,2-Dichloropropane (ppb)	0	5	Discharge from industrial chemical factories.
73. Ethylbenzene (ppb)	700	700	Discharge from petroleum refineries.

Contaminant (units)	MCLG	MCL	Major sources in drinking water
74. Haloacetic acids (HAA) (ppb)	n/a	60	By-product of drinking water disinfection.
75. Styrene (ppb)	100	100	Discharge from rubber and plastic factories; Leaching from landfills.
76. Tetrachloroethylene (ppb)	0	5	Leaching from PVC pipes; Discharge from factories and dry cleaners.
77. 1,2,4-Trichlorobenzene (ppb)	70	70	Discharge from textile-finishing factories.
78. 1,1,1-Trichloroethane (ppb)	200	200	Discharge from metal degreasing sites and other factories.
79. 1,1,2-Trichloroethane (ppb)	3	5	Discharge from industrial chemical factories.
80. Trichloroethylene (ppb)	0	5	Discharge from metal degreasing sites and other factories.
81. TTHMs (Total trihalomethanes) (ppb)	n/a	80	By-product of drinking water disinfection.
82. Toluene (ppm)	1	1	Discharge from petroleum factories.
83. Vinyl Chloride (ppb)	0	2	Leaching from PVC piping; Discharge from plastics factories.
84. Xylenes (ppm)	10	10	Discharge from petroleum factories; Discharge from chemical factories.

[1] The 10 ppb arsenic level is effective January 23, 2006. Until then, the MCL is 0.05 mg/L and there is no MCLG.

Figure: 30 TAC §290.275(3)

Appendix C--Health Effects Language

Microbiological Contaminants

(1) Total Coliform. Coliforms are bacteria that are naturally present in the environment and are used as an indicator that other, potentially-harmful, bacteria may be present. Coliforms were found in more samples than allowed and this was a warning of potential problems.

(2) Fecal coliform/E.Coli. Fecal coliforms and E. coli are bacteria whose presence indicates that the water may be contaminated with human or animal wastes. Microbes in these wastes can cause short-term effects, such as diarrhea, cramps, nausea, headaches, or other symptoms. They may pose a special health risk for infants, young children, and people with severely compromised immune systems.

(3) Total organic carbon. Total organic carbon (TOC) has no health affects. However, TOC provides a medium for the formation of disinfection by-products. These by-products include trihalomethanes (THMs) and haloacetic acids (HAAs). Drinking water containing these by-products in excess of the maximum contaminant level (MCL) may lead to adverse health effects, liver or kidney problems, or nervous system effects, and may lead to an increased risk of getting cancer.

(4) Turbidity. Turbidity has no health effects. However, turbidity can interfere with disinfection and provide a medium for microbial growth. Turbidity may indicate the presence of disease-causing organisms. These organisms include bacteria, viruses, and parasites that can cause symptoms such as nausea, cramps, diarrhea, and associated headaches.

Radioactive Contaminants

(5) Beta/photon emitters. Certain minerals are radioactive and may emit forms of radiation known as photons and beta radiation. Some people who drink water containing beta and photon emitters in excess of the MCL over many years may have an increased risk of getting cancer.

(6) Alpha emitters. Certain minerals are radioactive and may emit a form of radiation known as alpha radiation. Some people who drink water containing alpha emitters in excess of the MCL over many years may have an increased risk of getting cancer.

(7) Combined Radium 226/228. Some people who drink water containing radium 226 or 228 in excess of the MCL over many years may have an increased risk of getting cancer.

(8) Uranium. Some people who drink water containing uranium in excess of the MCL over many years may have an increased risk of getting cancer and kidney toxicity.

Inorganic Contaminants

(9) Antimony. Some people who drink water containing antimony well in excess of the MCL over many years could experience increases in blood cholesterol and decreases in blood sugar.

(10) Arsenic. Some people who drink water containing arsenic in excess of the MCL over many years could experience skin damage or problems with their circulatory system, and may have an increased risk of getting cancer.

(11) Asbestos. Some people who drink water containing asbestos in excess of the MCL over many years may have an increased risk of developing benign intestinal polyps.

(12) Barium. Some people who drink water containing barium in excess of the MCL over many years could experience an increase in their blood pressure.

(13) Beryllium. Some people who drink water containing beryllium well in excess of the MCL over many years could develop intestinal lesions.

(14) Bromate. Some people who drink water containing bromate in excess of the MCL over many years could experience an increased risk of getting cancer.

(15) Cadmium. Some people who drink water containing cadmium in excess of the MCL over many years could experience kidney damage.

(16) Chloramines. Some people who use water containing chloramines well in excess of the MRDL could experience irritating effects to their eyes and nose. Some people who drink water containing chloramines well in excess of the maximum residual disinfectant level (MRDL) could experience stomach discomfort or anemia.

(17) Chlorine. Some people who use water containing chlorine well in excess of the MRDL could experience irritating effects to their eyes and nose. Some people who drink water containing chlorine well in excess of the MRDL could experience stomach discomfort.

(18) Chlorine dioxide. Some infants and young children who drink water containing chlorine dioxide in excess of the MRDL could experience nervous system effects. Similar effects may occur in fetuses of pregnant women who drink water containing chlorine dioxide in excess of the MRDL. Some people may experience anemia.

(19) Chlorite. Some infants and young children who drink water containing chlorite in excess of the MCL could experience nervous system effects. Similar effects may occur in fetuses of pregnant women who drink water containing chlorite in excess of the MCL. Some people may experience anemia.

(20) Chromium. Some people who use water containing chromium well in excess of the MCL over many years could experience allergic dermatitis.

(21) Copper. Copper is an essential nutrient, but some people who drink water containing copper in excess of the action level over a relatively short amount of time could experience gastrointestinal distress. Some people who drink water containing copper in excess of the action level over many years could suffer liver or kidney damage. People with Wilson's Disease should consult their personal doctor.

(22) Cyanide. Some people who drink water containing cyanide well in excess of the MCL over many years could experience nerve damage or problems with their thyroid.

(23) Fluoride. Some people who drink water containing fluoride in excess of the MCL over many years could get bone disease, including pain and tenderness of the bones. Children may get mottled teeth.

(24) Lead. Infants and children who drink water containing lead in excess of the action level could experience delays in their physical or mental development. Children could show slight deficits in attention span and learning abilities. Adults who drink this water over many years could develop kidney

problems or high blood pressure.

(25) Mercury (inorganic). Some people who drink water containing inorganic mercury well in excess of the MCL over many years could experience kidney damage.

(26) Nitrate. Infants below the age of six months who drink water containing nitrate in excess of the MCL could become seriously ill and, if untreated, may die. Symptoms include shortness of breath and blue-baby syndrome.

(27) Nitrite. Infants below the age of six months who drink water containing nitrite in excess of the MCL could become seriously ill and, if untreated, may die. Symptoms include shortness of breath and blue-baby syndrome.

(28) Selenium. Selenium is an essential nutrient. However, some people who drink water containing selenium in excess of the MCL over many years could experience hair or fingernail losses, numbness in fingers or toes, or problems with their circulation.

(29) Thallium. Some people who drink water containing thallium in excess of the MCL over many years could experience hair loss, changes in their blood, or problems with their kidneys, intestines, or liver.

Synthetic Organic Contaminants Including Pesticides and Herbicides

(30) 2,4-D. Some people who drink water containing the weed killer 2,4-D well in excess of the MCL over many years could experience problems with their kidneys, liver, or adrenal glands.

(31) 2,4,5-TP (Silvex). Some people who drink water containing silvex in excess of the MCL over many years could experience liver problems.

(32) Acrylamide. Some people who drink water containing high levels of acrylamide over a long period of time could have problems with their nervous system or blood, and may have an increased risk of getting cancer.

(33) Alachlor. Some people who drink water containing alachlor in excess of the MCL over many years could have problems with their eyes, liver, kidneys, or spleen, or experience anemia, and may have an increased risk of getting cancer.

(34) Atrazine. Some people who drink water containing atrazine well in excess of the MCL over many years could experience problems with their cardiovascular system or reproductive difficulties.

(35) Benzo(a)pyrene (PAH). Some people who drink water containing benzo(a)pyrene in excess of the MCL over many years may experience reproductive difficulties and may have an increased risk of getting cancer.

(36) Carbofuran. Some people who drink water containing carbofuran in excess of the MCL over many years could experience problems with their blood, or nervous or reproductive systems.

(37) Chlordane. Some people who drink water containing chlordane in excess of the MCL over many years could experience problems with their liver or nervous system, and may have an increased risk of getting cancer.

(38) Dalapon. Some people who drink water containing dalapon well in excess of the MCL over many years could experience minor kidney changes.

(39) Di (2-ethylhexyl) adipate. Some people who drink water containing di (2-ethylhexyl) adipate well in excess of the MCL over many years could experience general toxic effects such as weight loss, liver enlargement, or possible reproductive difficulties.

(40) Di (2-ethylhexyl) phthalate. Some people who drink water containing di (2-ethylhexyl) phthalate in excess of the MCL over many years may have problems with their liver, or experience reproductive difficulties, and may have an increased risk of getting cancer.

(41) Dibromochloropropane (DBCP). Some people who drink water containing DBCP in excess of the MCL over many years could experience reproductive difficulties and may have an increased risk of getting cancer.

(42) Dinoseb. Some people who drink water containing dinoseb well in excess of the MCL over many years could experience reproductive difficulties.

(43) Dioxin (2,3,7,8-TCDD). Some people who drink water containing dioxin in excess of the MCL over many years could experience reproductive difficulties and may have an increased risk of getting cancer.

(44) Diquat. Some people who drink water containing diquat in excess of the MCL over many years could get cataracts.

(45) Endothall. Some people who drink water containing endothall in excess of the MCL over many years could experience problems with their stomach or intestines.

(46) Endrin. Some people who drink water containing endrin in excess of the MCL over many years could experience liver problems.

(47) Epichlorohydrin. Some people who drink water containing high levels of epichlorohydrin over a long period of time could experience stomach problems, and may have an increased risk of getting cancer.

(48) Ethylene dibromide. Some people who drink water containing ethylene dibromide in excess of the MCL over many years could experience problems with their liver, stomach, reproductive system, or kidneys, and may have an increased risk of getting cancer.

(49) Glyphosate. Some people who drink water containing glyphosate in excess of the MCL over many years could experience problems with their kidneys or reproductive difficulties.

(50) Heptachlor. Some people who drink water containing heptachlor in excess of the MCL over many years could experience liver damage and may have an increased risk of getting cancer.

(51) Heptachlor epoxide. Some people who drink water containing heptachlor epoxide in excess of the MCL over many years could experience liver damage, and may have an increased risk of getting cancer.

(52) Hexachlorobenzene. Some people who drink water containing hexachlorobenzene in excess of the MCL over many years could experience problems with their liver or kidneys, or adverse reproductive

effects, and may have an increased risk of getting cancer.

(53) Hexachlorocyclopentadiene. Some people who drink water containing hexachlorocyclopentadiene well in excess of the MCL over many years could experience problems with their kidneys or stomach.

(54) Lindane. Some people who drink water containing lindane in excess of the MCL over many years could experience problems with their kidneys or liver.

(55) Methoxychlor. Some people who drink water containing methoxychlor in excess of the MCL over many years could experience reproductive difficulties.

(56) Oxamyl. Some people who drink water containing oxamyl in excess of the MCL over many years could experience slight nervous system effects.

(57) PCBs. Some people who drink water containing PCBs in excess of the MCL over many years could experience changes in their skin, problems with their thymus gland, immune deficiencies, or reproductive or nervous system difficulties, and may have an increased risk of getting cancer.

(58) Pentachlorophenol. Some people who drink water containing pentachlorophenol in excess of the MCL over many years could experience problems with their liver or kidneys, and may have an increased risk of getting cancer.

(59) Picloram. Some people who drink water containing picloram in excess of the MCL over many years could experience problems with their liver.

(60) Simazine. Some people who drink water containing simazine in excess of the MCL over many years could experience problems with their blood.

(61) Toxaphene. Some people who drink water containing toxaphene in excess of the MCL over many years could have problems with their kidneys, liver, or thyroid, and may have an increased risk of getting cancer.

Volatile Organic Contaminants

(62) Benzene. Some people who drink water containing benzene in excess of the MCL over many years could experience anemia or a decrease in blood platelets, and may have an increased risk of getting cancer.

(63) Carbon Tetrachloride. Some people who drink water containing carbon tetrachloride in excess of the MCL over many years could experience problems with their liver and may have an increased risk of getting cancer.

(64) Chlorobenzene. Some people who drink water containing chlorobenzene in excess of the MCL over many years could experience problems with their liver or kidneys.

(65) o-Dichlorobenzene. Some people who drink water containing o-dichlorobenzene well in excess of the MCL over many years could experience problems with their liver, kidneys, or circulatory systems.

(66) p-Dichlorobenzene. Some people who drink water containing p-dichlorobenzene in excess of the MCL over many years could experience anemia, damage to their liver, kidneys, or spleen, or changes in

their blood.

(67) 1,2-Dichloroethane. Some people who drink water containing 1,2-dichloroethane in excess of the MCL over many years may have an increased risk of getting cancer.

(68) 1,1-Dichloroethylene. Some people who drink water containing 1,1-dichloroethylene in excess of the MCL over many years could experience problems with their liver.

(69) cis-1,2-Dichloroethylene. Some people who drink water containing cis-1,2-dichloroethylene in excess of the MCL over many years could experience problems with their liver.

(70) trans-1,2-Dicholoroethylene. Some people who drink water containing trans-1,2-dichloroethylene well in excess of the MCL over many years could experience problems with their liver.

(71) Dichloromethane. Some people who drink water containing dichloromethane in excess of the MCL over many years could have liver problems and may have an increased risk of getting cancer.

(72) 1,2-Dichloropropane. Some people who drink water containing 1,2-dichloropropane in excess of the MCL over many years may have an increased risk of getting cancer.

(73) Ethylbenzene. Some people who drink water containing ethylbenzene well in excess of the MCL over many years could experience problems with their liver or kidneys.

(74) Haloacetic acids (HAAs). Some people who drink water containing HAAs in excess of the MCL over many years may have an increased risk of getting cancer.

(75) Styrene. Some people who drink water containing styrene well in excess of the MCL over many years could have problems with their liver, kidneys, or circulatory system.

(76) Tetrachloroethylene. Some people who drink water containing tetrachloroethylene in excess of the MCL over many years could have problems with their liver, and may have an increased risk of getting cancer.

(77) 1,2,4-Trichlorobenzene. Some people who drink water containing 1,2,4-trichlorobenzene well in excess of the MCL over many years could experience changes in their adrenal glands.

(78) 1,1,1,-Trichloroethane. Some people who drink water containing 1,1,1-trichloroethane in excess of the MCL over many years could experience problems with their liver, nervous system, or circulatory system.

(79) 1,1,2-Trichloroethane. Some people who drink water containing 1,1,2-trichloroethane well in excess of the MCL over many years could have problems with their liver, kidneys, or immune systems.

(80) Trichloroethylene. Some people who drink water containing trichloroethylene in excess of the MCL over many years could experience problems with their liver and may have an increased risk of getting cancer.

(81) TTHMs (Total Trihalomethanes). Some people who drink water containing trihalomethanes in excess of the MCL over many years may experience problems with their liver, kidneys, or central nervous systems, and may have an increased risk of getting cancer.

(82) Toluene. Some people who drink water containing toluene well in excess of the MCL over many years could have problems with their nervous system, kidneys, or liver.

(83) Vinyl Chloride. Some people who drink water containing vinyl chloride in excess of the MCL over many years may have an increased risk of getting cancer.

(84) Xylenes. Some people who drink water containing xylenes in excess of the MCL over many years could experience damage to their nervous system.

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.

Department of Assistive and Rehabilitative Services

Request for Information

The Department of Assistive and Rehabilitative Services (DARS), Division for Deaf and Hard of Hearing Services (DHHS) through the Specialized Telecommunications Access Program (STAP) hereby gives notice of Request for Information (RFI). The primary purpose of the RFI is to obtain information on basic adaptive equipment or services that provides persons with disabilities basic telecommunication devices and functionally equivalent access to the telecommunications network.

By the authority of the Utilities Code Chapter 56 DHHS is designated to receive applications, determine eligibility, and issue vouchers to eligible applicants to use to purchase suitable adaptive telecommunication equipment. The voucher can only be used to purchase the equipment or service that is specified on the voucher from vendors who are registered with the PUC. Registered vendors are then reimbursed the face amount of the voucher or the actual retail cost of the equipment or service, whichever is less.

DHHS is required to establish a reasonable price for basic STAP authorized devices. For this reason DHHS requests information (including prices) from potential vendors concerning available models of devices/services for equipment or services that could be purchased with STAP vouchers.

The RFI is for informational purposes only. Used or reconditioned equipment cannot be purchased using a STAP voucher. Descriptions of each device as shown on the application have been included for reference. All equipment must be new and have all the basic key features listed per device on the attached page.

To obtain a copy of the RFI or for additional information contact Eileen Alter at 512-407-3250 voice or 512-407-3251 TTY, or eileen.alter@dars.state.tx.us. Responses must be received in the DHHS office by 5:00 p.m., February 15 , 2005, at DHHS, Attn: Eileen Alter, 4900 N. Lamar, Suite 2169, Austin, Texas 78751

TRD-200407446
Terrell I. Murphy
Commissioner
Department of Assistive and Rehabilitative Services
Filed: December 21, 2004

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Office of the Attorney General

Notice of Settlement of a Texas Solid Waste Disposal Act Enforcement Action

Notice is hereby given by the State of Texas of the following proposed resolution of an environmental enforcement action under the Texas Health and Safety Code. Before the State may enter into a voluntary settlement agreement, pursuant to §7.110 of the Texas Water Code the State shall permit the public to comment in writing. The Attorney General will consider any written comments and may withdraw or withhold consent to the proposed agreement if the comments disclose facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Act.

Case Title: Gulf Metals Industries State Superfund Site, Telean Street, northeast of the intersection of Mykawa Road and Almeda-Genoa Road, Houston, Harris County, Texas.

Background: On January 22, 1988, the Texas Natural Resource Conservation Commission ("TNRCC") listed the Gulf Metals Industries Site on the State Superfund Registry. In 1992 certain potentially responsible parties agreed to underwrite the costs of a remedial investigation/feasibility study (RI/FS) and participate in cleanup activities under TNRCC supervision. The RI/FS was completed and approved in 2001. In 2002 the Texas Commission on Environmental Quality ("TCEQ"), successor to the TNRCC, deleted the Site from the Superfund Registry and accepted it into the Voluntary Cleanup Program (27 TexReg 6126). The TCEQ approved a groundwater monitoring plan for the Site in June 2002 and a landfill closure completion report in March 2003.

The TCEQ now seeks to recover its oversight costs from potentially responsible parties that have not participated in the RI/FS and the remediation activities.

Nature of the Settlement: The case is to be settled by written settlement agreement.

Proposed Settlement: The settlement agreement provides for payment of TCEQ oversight costs and attorneys' fees, releases for settling parties, and the settlement of contribution claims among settling parties.

The Office of the Attorney General will accept written comments relating to the proposed settlement for thirty (30) days from the date of publication of this notice. Copies of the proposed settlement agreement may be examined at the Office of the Attorney General, 300 W. 15th Street, 10th Floor, Austin, Texas. A copy of the settlement agreement may also be obtained in person or by mail at the above address for the cost of copying. Requests for copies of the settlement agreement, and written comments on same, should be directed to Thomas H. Edwards, Assistant Attorney General, Office of the Attorney General, P.O. Box 12548, Austin, Texas 78711-2548; telephone (512) 463-2012, fax (512) 320-0052.

For information regarding this publication you may contact A.G. Younger, Agency Liaison, at (512) 463-2110.

TRD-200407449
Nancy S. Fuller
Assistant Attorney General
Office of the Attorney General
Filed: December 21, 2004

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Texas Building and Procurement Commission

Request for Proposal

RFP Number: #303-5-10554

Opening Date/Time: January 11, 2005 at 3:00 PM

Description: Lease requirement for approximately 536 sq. ft. of Office Space in Huntsville, Walker County, Texas

Agency: Department of Assistive and Rehabilitative Services (DARS)

Purchaser/Contact: Kenneth Ming (512) 463-2743 or through the Electronic State Business Daily at: http://esbd.tbpc.state.tx.us/1380/bid_show.cfm?bidid=56994

TRD-200407447
Mark Gentle
Legal Counsel
Texas Building and Procurement Commission
Filed: December 21, 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. Requests for federal consistency review were deemed administratively complete for the following project(s) during the period of December 9, 2004, through December 16, 2004. 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. The notice was published on the web site on December 22, 2004. The public comment period for these projects will close at 5:00 p.m. on January 21, 2005.

FEDERAL AGENCY ACTIONS:

Applicant: Davis Petroleum Corporation; Location: The project is located within Galveston Bay, in State Tract 287, approximately 2 miles northeast of Eagle Point, Chambers County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Bacliff, Texas. Approximate UTM Coordinates in NAD 27 (meters): Zone 15; Easting: 316178; Northing: 3265414. Project Description: The applicant proposes to install, operate, and maintain structures and equipment necessary for oil and gas drilling, production, and transportation activities. Such activities include installation of typical marine barges and keyways, shell and gravel pad, production structure with attendant facility, flowlines, and 12,000 linear feet of 8-inch pipeline. CCC Project No.: 05-0064-F1; Type of Application: U.S.A.C.E. permit application #23606 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. §1344). Note: The consistency review for this project may be conducted by the Texas Railroad Commission under §401 of the Clean Water Act.

Applicant: Port Aransas Marina Association; Location: The project is located at the end of A Street on the Port A Marina Annex, Port Aransas, Nueces County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Port Aransas, Texas. Approximate UTM Coordinates in NAD 27 (meters): Zone 14; Easting: 691250; Northing: 3081000. Project Description: The applicant proposes to amend his existing permit to retain approximately 150 cubic yard of broken concrete riprap material that was placed along a portion of the toe of an existing bulkhead for a residential canal. The material was placed into navigable waters of the United States without authorization from the Corps of Engineers. The applicant also proposes to place additional riprap material for erosion control along an additional 250 feet of the residential canal bulkhead and 2,050 feet of shoreline parallel to the Corpus Christi Ship Channel (CCSC). The proposed riprap area along the CCSC would be approximately 200 feet from the top-edge-cut of the channel. Approximately 450 cubic yards of material would be used for the additional work along the canal and 800 cubic yards for the area along the CCSC. The purpose of the project is for erosion control needed to prevent undermining of the applicant's bulkhead from wave action generated by heavy ship traffic through the nearby CCSC. CCC Project No.: 05-0068-F1; Type of Application: U.S.A.C.E. permit application #04761(02) 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. §1344). Note: The consistency review for this project may be conducted by the Texas Commission on Environmental Quality 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. Gwen Spriggs, Council Administrative Coordinator, Coastal Coordination Council, P.O. Box 12873, Austin, Texas 78711-2873, or gwen.spriggs@glo.state.tx.us. Comments should be sent to Ms. Spriggs at the above address or by fax at (512) 475-0680.

TRD-200407440
Larry L. Laine
Chief Clerk/Deputy Land Commissioner, General Land Office
Coastal Coordination Council
Filed: December 21, 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 303.003, 303.009, and 304.003, Tex. Fin. Code.

The weekly ceiling as prescribed by Sec. 303.003 and Sec. 303.009 for the period of 12/27/04 - 01/02/05 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 12/27/04 - 01/02/05 is 18% for Commercial over $250,000.

The judgment ceiling as prescribed by Sec. 304.003 for the period of 01/01/05 - 01/31/05 is 5.25% for Consumer/Agricultural/Commercial/credit thru $250,000.

The judgment ceiling as prescribed by Sec. 304.003 for the period of 01/01/05 - 01/31/05 is 5.25% for Commercial over $250,000.

[1] Credit for personal, family or household use.

[2] Credit for business, commercial, investment or other similar purpose.

TRD-200407444
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: December 21, 2004

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Credit Union Department

Applications to Amend Articles of Incorporation

Notice is given that the following applications have been filed with the Credit Union Department and are under consideration:

An application for a name change was received from Denton Area Teachers Credit Union, Denton, Texas. The credit union is proposing to change its name to DATCU.

An application for a name change was received from Dresser Central Credit Union, Houston, Texas. The credit union is proposing to change its name to Southern Star Credit Union.

An application was filed by MemberSource Credit Union, Houston, Texas to amend its Articles of Incorporation relating to primary place of business.

Comments or a request for a meeting by any interested party relating to an application must be submitted in writing within 30 days from the date of this publication. Any written comments must provide all information that the interested party wishes the Department to consider in evaluating the application. All information received will be weighed during consideration of the merits of an application. Comments or a request for a meeting should be addressed to the Texas Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

TRD-200407453
Harold E. Feeney
Commissioner
Credit Union Department
Filed: December 22, 2004

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Applications to Expand Field of Membership

Notice is given that the following applications have been filed with the Credit Union Department and are under consideration:

An application was received from InvesTex Credit Union, Houston, Texas to expand its field of membership. The proposal would permit persons who live in the North Harris Montgomery Community College District, to be eligible for membership in the credit union.

An application was received from Texas Bay Area Credit Union, Pasadena, Texas to expand its field of membership. The proposal would permit persons who live, work, attend school, or worship in and businesses located within 10 miles of the offices of Texas Bay Area Credit Union located at 1301 Highway 225, Pasadena, Texas 77506, 15245 Wallisville Road, Houston, Texas 77049, and 3409 Spencer Highway, Pasadena, Texas 77504, to be eligible for membership in the credit union.

An application was received from Texas Employees Credit Union, Dallas, Texas to expand its field of membership. The proposal would permit employees of Master Cleaning who work in or are paid or supervised from North Richland Hills, Texas, to be eligible for membership in the credit union.

An application was received from Associated Credit Union of Texas, Texas City, Texas to expand its field of membership. The proposal would permit persons who live in, work in, worship in, or attend school in, and businesses located in Brazoria County, Texas, to be eligible for membership in the credit union.

An application was received from Harlingen Area Teachers' Credit Union, Harlingen, Texas to expand its field of membership. The proposal would permit persons who live, work, attend school, or worship in and businesses located within a 10 mile radius of Harlingen Area Teachers' Credit Union offices located at: 2910 E. Grimes, Harlingen, TX 78550; 4321 W. Exp. 83, Harlingen, TX 78550; and 345 N. Williams Road, San Benito, TX 78586, to be eligible for membership in the credit union.

An application was received from Texas Trust Credit Union (#1), Grand Prairie, Texas to expand its field of membership. The proposal would permit persons who live, work, worship, or attend school in, and businesses located in Ellis County, Texas, to be eligible for membership in the credit union.

An application was received from Texas Trust Credit Union (#2), Grand Prairie, Texas to expand its field of membership. The proposal would permit persons who live, work, worship, or attend school in, and businesses located in Johnson County, Texas, to be eligible for membership in the credit union.

Comments or a request for a meeting by any interested party relating to an application must be submitted in writing within 30 days from the date of this publication. Credit unions that wish to comment on any application must also complete a Notice of Protest form. The form may be obtained by contacting the Department at (512) 837-9236 or downloading the form at http://www.tcud.state.tx.us/applications.html. Any written comments must provide all information that the interested party wishes the Department to consider in evaluating the application. All information received will be weighed during consideration of the merits of an application. Comments or a request for a meeting should be addressed to the Texas Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

TRD-200407455
Harold E. Feeney
Commissioner
Credit Union Department
Filed: December 22, 2004

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Notice of Final Action Taken

In accordance with the provisions of 7 TAC §91.103, the Credit Union Department provides notice of the final action taken on the following applications:

Applications to Expand Field of Membership - Approved

Members Choice Credit Union, Houston, Texas - See *Texas Register* issue dated August 27, 2004.

Dresser Central Credit Union, Houston, Texas (Amended) - Persons who live in, work in, attend school in, or worship in, and businesses located within a 10-mile radius of Dresser Central Credit Union's offices located at 2607 Gessner, Houston, TX 77080 and 5253 Hollister Road, Houston, TX 77040.

First Community Credit Union of Houston, Houston, Texas (#1) - See *Texas Register* issue dated September 24, 2004.

First Community Credit Union of Houston, Houston, Texas (#2) - See *Texas Register* issue dated September 24, 2004.

First Community Credit Union of Houston, Houston, Texas (#3) - See *Texas Register* issue dated September 24, 2004.

Community Service Credit Union, Huntsville, Texas - See *Texas Register* issue dated September 24, 2004.

LCRA Credit Union, Austin, Texas (#2) - See *Texas Register* issue dated September 24, 2004.

LCRA Credit Union, Austin, Texas (#3) (Amended) - Persons who live, work, attend school, or worship in, and businesses located within a 10-mile radius of LCRA Credit Union's offices located at: 3701 Lake Austin Blvd., Austin, TX 78703 and 3505 Montopolis, Austin, TX 78744.

LCRA Credit Union, Austin, Texas (#4) - See *Texas Register* issue dated September 24, 2004.

LCRA Credit Union, Austin, Texas (#6) - See *Texas Register* issue dated September 24, 2004.

GPS Community Credit Union, Galena Park, Texas (#1) - See *Texas Register* issue dated September 24, 2004.

GPS Community Credit Union, Galena Park, Texas (#2) - See *Texas Register* issue dated September 24, 2004.

GPS Community Credit Union, Galena Park, Texas (#4) - See *Texas Register* issue dated September 24, 2004.

GPS Community Credit Union, Galena Park, Texas (#5) - See *Texas Register* issue dated September 24, 2004.

Memorial Hermann Credit Union, Houston, Texas - See *Texas Register* issue dated September 24, 2004.

Texas Dow Employees Credit Union, Lake Jackson, Texas (#1) - See *Texas Register* issue dated October 29, 2004.

Texas Dow Employees Credit Union, Lake Jackson, Texas (#2) - See *Texas Register* issue dated October 29, 2004.

Houston Highway Credit Union, Houston, Texas (#1) - See *Texas Register* issue dated October 29, 2004.

Houston Highway Credit Union, Houston, Texas (#2) - See *Texas Register* issue dated October 29, 2004.

Houston Highway Credit Union, Houston, Texas (#3) - See *Texas Register* issue dated October 29, 2004.

Harlingen Area Teachers Credit Union, Harlingen, Texas - See *Texas Register* issue dated October 29, 2004.

Shared Resources Credit Union, Pasadena, Texas - See *Texas Register* issue dated October 29, 2004.

Applications to Expand Field of Membership - Denied

GPS Community Credit Union, Galena Park, Texas (#3) - See *Texas Register* issue dated September 24, 2004.

First Community Credit Union of Houston, Houston, Texas (#4) - See *Texas Register* issue dated September 24, 2004.

First Community Credit Union of Houston, Houston, Texas (#5) - See *Texas Register* issue dated September 24, 2004.

Applications to Expand Field of Membership - Vacated

Telco Plus Credit Union, Longview, Texas (#1) (Conditional) - See *Texas Register* issue dated November 28, 2003.

Applications to Amend Articles of Incorporation - Approved

Associated Credit Union of Texas, Texas City, Texas - See *Texas Register* issue dated October 29, 2004.

Kraft America Credit Union, Garland, Texas - See *Texas Register* issue dated October 29, 2004.

Applications for a Merger or Consolidation - Approved

Texas State Florists' Association Credit Union (Austin) and The Florist Federal Credit Union (Roswell, NM) - See *Texas Register* issue dated June 25, 2004.

TRD-200407454
Harold E. Feeney
Commissioner
Credit Union Department
Filed: December 22, 2004

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Public Meeting Notice

The Joint Financial Regulatory Agencies comprised of the Finance Commission of Texas and the Texas Credit Union Commission (the "Commissions") have proposed new 7 TAC §§152.9, 152.11, 152.13, and 153.93, concerning interpretations related to a lien on a homestead for home improvement, and interpretations of the nature of and process by which a lender or holder ("lender") of a home equity loan may cure its failure to fully comply with its obligations under the Texas Constitution, Article XVI, §50 (Section 50).

The Credit Union Commissioner and the Consumer Credit Commissioner have been delegated the authority to conduct a public meeting, on behalf of the Commissions, for the purpose of receiving oral comments, views, and/or testimony concerning the proposed interpretations. At the conclusion of this public meeting, the official record for each of these proposed interpretations will be closed and no further written or oral comments will be considered or accepted by the Commissions. This public meeting will be held in Austin on January 6, 2005, at 9:00 a.m. in the State Finance Commission Building, William F. Aldridge Hearing Room, located at 2601 North Lamar Boulevard. The meeting will be structured for the receipt of oral testimony or comments only. Individuals may present oral statements when recognized but no written materials will be accepted. The deadline for written comments has already passed.

Members of the Commissions may be present. This meeting is being posted as a special meeting of the respective Commissions as required by the Texas Open Meetings Law, in case a quorum of either Commission is present.

Person with disabilities who have special communication or other accommodation needs who are planning to attend the meeting should contact the Joann McAnally at the Office of Consumer Credit Commissioner at 512/936-7640. Requests should be made as far in advance as possible.

TRD-200407353
Harold E. Feeney
Commissioner
Credit Union Department
Filed: December 16, 2004

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Texas Education Agency

Request for Applications Concerning Career and Technology Education Special Populations Project

Eligible Applicants. The Texas Education Agency (TEA) is requesting applications under Request for Applications (RFA) #701-05-02 from local education agencies, eligible institutions, regional education service centers, or a consortium of two or more of these entities that has the capacity and resources to provide statewide projects in Texas. Eligible institutions are institutions of higher education or local education agencies providing education at the postsecondary level.

Description. The purpose of this RFA is to solicit grant applications from eligible applicants to carry out a statewide program to provide online instructional materials, teaching resources, and information on

meeting the unique needs of students who are members of special populations.

Dates of Project. Career and Technology Education Special Populations Project will be implemented during the 2004-2005 and 2005-2006 school years. Applicants should plan for a starting date of no earlier than March 1, 2005, and an ending date of no later than May 31, 2006.

Project Amount. Funding will be provided for one project. The project will receive an award not to exceed $250,000 for the 2004-2005 school year. Continuation funding, if available, will be based on satisfactory progress of the first-year objectives and activities and on general budget approval by the commissioner of education and the U.S. Congress. This project is funded 100 percent from Carl D. Perkins Vocational and Technical Education federal funds.

Selection Criteria. Applications will be selected based on the ability of each applicant to carry out all requirements contained in the RFA. Reviewers will evaluate applications based on the overall quality and validity of the proposed grant programs and the extent to which the applications address the primary objectives and intent of the project. Applications must address each requirement as specified in the RFA to be considered for funding. The TEA reserves the right to select from the highest-ranking applications those that address all requirements in the RFA.

The TEA is not obligated to approve an application, provide funds, or endorse any application submitted in response to this RFA. This RFA does not commit TEA to pay any costs before an application is approved. The issuance of this RFA does not obligate TEA to award a grant or pay any costs incurred in preparing a response.

Requesting the Application. A complete copy of RFA #701-05-02 may be obtained by writing the Document Control Center, Room 6-108, Texas Education Agency, William B. Travis Building, 1701 N. Congress Avenue, Austin, Texas 78701; by calling (512) 463-9304; by faxing (512) 463-9811; or by e- mailing dcc@tea.state.tx.us. Please refer to the RFA number and title in your request. Provide your name, complete mailing address, and phone number including area code. The announcement letter and complete RFA will also be posted on the TEA website at http://www.tea.state.tx.us/opge/disc/index.html for viewing and downloading.

Further Information. For clarifying information about the RFA, email Career@tea.state.tx.us, Division of Curriculum, Texas Education Agency. In order to assure that no prospective applicant may obtain a competitive advantage because of acquisition of information unknown to other prospective applicants, any additional information that is different from or in addition to information provided in the RFA will be provided only in response to written inquiries. Copies of all such inquiries and the written answers thereto will be posted on the TEA website in the format of Frequently Asked Questions (FAQs) at http://www.tea.state.tx.us/opge/disc/index.html.

Deadline for Receipt of Applications. Applications must be received in the Document Control Center of the Texas Education Agency by 5:00 p.m. (Central Time), Thursday, January 27, 2005, to be eligible to be considered for funding.

TRD-200407458
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: December 22, 2004

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Texas Commission on Environmental Quality

Notice of Opportunity to Comment on Default Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Default Orders (DOs). The commission staff proposes a DO when the staff has sent an executive director's preliminary report and petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; and the proposed technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP. Similar to the procedure followed with respect to Agreed Orders entered into by the executive director of the commission in accordance with Texas Water Code (TWC), §7.075, this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **January 31, 2005**. The commission will consider any written comments received and the commission may withdraw or withhold approval of a DO if a comment discloses facts or considerations that indicate a proposed DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed DO is not required to be published if those changes are made in response to written comments.

A copy of each proposed DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Comments about the DO should be sent to the attorney designated for the DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on January 31, 2005**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission's attorneys are available to discuss the DOs and/or the comment procedure at the listed phone numbers; however, comments on the DOs should be submitted to the commission in **writing**.

(1) COMPANY: Albert E. Ellis dba Houston Land Designers; DOCKET NUMBER: 2003- 1553-LII-E; TCEQ ID NUMBER: RN103862447; LOCATION: 2842 West Pebble Beach, Missouri City, and 14222 Ingham Court, Sugar Land, Fort Bend County, Texas; TYPE OF FACILITY: landscaping and irrigation system installation; RULES VIOLATED: 30 TAC §30.5(a) and §344.4 and TWC, §34.007(a) and §37.003, by failing to hold a valid, effective landscape irrigator license issued by the commission as required to sell or install an irrigation system; PENALTY: $250; STAFF ATTORNEY: Deborah A. Bynum, Litigation Division, MC 175, (512) 239-1976; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(2) COMPANY: Antonio Garcia dba Garcia Junk Yard; DOCKET NUMBER: 2003-1476- MSW-E; TCEQ ID NUMBER: RN102494366; LOCATION: west side of North Alamo Road, approximately 4.3 miles north of the intersection of Highway 83 and North Alamo Road, Edinburg, Hidalgo County, Texas; TYPE OF FACILITY: automotive salvage yard; RULES VIOLATED: 30 TAC §328.60(a) and Texas Health and Safety Code (THSC), §361.112(a), by failing to obtain a scrap tire storage site registration prior to storing more than 500 scrap tires on the ground; PENALTY: $2,625; STAFF ATTORNEY: Lindsay Andrus, Litigation Division, MC 175, (512) 239-4761; REGIONAL OFFICE: Harlingen Regional Office, 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(3) COMPANY: DBW Enterprises, Ltd. dba Scotty Mint Grocery; DOCKET NUMBER: 2003-0259-PST-E; TCEQ ID NUMBERS:

0024871 and RN103077939; LOCATION: corner of Rail Road and Highway 281, Hico, Hamilton County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.7(d)(1)(A) and (B), by failing to amend the petroleum storage tank (PST) registration and submit it to the TCEQ; and 30 TAC §334.47(a)(2), by failing to remove the existing underground storage tank (UST) systems that had not been brought into timely compliance with the upgrade requirements; PENALTY: $6,300; STAFF ATTORNEY: Barbara Klein, Litigation Division, MC 175, (512) 239-1320; REGIONAL OFFICE: Waco Regional Office, 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(4) COMPANY: Fleet Star Service Center, Inc.; DOCKET NUMBER: 2002-0403-AIR-E; TCEQ ID NUMBERS: DB-5255-A and RN100763465; LOCATION: 1301 West Shady Grove Road, Grand Prairie, Dallas County, Texas; TYPE OF FACILITY: autobody refinishing operation; RULES VIOLATED: 30 TAC §101.4 and THSC, §382.085(b), by failing to limit the air contaminants to such a concentration that would not interfere with the normal use and enjoyment of property; and 30 TAC §106.4(c) and THSC, §382.085(b), by failing to maintain all emissions control equipment in good condition and operating properly during operation of the plant; PENALTY: $3,750; STAFF ATTORNEY: Wendy Cooper, Litigation Division, MC R-4, (817) 588- 5867; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(5) COMPANY: Maurice Lozano; DOCKET NUMBER: 2004-0088-OSS-E; TCEQ ID NUMBER: RN102988730; LOCATION: 11125 Dallas Road, Block 13, Lot 6, Carlsbad, Tom Green County, Texas; TYPE OF FACILITY: sewage disposal pit; RULES VIOLATED: 30 TAC §285.3(i), by operating a seepage pit treating or disposing of less than 5,000 gallons of sewage per day; PENALTY: $750; STAFF ATTORNEY: Barbara Klein, Litigation Division, MC 175, (512) 239-1320; REGIONAL OFFICE: San Angelo Regional Office, 622 South Oakes, Suite K, San Angelo, Texas 76903-7013, (915) 655-9479.

(6) COMPANY: Mehmood Lakhani dba C-Store; DOCKET NUMBER: 2002-0751-PST-E; TCEQ ID NUMBERS: 0021877 and RN102360716; LOCATION: 100 North Story Road, Irving, Dallas County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §115.246(7)(A) and THSC, §382.085(b), by failing to maintain Stage II records on site at the station and available for review; 30 TAC §115.245(2) and THSC, §382.085(b), by failing to conduct an annual pressure decay test on the Stage II vapor recovery system; 30 TAC §115.242(3)(A) and (B) and (4) and THSC, §382.085(b), by failing to ensure that no gasoline leaks, as detected by sampling, sight, sound, or smell, existed anywhere in the dispensing equipment; 30 TAC §334.7(d)(3), by failing to provide amended registration for any change or additional information regarding the USTs; 30 TAC §334.8(c)(4)(B) and TWC, §26.346(a), by failing to ensure that the TCEQ underground storage tank registration and self- certification form was submitted to the commission in a timely manner; 30 TAC §334.49(a) and TWC, §26.3475(d), by failing to install a method of corrosion protection for the UST system; 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of the petroleum USTs; 30 TAC §334.50(b)(1)(A) and (2), by failing to provide proper release detection for the product piping associated with the UST system and failing to ensure that all tanks were monitored for releases at a frequency of at least once every month; and 30 TAC §334.10(b)(1)(B), by failing to provide petroleum storage tank delivery records upon request by the TCEQ; PENALTY: $17,850; STAFF ATTORNEY: Lindsay Andrus, Litigation Division, MC 175, (512) 239-4761; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

TRD-200407457
Paul C. Sarahan
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: December 22, 2004

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Notice of Opportunity to Comment on Settlement Agreements of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **January 31, 2005**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Comments about an AO should be sent to the attorney designated for the AO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on January 31, 2005**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The designated attorney is available to discuss the AO and/or the comment procedure at the listed phone number; however, §7.075 provides that comments on an AO should be submitted to the commission in **writing**.

(1) COMPANY: Anwar Dayani dba Sid's Food Store; DOCKET NUMBER: 2003-1140-PST- E; TCEQ ID NUMBERS: 0015149 and RN101562643; LOCATION: 13317 Kleberg Road, Dallas, Dallas County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §115.245(2) and Texas Health and Safety Code (THSC), §382.085(b), by failing to conduct an annual pressure decay test within the preceding 12-month period; and 30 TAC §115.242(3)(A) and (G) and THSC, §382.085(b), by failing to maintain the Stage II vapor recovery system in proper operating condition; PENALTY: $4,200; STAFF ATTORNEY: Lindsay Andrus, Litigation Division, MC 175, (512) 239-4761; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588- 5800.

(2) COMPANY: City of Garland; DOCKET NUMBER: 2002-1353-AIR-E; TCEQ ID NUMBER: DB-4394-P; LOCATION: 3637 Castle Drive, Garland, Dallas County, Texas; TYPE OF FACILITY: municipal solid waste; RULES VIOLATED: 30 TAC §122.146(1) and

THSC, §382.085(b), by failing to submit annual certification of compliance; and 30 TAC §122.143(14) and THSC, §382.085(b), by failing to maintain a copy of the landfill's permit on site; PENALTY: $4,600; STAFF ATTORNEY: Wendy Cooper, Litigation Division, MC R-4, (817) 588-5867; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(3) COMPANY: City of Marlin; DOCKET NUMBER: 2003-0215-MLM-E; TCEQ ID NUMBERS: 10042 and RN101415073; LOCATION: one mile east of State Highway 6 bypass on Farm-to-Market Road (FM) 147, Marlin, Falls County, Texas; TYPE OF FACILITY: public water supply system; RULES VIOLATED: 30 TAC §§290.46(q)(3), 290.111(b)(2)(A), (e)(1), (g)(1) and (2), and 290.122(a)(2), by failing to notify the executive director and the water system customers of the acute violation by the next business day when the turbidity levels of the finished water exceeded 1.0 nephelometric turbidity units (NTU); 30 TAC §290.111(b)(1)(A)(i) and (ii) and THSC, §341.031(a), by failing to maintain turbidity level of the combined filter effluent so as to not exceed 5.0 NTU and by failing to maintain the turbidity level of the combined filter effluent of 0.5 NTU or less in at least 95% of the samples tested each month; 30 TAC §290.110(c), (c)(2)(A), and (d)(3)(C)(i), by failing to properly conduct continuous monitoring and recording of the disinfectant residual of the treated water entering the distribution system; 30 TAC §290.46(e)(6)(B) and (C) and THSC, §341.033(a), by failing to have a certified class C surface water operator on duty when the facility was in operation or to provide the facility with continuous turbidity and disinfectant residual monitors with automatic facility shutdown devices and alarms to summon the operator to ensure that the water produced continued to meet the commission's drinking water standards; 30 TAC §290.42(d)(11)(F)(iii), by failing to maintain the rate of flow of backwash water to a minimum of 20 inches vertical rise per minute; 30 TAC §290.42(d)(5), by failing to provide an operational flow measuring device to measure the raw water supplied to the facility, and failing to provide a filter backwash rate-of-flow meter to measure the treated water used in backwashing the filters, and failing to provide a flow meter to measure the backwash lagoon decant return water; 30 TAC §290.46(s)(1), (2)(A)(i), (B)(ii), (C)(i) and (ii) and (f)(3)(B)(v) and§290.119, by failing to calibrate the following: the rate-of-flow controllers at least once every 12 months; the bench top pH meter at least once a day or to calibrate it according to manufacturer's specifications; and the continuous disinfectant residual analyzers at least once in 90 days using chlorine solutions for known concentrations; conduct calibration checks on the bench top turbidimeters with secondary standard each time a series of samples was tested, failing to check the accuracy of manual disinfectant residual analyzers at least once in 30 days using chlorine solutions for known concentrations to facilitate the calibration and accuracy verification of the disinfectant residual compliance test equipment; 30 TAC §§290.111(c)(4) and (d)(4), 290.46(f)(3)(B)(iv), and 290.42(d)(11)(E)(ii), by failing to measure and record turbidity levels of the treated water from each individual filter at least once a day and failing to equip each filter on the effluent line, having a minimum capacity of 1.0 million gallons per day, with an on-line turbidimeter; 30 TAC §290.44(d)(1), (h)(1)(A) and (B)(i), and §291.93(5), by failing to provide additional protection at the meter in the form of an air gap or back flow prevention assembly and failing to have properly installed air releases in the distribution system; 30 TAC §290.46(f)(3)(E)(iv) and (j), by failing to provide documentation of customer service inspection reports; 30 TAC §290.42(d)(2) and §290.46(m) and (t), by failing to maintain all related appurtenances in a watertight condition and failing to properly maintain the equipment and facilities; 30 TAC §290.42(d)(15)(E), by failing to equip the facilities with the means to monitor the depth of the sludge-blanket in the sludge-blanket clarifiers; 30 TAC §290.42(d)(2)(A), by failing to provide a vacuum breaker on each hose bib within the facility; 30 TAC §290.43(c)(1) - (4), (8) and §290.46(m), by failing to modify the overflow pipe flap valve assembly on the storage tanks to provide no more than 1/16-inch gap and failing to provide and secure with a 16-mesh or finer corrosion resistant screen on the air vent, roof hatch cover, roof hatch lock, screen openings and over flow pipe hinged flap valve cover, the filter rate-of-flow controllers, and other filter controls, and failing to provide a functioning water level indicator in strict accordance with American Water Works Association standards on the clear storage tanks, elevated storage tanks and ground storage tanks; 30 TAC §290.43(e), by failing to provide proper security; 30 TAC §290.46(r) and §290.44(d), by failing to design, maintain, and operate the facility so as to provide a minimum pressure of 35 pounds per square inch throughout the distribution system under normal operating conditions; 30 TAC §290.42(d)(6)(C) and (13), by failing to properly identify the influent, effluent, waste backwash, and chemical feed lines by the use of labels or various colors of paint; 30 TAC §290.42(d)(6)(E)(ii) and (ii)(I), by failing to provide adequate containment structures for all liquid chemical storage tanks; 30 TAC §290.46(m)(1), by failing to produce documentation of the annual tank inspections for the steel clear well and concrete clear well and the annual tank inspections; 30 TAC §290.46(m) and (v), by failing to initiate a maintenance program to ensure the reliability and general appearance of the facility and thereby reduce costly repairs due to a lack of proper maintenance; 30 TAC §290.121, by failing to maintain an up-to-date bacterial site monitoring plan; 30 TAC §290.111(b)(1)(A)(i) and (ii), by failing to maintain treatment processes so that the combined filter effluent never exceeded 1.0 NTU; and 30 TAC §288.30(3)(b), by failing to submit a drought contingency plan; PENALTY: $33,282; STAFF ATTORNEY: Barbara Klein, Litigation Division, MC 175, (512) 239-1320; REGIONAL OFFICE: Waco Regional Office, 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(4) COMPANY: Inayat Enterprises, Inc. dba Mini Max Food Mart; DOCKET NUMBER: 2003-1005-PST-E; TCEQ ID NUMBERS: 11329 and RN101491496; LOCATION: 10412 FM 969, Austin, Travis County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.72, by failing to report a suspected release to the commission within 24 hours; and 30 TAC §334.50(b)(1)(A), (2)(A)(ii)(I) and (i)(III), and TWC, §26.3475(a) and (c)(1), by failing to provide release detections for the facility's three underground storage tanks (USTs) and associated piping and by failing to test a line leak detector at least once per year for performance and operational reliability; PENALTY: $5,400; STAFF ATTORNEY: Wendy Cooper, Litigation Division, MC R-4, (817) 588-5867; REGIONAL OFFICE: Austin Regional Office, 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(5) COMPANY: Lake Whitney Water Co., Inc. dba Cedar Creek Water Supply System and Lakeshore Water System and Murray Hill Water System and Oak Hill Water System; DOCKET NUMBER: 2003-1291-PWS-E; TCEQ ID NUMBERS: 1090012, 1090008, 1090014, 1090043, RN101213437, RN101269595, RN101208999, and RN101435865; LOCATION: State Highway 22 Southwest of Whitney (Cedar Creek), State Highway 22 Southwest of Whitney (Murray Hill), four miles Northeast of Whitney near State Highway 22 (Oak Hill), and FM 933 along the west end of FM 2604, North of Whitney (Lake Shore), Hill County, Texas; TYPE OF FACILITY: retail public utility; RULES VIOLATED: 30 TAC §290.42(e)(4)(A), by failing to provide a full face self- contained breathing apparatus or air respirator that meets Occupational Safety and Health Administration standards readily accessible outside the chlorination room and immediately available to the operator in the event of an emergency; 30

TAC §290.45(b)(1)(D)(iii), by failing to provide two or more service pumps with a capacity of 2.0 gallons per minute (gpm) per service connection; 30 TAC §290.45(b)(1)(D)(i), by failing to provide a well capacity of 0.6 gpm per connection; and 30 TAC §290.44(h), by failing to provide adequate back-flow protection assemblies; PENALTY: $9,338; STAFF ATTORNEY: Rebecca Nash Petty, Litigation Division, MC 175, (512) 239-3693; REGIONAL OFFICE: Waco Regional Office, 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710- 7826, (254) 751-0335.

(6) COMPANY: Mohammad N. Qureshi dba HAH Gas Mart; DOCKET NUMBER: 2003- 0855-PST-E; TCEQ ID NUMBERS: 40144 and RN101808251; LOCATION: 222 North Highway 3, League City, Galveston County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum USTs; PENALTY: $3,870; STAFF ATTORNEY: Barbara J. Watson, Litigation Division, MC 175, (512) 239-2044; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(7) COMPANY: Munisha, Inc. dba Grab All Drive In Grocery; DOCKET NUMBER: 2004- 0406-PWS-E; TCEQ ID NUMBERS: 0840136 and RN101823995; LOCATION: 7830 FM 646 South, Santa Fe, Galveston County, Texas; TYPE OF FACILITY: public water system; RULES VIOLATED: 30 TAC §290.45(d)(2)(A)(ii) and THSC, §341.0315(b), by failing to provide a minimum pressure tank capacity of 220 gallons; and 30 TAC §290.41(c)(1)(F), by failing to secure sanitary easements for the well from adjacent landowners and to record the easements at the county courthouse to ensure that hazards will not develop in the well area; PENALTY: $350; STAFF ATTORNEY: Ashley Kever, Litigation Division, MC 175, (512) 239-2987; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(8) COMPANY: U.S. Department of the Army, Fort Hood; DOCKET NUMBER: 2003-0144- IWD-E; TCEQ ID NUMBERS: 02233 and RN101612083; LOCATION: near Belton Lake at Fort Hood, Bell and Coryell Counties, Texas; TYPE OF FACILITY: vehicle cleaning and sewage treatment; RULES VIOLATED: 30 TAC §305.125(1), Permit Number 002233, Effluent Limitations and Monitoring Requirement Number 1, and TWC, §26.121(a), by failing to comply with the permitted effluent limits for daily average concentration of chemical oxygen demand (COD) and total suspended solids (TSS), pH, oil, grease, and total residual chlorine (TRC); 30 TAC §305.125(1), Permit Number 002233, Other Requirements Number 4, and TWC, §26.121, by failing to document maintenance on the oil/water interceptor; 30 TAC §305.125(1), Permit Number 002233, Monitoring and Reporting Requirements Number 2, and TWC, §26.121(a), by failing to accurately measure the outflows; 30 TAC §305.125(1), Permit Number 002233, Monitoring and Reporting Requirement Number 5, and TWC, §26.121(a), by failing to calibrate the electronic flow meter as required by the permit; and 30 TAC §319.6 and §319.7(a) and (c), Permit Number 002233, Monitoring and Reporting Requirement Number 3b, and TWC, §26.121, by failing to maintain required records; PENALTY: $2,365; STAFF ATTORNEY: Gitanjali Yadav, Litigation Division, MC 175, (512) 239-2029; REGIONAL OFFICE: Waco Regional Office, 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

TRD-200407456

Paul C. Sarahan
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: December 22, 2004

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Notice of Public Hearing on Proposed Revision to 30 TAC Chapter 114 and Revisions to the State Implementation Plan

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony regarding proposed revisions to 30 TAC Chapter 114, Control of Air Pollution from Motor Vehicles, and the state implementation plan (SIP), 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 regulations concerning SIPs.

The commission proposes amendments to §114.6 in Subchapter A, Definitions, and §§114.312, 114.314 - 114.316, 114.318, and 114.319 in Division 2, Low Emission Diesel, Subchapter H, Low Emission Fuels. The proposed rulemaking would extend the compliance date for the Texas low emission diesel fuel standards by six months, address enforcement issues with alternative plans, address methods and models to determine compliance with the standards using alternative formulations, strengthen registration requirements to allow collection of more comprehensive data on supply, and update references.

A public hearing on this proposal will be held in Austin on January 18, 2005, at 2:00 p.m. at the Texas Commission on Environmental Quality in Building F, Room 2210, located at 12100 Park 35 Circle. The hearing will be structured for the receipt of oral or written comments by interested persons. Registration will begin 30 minutes prior to the hearing. Individuals may present oral statements when called upon in order of registration. A time limit may be established at the hearing to assure that enough time is allowed for every interested person to speak. There will be no open discussion during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes before the hearing and will answer questions before and after the hearing.

Persons planning to attend the hearing 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.

Comments may be submitted to Lola Brown, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, or by fax at (512) 239-4808. Copies of the proposed rules can be obtained from the commission's web site at *http://www.tnrcc.state.tx.us/oprd/rules/propadop.html*. All comments should reference Rule Project Number 2005-008-114-AI. Comments must be received by 5:00 p.m. on January 18, 2005. For further information, please contact Clifton Wise, Policy and Regulations Division at (512) 239-2263, or Scott Carpenter, Technical Analysis Division at (512) 239-1757.

TRD-200407373
Stephanie Bergeron Perdue
Director, Enviromental Law Division
Texas Commission on Environmental Quality
Filed: December 17, 2004

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Proposed Enforcement Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (the Code), §7.075, which requires that the commission may not approve these AOs unless the public has been provided an opportunity to submit written comments. Section 7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **January 31, 2005**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withhold approval of an AO if a comment discloses facts or considerations that indicate the proposed AO is inappropriate, improper, inadequate, or inconsistent with the requirements of the Code, the Texas Health and Safety Code (THSC), and/or the Texas Clean Air Act (the Act). Additional notice is not required if changes to an AO are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-1864 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on January 31, 2005**. Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs should be submitted to the commission in **writing**.

(1) COMPANY: A. B. Marathon Gas and Go Coastal, Inc. dba Gulfway Quick Mart Citgo; DOCKET NUMBER: 2004-1159-PST-E; IDENTIFIER: Petroleum Storage Tank (PST) Facility Identification Number 69204, Regulated Entity Number (RN) 101793032; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance; PENALTY: $1,900; ENFORCEMENT COORDINATOR: Catherine Albrecht, (713) 767- 3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767- 3500.

(2) COMPANY: Asarco Inc.; DOCKET NUMBER: 2004-1254-UIC-E; IDENTIFIER: Underground Injection Control Permit Numbers WDW 129, WDW 324, WDW 273; LOCATION: Amarillo, Potter County, Texas; TYPE OF FACILITY: noncommercial hazardous class 1 injection wells; RULE VIOLATED: 30 TAC §37.404 and the Code, §27.073, by failing to maintain continuous third party liability coverage; PENALTY: $3,125; ENFORCEMENT COORDINATOR: Cheryl Thompson, (817) 588-5800; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(3) COMPANY: Johnny Bailey dba Bailey's Pump Service; DOCKET NUMBER: 2004-0786- PST-E; IDENTIFIER: Contractor CRP Number 000656, RN103097507; LOCATION: Nocona, Henrietta, Vernon; Montague, Clay, and Wilbarger Counties, Texas; TYPE OF FACILITY: contractor business; RULE VIOLATED: 30 TAC §334.6(b)(2)(C) and (4), by failing to submit a construction notification for underground storage tanks (USTs); 30 TAC §334.55(a)(6)(D)(ii), (b)(4)(A) - (D), and (e)(1)(B), by failing to follow technical standards for permanent removal from service of USTs, by failing to assemble the records for the removal of the USTs and file a release determination report, by failing to permanently label tanks, by failing to properly remove USTs from the ground, and by failing to perform a site assessment after removal of a UST; and 30 TAC §334.6(b)(2)(B)(vii), by failing to submit a closure plan for approval; PENALTY: $13,200; ENFORCEMENT COORDINATOR: Brandon Smith, (512) 239-4471; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (915) 698-9674.

(4) COMPANY: Balch Oil Company, Inc. dba 66 Truck & Auto Plaza; DOCKET NUMBER: 2004-1449-PST-E; IDENTIFIER: PST Facility Identification Number 27024, RN103045977; LOCATION: Slaton, Lubbock County, Texas; TYPE OF FACILITY: truck stop; RULE VIOLATED: 30 TAC §334.8(c)(5)(A)(i) and (B) and the Code, §26.3467(a), by failing to make available to a common carrier a valid, current delivery certificate and by failing to renew a delivery certificate; PENALTY: $4,080; ENFORCEMENT COORDINATOR: Ruben Soto, (512) 239-4571; REGIONAL OFFICE: 4630 50th Street, Suite 600, Lubbock, Texas 79414-3520, (806) 796-7092.

(5) COMPANY: Bassingame, Inc. dba Superior Fiberglass; DOCKET NUMBER: 2004-1144- AIR-E; IDENTIFIER: Air Account Number WN-0164-G; LOCATION: Bridgeport, Wise County, Texas; TYPE OF FACILITY: reinforced plastics manufacturing; RULE VIOLATED: 30 TAC §116.115(b) and (c), Permit Number 31509, and THSC, §382.085(b), by failing to comply with recordkeeping requirements and by failing to properly seal containers of materials that have the potential to emit air contaminants; 30 TAC §122.146(1), Federal Operating Permit Number O- 02155, and THSC, §382.085(b), by failing to submit annual compliance certifications; 30 TAC §122.145(2), Federal Operating Permit Number O-02155, and THSC, §382.085(b), by failing to submit deviation reports; PENALTY: $6,840; ENFORCEMENT COORDINATOR: Jorge Ibarra, (817) 588-5800; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(6) COMPANY: CA New Plan Floating Rate Partnership, L.P.; DOCKET NUMBER: 2004- 0784-MWD-E; IDENTIFIER: Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0014144001; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1) and (4), TPDES Permit Number WQ0014144001, and the Code, §26.121(a)(1), by failing to prevent the discharge and accumulation of sludge in the receiving stream and by failing to maintain compliance with the carbonaceous biochemical oxygen demand; PENALTY: $950; ENFORCEMENT COORDINATOR: Catherine Albrecht, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(7) COMPANY: Celanese Ltd.; DOCKET NUMBER: 2004-0975-AIR-E; IDENTIFIER: Air Account Number HG-0126-Q, RN100227016; LOCATION: Pasadena, Harris County, Texas; TYPE OF FACILITY: chemical processing; RULE VIOLATED: 30 TAC §116.115(b)(2)(F) and (c), Air Permit Number 31178, and THSC, §382.085(b), by failing to comply with the maximum allowable emissions rate table for oxides of nitrogen; PENALTY: $3,200; ENFORCEMENT COORDINATOR: Trina Grieco, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(8) COMPANY NAME: Eric Cornelius dba Cornelius Oil Co.; DOCKET NUMBER: 2004- 1345-PST-E; IDENTIFIER: RN101898864; LOCATION: Floydada, Floyd County, Texas; TYPE OF FACILITY: fuel distributor; RULE VIOLATED: 30 TAC §334.50(b)(1)(A), by failing to ensure that the owner or operator had a valid, current delivery certificate; PENALTY: $360; ENFORCEMENT COORDINATOR: Erika Fair, (512) 239-6673; REGIONAL OFFICE: 4630 50th Street, Suite 600, Lubbock, Texas 79414-3520, (806) 796-7092.

(9) COMPANY: Department of Veterans Affairs; DOCKET NUMBER: 2004-0589-PST-E; IDENTIFIER: PST Facility Identification Numbers 8642 and 9274, RN100598316; LOCATION: Waco, McLennan County, Texas; TYPE OF FACILITY: government health care; RULE VIOLATED: 30 TAC §334.50(a)(1)(A) and (b)(1)(A) and the Code, §26.3475(a) and (c), by failing to conduct release detection and by failing to put the automatic tank gauge into test mode; and 30 TAC §334.49(c) and the Code, §26.3475(d), by failing to have corrosion protection; PENALTY: $8,000; ENFORCEMENT COORDINATOR: Erika Fair, (512) 239-6673; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(10) COMPANY: James A. Ince dba Diamond Jims; DOCKET NUMBER: 2004-1349-PST-E; IDENTIFIER: PST Facility Identification Number 44351; LOCATION: Wolfforth, Lubbock County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.8(c)(5)(A)(i) and (B)(ii) and the Code, §26.346(a) and §26.3467(a), by failing to make available to any common carrier, a valid delivery certificate and by failing to ensure that a delivery certificate is renewed by timely and proper submission of a new UST registration and self-certification form; PENALTY: $1,280; ENFORCEMENT COORDINATOR: Chad Blevins, (512) 239-6017; REGIONAL OFFICE: 4630 50th Street, Suite 600, Lubbock, Texas 79414-3520, (806) 796-7092.

(11) COMPANY: East Cedar Creek Fresh Water Supply District; DOCKET NUMBER: 2003- 1420-MWD-E; IDENTIFIER: TPDES Permit Number 11858-001; LOCATION: Gun Barrel City, Henderson County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1) and §317.4(k)(6), TPDES Permit Number 11858-001, and the Code, §26.121(a), by failing to prevent the discharge of wastewater that exceeded total suspended solids (TSS), biochemical oxygen demand (BOD5), pH, chlorine residual, and dissolved oxygen, by failing to operate the facility in a manner that prevents the discharge of wastewater from the wastewater equalization pond, maintains a freeboard of not less than two feet, and prevents the discharge of wastewater treatment plant sludge into waters of the state; PENALTY: $19,760; ENFORCEMENT COORDINATOR: Tom Greimel, (512) 239-5690; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(12) COMPANY: Enbridge Pipelines (NE Texas) L.P.; DOCKET NUMBER: 2004-0227-AIR- E; IDENTIFIER: Air Account Number HR0001N, RN10022665; LOCATION: Birthright, Hopkins County, Texas; TYPE OF FACILITY: natural gas compressor station; RULE VIOLATED: 30 TAC §101.201(a)(1) and (2) and THSC, §382.085(b), by failing to report emission events and by failing to notify the TCEQ of an emission event; and 30 TAC §101.221(a) and THSC, §382.085(b), by failing to maintain the C3 compressor engine in good working order; PENALTY: $34,340; ENFORCEMENT COORDINATOR: Tel Croston, (512) 239-5717; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(13) COMPANY: Sajjad Z. Bhayani dba EZ Mart; DOCKET NUMBER: 2004-0913-PST-E; IDENTIFIER: PST Facility Identification Number 6642, RN101659456; LOCATION: Waco, McLennan County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.10(b)(1)(A), by failing to develop and maintain all records available for review; and 30 TAC §334.48(c), by failing to conduct effective or automatic inventory control procedures for USTs; PENALTY: $3,675; ENFORCEMENT COORDINATOR: Craig Fleming, (512) 239-5806; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(14) COMPANY: Good Time Stores, Inc. dba Good Time Store No. 61; DOCKET NUMBER: 2004-1046-AIR-E; IDENTIFIER: Air Account Number EE0914K, RN101695427; LOCATION: El Paso, El Paso County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.252(2) and THSC, §382.085(b), by allowing the transfer of gasoline with a Reid vapor pressure greater than seven pound per square inch absolute; PENALTY: $1,472; ENFORCEMENT COORDINATOR: Jill Reed, (915) 570-1359; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(15) COMPANY: City of Hico; DOCKET NUMBER: 2004-0757-PWS-E; IDENTIFIER: Public Water Supply (PWS) Number 0970002, RN102677911; LOCATION: Hico, Hamilton County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.46(f)(2), by failing to maintain and make available required records; 30 TAC §290.45(b)(1)(D)(iv) and (v) and THSC, §341.0315(c), by failing to provide adequate elevated storage and by failing to provide emergency power; 30 TAC §290.42(e)(5), by failing to properly seal the hypochlorination container; 30 TAC §290.43(d)(3), by failing to provide facilities for maintaining the air-water- volume at the design water level and working pressure and by failing to provide a device to readily determine air-water-volume; 30 TAC §290.41(c)(3)(K), by failing to provide an adequate well casing vent; 30 TAC §290.44(d) and §290.46(r), by failing to provide, at all times, a minimum pressure of 35 pounds per square inch in the distribution system; and 30 TAC §290.46(m)(1), (t), and (u), by failing to inspect each pressure tank annually, by failing to post a legible sign at water facilities, and by failing to test public water wells that are not in use as required; PENALTY: $4,950; ENFORCEMENT COORDINATOR: Brian Lehmkuhle, (512) 239-4482; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(16) COMPANY: James Hardie Building Products, Inc.; DOCKET NUMBER: 2004-0994- IHW-E; IDENTIFIER: Field Operations Identification Number F1969, RN100763895; LOCATION: Cleburne, Johnson County, Texas; TYPE OF FACILITY: fiber cement building product; RULE VIOLATED: 30 TAC §335.62 and 40 Code of Federal Regulations (CFR) §262.11, by failing to complete hazardous waste determinations of all waste generated; and 30 TAC §335.2(b), by failing to store, process, or dispose of its waste at an authorized facility; PENALTY: $5,400; ENFORCEMENT COORDINATOR: Mac Vilas, (512) 239-2557; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(17) COMPANY: Nhan Pham dba Joels Sandy Beach Mart; DOCKET NUMBER: 2004-0715- PST-E; IDENTIFIER: PST Facility Identification Number 32987, RN101910933; LOCATION: Azle, Tarrant County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.49(c)(2)(C) and (4)(C) and the Code, §26.3475(c), by failing to inspect the impressed current cathodic protection system; 30 TAC §334.48(c) and §334.50(d)(1)(B)(ii) and the Code, §26.3475(a), by failing to properly conduct manual or automatic inventory control; 30 TAC §334.50(b)(2)(A)(i)(III) and the Code, §26.3475(a), by failing to test the pressured underground product piping; 30 TAC §115.245(2) and THSC, §382.085(b), by failing to have the Stage II equipment tested to determine vapor recovery efficiency; 30 TAC §115.246(7)(A) and THSC, §382.085(b), by failing to maintain Stage II records on-site during business hours; and 30 TAC §115.242(3)(K) and THSC, §382.085(b), by failing to maintain the Stage II vapor recovery system (VRS); PENALTY: $7,200; ENFORCEMENT COORDINATOR: Steven Lopez, (512) 239-1896; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(18) COMPANY: Herbert E. Brite dba K Q General Store; DOCKET NUMBER: 2004-1242- PST-E; IDENTIFIER: PST Facility Identification Number 73787, RN102652674; LOCATION: Dale, Caldwell County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance; PENALTY: $950; ENFORCEMENT COORDINATOR: Larry King, (512) 239-7037; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339- 2929.

(19) COMPANY: L.S.F., Inc. dba Lone Star Fabrication; DOCKET NUMBER: 2004-1448- MLM-E; IDENTIFIER: RN102509601; LOCATION: Willis, Montgomery County, Texas; TYPE OF FACILITY: metal fabrication; RULE VIOLATED: 30 TAC §281.25(a)(4) and the Code, §26.121(a), by failing to obtain a TPDES multi-sector general storm water permit; the Code, §26.121(a)(1), by failing to remove contaminated soils adjacent to the wastewater collection sump; and 30 TAC §335.4(1), by failing to properly manage industrial solid waste; PENALTY: $6,825; ENFORCEMENT COORDINATOR: Catherine Albrecht, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(20) COMPANY: Lide Industries, Inc. and Lide Industries, Inc. dba Ultrafab Incorporated; DOCKET NUMBER: 2004-1270-AIR-E; IDENTIFIER: Air Account Numbers FI0066V and FI0159N, RN101698439 and RN100836147; LOCATION: between Mexia and Teague, Freestone County, Texas; TYPE OF FACILITY: tanks and storage vessels manufacturing; RULE VIOLATED: 30 TAC §116.110(a) and THSC, §382.085(b) and §382.0518(a), by failing to meet the conditions of Standard Exemption 75 for surface coating operations and by failing to meet the conditions and obtain a permit for surface coating operations; PENALTY: $3,772; ENFORCEMENT COORDINATOR: Merrilee Hupp, (512) 239-4490; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(21) COMPANY: Louisiana Chicken Food Mart, Inc. dba Louisiana Chicken Food Mart; DOCKET NUMBER: 2004-1385-PST-E; IDENTIFIER: PST Facility Identification Number 2417, RN102713344; LOCATION: Fort Worth, Tarrant County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment; 30 TAC §115.244(1) and (3) and THSC, §382.085(b), by failing to conduct daily inspections of the Stage II VRS and by failing to conduct monthly inspections of the Stage II VRS; and 30 TAC §115.242(3)(J) and THSC, §382.085(b), by failing to maintain the Stage II VRS in proper operating condition; PENALTY: $2,400; ENFORCEMENT COORDINATOR: Jorge Ibarra, (817) 588-5800; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(22) COMPANY: Maknojia & Maknojia Inc dba Sam's Drive Inn #3; DOCKET NUMBER: 2004-1148-PST-E; IDENTIFIER: PST Facility Identification Number 65434; LOCATION: Baytown, Harris County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance; PENALTY: $2,850; ENFORCEMENT COORDINATOR: Elvia Maske, (512) 239-0789; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(23) COMPANY: Benneth Okongwu dba Mesa Drive Pharmacy; DOCKET NUMBER: 2004- 1371-PST-E; IDENTIFIER: PST Facility Identification Number 67529, RN100876093; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance; PENALTY: $1,900; ENFORCEMENT COORDINATOR: Trina Grieco, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(24) COMPANY: Mo-Vac Environmental, Inc.; DOCKET NUMBER: 2004-1157-MLM-E; IDENTIFIER: Solid Waste Registration Number 23036, RN100671940; LOCATION: Edinburg, Hidalgo County, Texas; TYPE OF FACILITY: vacuum truck company; RULE VIOLATED: 30 TAC §335.513(c), by failing to maintain adequate documentation of hazardous waste determinations, waste classification determinations, and other information; 30 TAC §335.69(a)(4) and 40 CFR §265.52(d) and (e), by failing to comply with the requirements contained in 40 CFR Part 265, Subparts C and D, by not listing the name and phone number of the emergency coordinator and the location of emergency equipment; 30 TAC §335.474 and §335.479, by failing to prepare a pollution prevention plan; and 30 TAC §281.25(a)(4) and 40 CFR §122.26(a), by failing to obtain authorization to discharge storm water associated with an industrial activity; PENALTY: $12,012; ENFORCEMENT COORDINATOR: Mac Vilas, (512) 239-2557; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(25) COMPANY: R. D. Wallace Oil Co., Inc. dba Petro Products Corporation; DOCKET NUMBER: 2004-1514-PST-E; IDENTIFIER: PST Facility Identification Number 30393, RN101783777; LOCATION: Levelland, Hockley County, Texas; TYPE OF FACILITY: gas station with retail card sales; RULE VIOLATED: 30 TAC §334.8(c)(4)(B) and (5)(A)(i) and the Code, §26.346(a) and §26.3467(a), by failing to ensure that the UST registration and self-certification form is submitted in a timely manner and by failing to make available to a common carrier a valid, current delivery certificate; PENALTY: $1,232; ENFORCEMENT COORDINATOR: Kent Heath, (512) 239-5025; REGIONAL OFFICE: 4630 50th Street, Suite 600, Lubbock, Texas 79414- 3520, (806) 796-7092.

(26) COMPANY NAME: Rebecca Creek Municipal Utility District; DOCKET NUMBER: 2004-0969-PWS-E; IDENTIFIER: PWS Number 0460164; LOCATION: Spring Branch, Comal County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.113(f)(5) and THSC, §341.0315(c), by failing to provide water that meets the maximum contamination level for total haloacetic acid; PENALTY: $240; ENFORCEMENT COORDINATOR: Chad Blevins, (512) 239-6017; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(27) COMPANY: Red River Authority of Texas; DOCKET NUMBER: 2004-1354-PWS-E; IDENTIFIER: PWS Number 0910037; LOCATION: Pottsboro, Grayson County, Texas; TYPE OF FACILITY: surface water treatment; RULE VIOLATED: 30 TAC §290.113(f)(4) and THSC, §341.0315(c), by exceeding the maximum contaminant level (MCL) of 0.080 milligrams per liter for total trihalomethanes (TTHM); PENALTY: $665; ENFORCEMENT COORDINATOR: Brandon Smith, (512) 239-4471; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(28) COMPANY: Russell S. Robinson, Jr.; DOCKET NUMBER: 2004-1104-WOC-E; IDENTIFIER: Wastewater License Number WW0012745; LOCATION: Orange, Orange County, Texas; TYPE OF FACILITY: acting as a licensed wastewater operator; RULE VIOLATED: 30 TAC §30.331(b), by failing to renew a wastewater operator license before continuing to operate a wastewater treatment plant; PENALTY: $300; ENFORCEMENT COORDINATOR: John Barry, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(29) COMPANY: Shirley Creek Marina, Inc.; DOCKET NUMBER: 2004-1051-MWD-E; IDENTIFIER: TPDES Permit Number 0010947001, RN102080199; LOCATION: Etoile, Nacogdoches County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number 0010947001, and the Code, §26.121(a), by failing to comply with the permitted effluent limits for BOD5, TSS, and chlorine; PENALTY: $5,100; ENFORCEMENT COORDINATOR: Laurie Eaves, (512) 239-4495; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(30) COMPANY: Sunbelt Rentals, Inc.; DOCKET NUMBER: 2004-1049-MLM-E; IDENTIFIER: RN103010476; LOCATION: Beaumont, Jefferson County, Texas; TYPE OF FACILITY: equipment rental; RULE VIOLATED: 30 TAC §330.5(a) and the Code, §26.121(a), by failing to prevent the unauthorized discharge of municipal solid waste and wastewater into waters in the state; PENALTY: $2,100; ENFORCEMENT COORDINATOR: Mav Vilas, (512) 239-2557; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(31) COMPANY NAME: Texaco Livingston L.L.C. dba Livingston Texaco; DOCKET NUMBER: 2004-0808-PST-E; IDENTIFIER: PST Facility Identification Number 67127; LOCATION: Livingston, Polk County, Texas; TYPE OF FACILITY: retail gas station; RULE VIOLATED: 30 TAC §334.48(c) and §334.50(b)(1)(A), (2)(A)(i)(III), and (d)(1)(B)(ii), and the Code, §26.3475(a), by failing to reconcile inventory control records, by failing to provide proper release detection, by failing to perform a tightness test, and by failing to test a line leak detector; 30 TAC §334.45(e)(2)(D), by failing to equip the diesel UST with a removable or permanent factory-constructed drop tube; and 30 TAC §334.10(b), by failing to have records readily accessible and available for inspection; PENALTY: $5,040; ENFORCEMENT COORDINATOR: Cheryl Thompson, (817) 588-5800; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(32) COMPANY: Texas State University - San Marcos; DOCKET NUMBER: 2004-1380-AIR- E; IDENTIFIER: Air Account Number HK0036C, RN100221480; LOCATION: San Marcos, Hays County, Texas; TYPE OF FACILITY: electric generating plant; RULE VIOLATED: 30 TAC §122.145(2)(A) and §122.146(1) and THSC, §382.085(b), by failing to submit two Title V permit annual compliance certifications and the corresponding deviation report; PENALTY: $4,080; ENFORCEMENT COORDINATOR: Kensley Greuter, (512) 239-2520; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(33) COMPANY NAME: The Dow Chemical Company; DOCKET NUMBER: 2004-0572-AIR- E; IDENTIFIER: Air Account Number BL-0082-R, RN100225945; LOCATION: Freeport, Brazoria County, Texas; TYPE OF FACILITY: chlorine manufacturing plant; RULE VIOLATED: 30 TAC §116.115(c) and §116.116(a), new source review (NSR) permit numbers 3301, 4021, and 4022, and THSC, §382.085(b), by failing to maintain logs whenever a chlorine leak was discovered, by failing to maintain a minimum of at least eight weight percent caustic concentration, by failing to adhere to the permitted limit in tons per year for the chlorine flare, by failing to operate the tail gas back-up scrubber, and by failing to prevent the premature failure of the primary reactor R-1 rupture disk; PENALTY: $76,960; ENFORCEMENT COORDINATOR: Suzanne Walrath, (512) 239-2134; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(34) COMPANY NAME: Tige Boats, Inc.; DOCKET NUMBER: 2004-1363-AIR-E; IDENTIFIER: Air Account Number JI0080S, RN100675222; LOCATION: Abilene, Taylor County, Texas; TYPE OF FACILITY: boat manufacturing; RULE VIOLATED: 30 TAC §122.145(2)(A) and §122.146(2) and THSC, §382.085(b), by failing to submit the Title V permit annual compliance certification and the corresponding deviation report; PENALTY: $2,080; ENFORCEMENT COORDINATOR: Kensley Greuter, (512) 239-2520; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (915) 698-9674.

(35) COMPANY NAME: Transcontinental Gas Pipe Line Corporation; DOCKET NUMBER: 2004-0682-AIR-E; IDENTIFIER: Air Account Number HF0042L, RN100211838; LOCATION: Sour Lake, Hardin County, Texas; TYPE OF FACILITY: natural gas compressor station; RULE VIOLATED: 30 TAC §122.145(2)(A) and THSC, §382.085(b), by failing to report an instance of deviation; PENALTY: $2,500; ENFORCEMENT COORDINATOR: Larry King, (512) 239-7037; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898- 3838.

(36) COMPANY NAME: Unocal Pipeline Company; DOCKET NUMBER: 2004-1426-AIR-E; IDENTIFIER: Air Account Numbers VB0024G and AA0053T, RN100212448 and RN101655256; LOCATION: near Van and Frankston; Van Zandt and Anderson Counties, Texas; TYPE OF FACILITY: crude pipeline tank farms; RULE VIOLATED: 30 TAC §122.145(2)(B) and §122.146(2) and THSC, §382.085(b), by failing to submit four Title V compliance certifications and associated deviation reports; PENALTY: $12,000; ENFORCEMENT COORDINATOR: Lori Thompson, (903) 535-5100; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(37) COMPANY NAME: Village of Surfside Beach; DOCKET NUMBER: 2004-1415-PWS-E; IDENTIFIER: PWS Number 200037, RN101175859; LOCATION: Surfside Beach, Brazoria County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.113(b)(1) and (f)(5) and THSC, §341.0315(c), by exceeding the MCL for TTHM and haloacetic acids; PENALTY: $625; ENFORCEMENT COORDINATOR: Mike Meyer, (512) 239-4492; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(38) COMPANY NAME: Weir Bros., Inc.; DOCKET NUMBER: 2004-1061-WQ-E; IDENTIFIER: RN104317920; LOCATION: Aubrey, Denton County, Texas; TYPE OF FACILITY: sand pit; RULE VIOLATED: 30 TAC §281.25(a)(4) and 40 CFR § 122.26(a), by failing to obtain authorization to discharge storm water associated with an industrial activity; PENALTY: $8,000; ENFORCEMENT COORDINATOR: Sherry Smith, (512) 239-0572; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(39) COMPANY NAME: Western Gas Resources, Inc.; DOCKET NUMBER: 2004-1343-AIR- E; IDENTIFIER: Air Account Number PE0195L, RN100213644; LOCATION: Fort Stockton, Pecos County, Texas; TYPE OF FACILITY: compressor station; RULE VIOLATED: 30 TAC §122.121 and §122.505(c) and THSC, §382.085(b), by failing to submit a permit renewal application; PENALTY: $17,460; ENFORCEMENT COORDINATOR: Tel Croston, (512) 239-5717; REGIONAL OFFICE: 3300 North A Street, Building 4, Suite 107, Midland, Texas 79705- 5404, (915) 570-1359.

TRD-200407443
Paul C. Sarahan
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: December 21, 2004

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Finance Commission of Texas

Notice of Public Meeting

The Joint Financial Regulatory Agencies comprised of the Finance Commission of Texas and the Texas Credit Union Commission (the "Commissions") have proposed new 7 TAC §§ 152.9, 152.11, 152.13, and 153.93, concerning interpretations related to a lien on a homestead for home improvement, and interpretations of the nature of and process by which a lender or holder ("lender") of a home equity loan may cure its failure to fully comply with its obligations under the Texas Constitution, Article XVI, §50 (Section 50).

The Credit Union Commissioner and the Consumer Credit Commissioner have been delegated the authority to conduct a public meeting, on behalf of the Commissions, for the purpose of receiving oral comments, views, and/or testimony concerning the proposed interpretations. At the conclusion of this public meeting, the official record for each of these proposed interpretations will be closed and no further written or oral comments will be considered or accepted by the Commissions. This public meeting will be held in Austin on January 6, 2005, at 9:00 a.m. in the State Finance Commission Building, William F. Aldridge Hearing Room, located at 2601 North Lamar Boulevard. The meeting will be structured for the receipt of oral testimony or comments only. Individuals may present oral statements when recognized but no written materials will be accepted. The deadline for written comments has already passed.

Members of the Commissions may be present. This meeting is being posted as a special meeting of the respective Commissions as required by the Texas Open Meetings Law, in case a quorum of either Commission is present.

Person with disabilities who have special communication or other accommodation needs who are planning to attend the meeting should contact the Joann McAnally at the Office of Consumer Credit Commissioner at 512/936-7640. Requests should be made as far in advance as possible.

TRD-200407352
Leslie L. Pettijohn
Commissioner
Finance Commission of Texas
Filed: December 16, 2004

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Department of State Health Services

Licensing Actions for Radioactive Materials

The Department of State Health Services has taken actions regarding Licenses for the possession and use of radioactive materials as listed in the tables. The subheading "Location" indicates the city in which the radioactive material may be possessed and/or used. The location listing "Throughout Texas" indicates that the radioactive material may be used on a temporary basis at job sites throughout the state.

NEW LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Bellaire	First Street Imaging Center LP	L05838	Bellaire	00	12/03/04
Brownsville	JRG Equipment DBA Springman Medical Plaza	L05831	Brownsville	00	12/10/04
Dallas	Baylor Radiosurgery Center DBA Baylor University Medical Center	L05842	Dallas	00	12/03/04
Denton	Denton Surgicare Partners LTD DBA Denton Surgicare	L05819	Denton	00	11/29/04
Harlingen	Cockins Kim A MD FACC Cardiac Imaging Associates	L05845	Harlingen	00	12/07/04
Houston	Weavexx Corporation	L05834	Houston	00	12/01/04

AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Abilene	Physician Reliance Network Inc DBA Texas Cancer Center Abilene	L05127	Abilene	07	12/02/04
Addison	Mobile Diagnostic Systems Inc DBA Diagnostic Health Services	L03212	Addison	27	11/29/04
Arlington	Arlington Memorial Hospital	L02217	Arlington	80	11/30/04
Arlington	Arlington Memorial Hospital	L02217	Arlington	81	12/07/04
Arlington	Columbia Medical Center of Arlington Subsidiary LP DBA Medical Center of Arlington	L02228	Arlington	61	12/06/04
Austin	Austin Heart PA	L04623	Austin	21	12/13/04
Austin	Columbia Saint Davids Healthcare System LP DBA South Austin Hospital	L03273	Austin	57	12/03/04
Austin	Daughters of Charity Health Services of Austin DBA Brackenridge Hospital	L00268	Austin	84	12/13/04
Austin	Seton Medical Center Risk Management Department	L02896	Austin	78	12/08/04
Beaumont	Christus Saint Elizabeth Hospital DBA Saint Elizabeth Hospital	L00269	Beaumont	95	11/29/04
Beaumont	Lamar University Risk Management	L04047	Beaumont	19	11/30/04
Cleburne	Walls Regional Hospital DBA Harris Methodist Walls Regional Hospital	L02039	Cleburne	33	12/01/04
College Station	College Station Hospital LP DBA College Station Medical Center	L02559	College Station	56	12/02/04
Conroe	Montgomery County Cardiovascular Association	L05151	Conroe	11	12/01/04
Dallas	PET NET Pharmaceuticals Inc	L05193	Dallas	18	12/08/04
Dallas	Physician Reliance Network DBA Texas Cancer Center at Medical City Dallas	L05534	Dallas	04	12/08/04

CONTINUED AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
El Campo	West Wharton County Hospital District DBA El Campo Memorial Hospital	L02664	El Campo	15	12/13/04
El Paso	El Paso Healthcare System LTD DBA Las Palmas Medical Center	L02715	El Paso	61	12/09/04
El Paso	Texas Imaging Services of El Paso Inc DBA Open MRI of El Paso	L05207	El Paso	03	12/10/04
Flower Mound	Imaging Specialists Group LTD DBA Imaging Specialists	L05407	Flower Mound	10	12/13/04
Fort Worth	Cooks Children's Health Care System DBA Cook Children's Medical Center Department of Pathology	L04587	Fort Worth	07	12/06/04
Houston	BJ Services Company USA	L02684	Houston	45	12/03/04
Houston	CHCA West Houston LP DBA West Houston Medical Center	L05808	Houston	03	12/06/04
Houston	CHCA West Houston LP DBA West Houston Medical Center	L02224	Houston	64	12/09/04
Houston	Diagnostic Nuclear Imaging	L05769	Houston	01	11/30/04
Houston	Gulf Coast Regional Blood Center	L04755	Houston	03	12/10/04
Houston	Integrated Diagnostic Centers of North Houston LLC DBA Integrated Diagnostic Centers	L05432	Houston	06	12/06/04
Houston	Integrated Diagnostic Centers of North Houston LLC	L05432	Houston	07	12/13/04
Houston	Introgen Therapeutics Inc	L04870	Houston	07	12/07/04
Houston	Nuclear Imaging Services	L05775	Houston	03	12/08/04
Houston	Rice Nuclear Diagnostics	L05830	Houston	01	11/29/04
Houston	The Methodist Hospital	L00457	Houston	128	12/10/04
Houston	Washington Group International Inc	L02662	Houston	95	12/02/04
Laredo	Laredo Regional Medical Center LP DBA Doctors Hospital of Laredo	L02192	Laredo	31	12/07/04
Lubbock	ISORX Radiopharmacy	L05284	Lubbock	13	12/03/04
Lubbock	West Texas Positron LLC	L05482	Lubbock	07	12/03/04
Lufkin	The Heart Institute of East Texas PA	L04147	Lufkin	12	11/29/04
Midland	Endeavor Energy Resources LP	L05745	Midland	01	12/02/04
Mission	South Texas Imaging Center-K PA DBA STIC-K	L05636	Mission	01	12/03/04
Nacogdoches	Nacogdoches Heart Clinic	L04382	Nacogdoches	09	12/08/04
North Richland Hills	Columbia North Hills Hospital Subsidiary LP DBA North Hills Hospital	L02271	North Richland Hills	48	12/13/04
Richmond	Polly Ryon Hospital Authority DBA Polly Ryon Memorial Hospital	L02406	Richmond	34	11/29/04
San Antonio	Methodist Healthcare System of San Antonio DBA Methodist Hospital	L00594	San Antonio	195	12/10/04
San Antonio	VHS San Antonio Partners LP DBA Baptist Health System	L00455	San Antonio	138	12/09/04
Sherman	North Texas Cardiology	L05395	Sherman	07	12/10/04
Texarkana	Alumax Mill Products Inc	L04663	Texarkana	10	12/07/04
The Woodlands	Memorial Hospital The Woodlands	L03772	The Woodlands	39	11/29/04
Tomball	Clinic for Cardiovascular Care PA DBA Cardiovascular Clinic of Texas	L05670	Tomball	01	12/02/04

CONTINUED AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Tyler	Cardiovascular Associates of East Texas PA	L04800	Tyler	13	12/13/04
Waco	Waco Cardiology Associates	L05158	Waco	09	12/09/04
Webster	Diagnostic Systems Laboratories Inc	L03084	Webster	29	12/06/04
Wichita Falls	North Texas Cardiology Center LLP DBA North Texas Cardiology Center	L05443	Wichita Falls	05	12/09/04
Throughout TX	Team Cooperheat-MQS Inc DBA Cooperheat-MQS	L00087	Alvin	123	12/08/04
Throughout TX	Team Cooperheat-MQS Inc DBA Cooperheat MQS	L00087	Alvin	124	12/10/04
Throughout TX	Brazos Valley Inspection Services Inc	L02859	Bryan	42	12/07/04
Throughout TX	Baylor University Medical Center	L01290	Dallas	67	12/07/04
Throughout TX	Aviles Engineering Corporation	L03016	Houston	17	12/10/04
Throughout TX	H & G Inspection Company Inc ADBA Statewide Maintenance Company	L02181	Houston	189	12/01/04
Throughout TX	IRISNDT Inc	L04769	Houston	14	12/09/04
Throughout TX	Nuclear Sources & Services Inc DBA NSSI/Sources & Services Inc	L02991	Houston	28	12/10/04
Throughout TX	Wood Group Logging Services Inc	L05262	Houston	14	12/03/04
Throughout TX	Longview Inspection Inc	L01774	La Porte	209	12/09/04
Throughout TX	Non-Destructive Inspection Corporation	L02712	Lake Jackson	117	12/10/04
Throughout TX	Desert Industrial X-Ray LP	L04590	Odessa	37	12/07/04
Throughout TX	Celanese LTD	L04210	Pampa	17	12/08/04
Throughout TX	Fugro South Inc	L04322	Pasadena	73	12/10/04
Throughout TX	IHI Southwest Technologies Inc	L05278	San Antonio	07	12/07/04
Throughout TX	Isbell Engineering Group Inc	L05355	Sanger	06	12/07/04
Throughout TX	Schlumberger Technology Corporation	L00109	Sugar Land	48	12/01/04

RENEWAL OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Austin	Applied Genetics Inc	L04806	Austin	08	11/30/04
Austin	South Austin Cancer Center	L05108	Austin	08	11/29/04
Beaumont	Timothy K Colgan MD PA	L05706	Beaumont	02	11/30/04
Brownsville	Jaime L Silva MD FACC MBA	L05245	Brownsville	04	11/29/04
Channelview	Lyondell Chemical Company	L04439	Channelview	20	11/29/04
Corpus Christi	Coastal Bend Blood Center	L05694	Corpus Christi	01	11/30/04
Crowley	Aztec Manufacturing Partnership LTD	L05056	Crowley	02	11/29/04
Dallas	Cardiovascular Consultants of North Texas LLP	L04627	Dallas	13	11/29/04
Dallas	Valley View Surgery Center	L05686	Dallas	01	11/30/04
Fort Worth	Cardiology Associates of Fort Worth PA	L05480	Fort Worth	11	11/30/04
Fort Worth	Healthsouth of Texas Inc DBA Baylor All Saints Gamma Knife Center	L05473	Fort Worth	13	11/30/04
Friendswood	Raj K Bhalla MD PA	L05469	Friendswood	01	11/30/04
Garland	Cardiology Consultants of North Dallas PA	L05454	Garland	05	11/30/04

CONTINUED RENEWAL OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Houston	Domingo G Gonzalez Jr MD PA Houston Metropolitan Cardiology Associates	L05283	Houston	04	11/29/04
Houston	Felipe Rios MD DBA Felipe Rios MD and Associates PA	L05700	Houston	02	11/30/04
Houston	H S Bhatia MD	L05708	Houston	01	11/30/04
Houston	Industrial Nuclear Company	L04508	Houston	04	11/29/04
Houston	Interventional Cardiology Associates	L05294	Houston	07	11/29/04
Houston	Memorial Hermann Hospital System DBA Memorial Hospital Memorial City Nuclear Medicine Department	L01168	Houston	81	12/06/04
Irving	Baylor Medical Center at Irving DBA Irving Healthcare System	L02444	Irving	55	12/07/04
Katy	Memorial City Cardiology Associates DBA Katy Cardiology Associates	L05713	Katy	02	11/30/04
Kingwood	Lieber-Moore Cardiology Associates DBA Texas Cardiology Associates	L04622	Kingwood	07	11/29/04
La Porte	Total Petrochemicals USA Inc	L04640	La Porte	13	11/29/04
Lubbock	ISORX Radiopharmacy	L05284	Lubbock	12	11/29/04
Lufkin	Memorial Medical Center of East Texas	L01346	Lufkin	74	11/30/04
Midland	Permian Cardiology Associates	L05716	Midland	01	11/30/04
Odessa	Texas Oncology PA DBA West Texas Cancer Center	L05140	Odessa	04	11/29/04
Orange	Cardinal Health 414 Inc DBA Cardinal Health Nuclear Pharmacy Services	L04785	Orange	29	11/30/04
Pampa	Pampa Heart and Imaging Center LLC DBA Pampa Heart and Imaging	L05273	Pampa	01	11/29/04
Pasadena	Conam Inspection & Engineering Inc	L05010	Pasadena	79	11/29/04
Plano	Dallas Cardiology Associates DBA Heartplace Plano	L05699	Plano	01	11/30/04
Richardson	Metroscan of Richardson LLC	L05688	Richardson	03	11/30/04
Richardson	Richardson Diagnostic Imaging LLP DBA Quantum Diagnostic Imaging	L05468	Richardson	05	11/30/04
San Antonio	Christus Santa Rosa Health Care	L02237	San Antonio	79	11/30/04
San Antonio	Heart and Vascular Institute of Texas	L04799	San Antonio	13	11/29/04
Sherman	Scela Inc DBA North Texas Nuclear Pharmacy	L05461	Sherman	04	11/30/04
Sugar Land	Fort Bend Heart Center	L05678	Sugar Land	04	11/30/04
Sulphur Springs	Medical Surgical Clinic of Sulphur Springs DBA Sulphur Springs Family Healthcare Associates	L05701	Sulphur Springs	02	11/30/04
Texarkana	J M Hurley MD PA DBA Texarkana Cardiology Associates	L04738	Texarkana	06	11/30/04
Tomball	Northwest Heart Center	L05296	Tomball	01	11/29/04
Tyler	East Texas Medical Center Healthcare Association	L05702	Tyler	04	11/30/04
Vernon	American Electric Power-Public Service Service Company of Oklahoma	L03481	Vernon	17	12/06/04
Wichita Falls	North Texas Isotopes	L04810	Wichita Falls	10	11/29/04

CONTINUED RENEWAL OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Throughout TX	Cornerstone Testing and Engineering Inc	L04725	Amarillo	06	11/29/04
Throughout TX	Beavers Construction Company	L05003	Bowie	07	11/29/04
Throughout TX	Reed Engineering Group Inc	L04343	Dallas	11	11/29/04
Throughout TX	Blaine T Williams Consulting Services	L05732	Dripping Springs	01	11/30/04
Throughout TX	Reynolds Asphalt & Construction Co	L05004	Euless	05	11/29/04
Throughout TX	Terra-Mar Inc	L03157	Fort Worth	42	12/07/04
Throughout TX	City of Garland Neighborhood Development	L05458	Garland	03	11/30/04
Throughout TX	AITEC USA Inc	L05718	Houston	07	11/30/04
Throughout TX	Scientific Drilling International	L05105	Houston	07	12/03/04
Throughout TX	Perf-O-Log Inc	L05478	Iowa Colony	09	11/30/04
Throughout TX	Drash Consulting Engineers Inc	L04724	San Antonio	13	11/29/04
Throughout TX	IHI Southwest Technologies Inc	L05279	San Antonio	02	11/29/04

TERMINATIONS OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Arlington	Shaw Environmental Inc	L02906	Arlington	L02906	11/30/04
San Antonio	Astex Inc DBA Astex Environmental Services Inc	L05071	San Antonio	L05071	12/02/04

LICENSE EXEMPTION ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Austin	Applied Genetics Inc	L04806	Austin		11/24/04

In issuing new licenses, amending and renewing existing licenses, or approving license exemptions, the Department of State Health Services (department), Radiation Safety Licensing Branch, has determined that the applicant has complied with the applicable provisions of Title 25 Texas Administrative Code (TAC), Chapter 289 regarding radiation control. In granting termination of licenses, the department has determined that the licensee has complied with the applicable decommissioning requirements of 25 TAC, Chapter 289. In denying the application for a license, license renewal or license amendment, the department has determined that the applicant has not met the applicable requirements of 25 TAC, Chapter 289.

This notice affords the opportunity for a hearing on written request of a person affected within 30 days of the date of publication of this notice. A person affected is defined as a person who demonstrates that the person has suffered or will suffer actual injury or economic damage and, if the person is not a local government, is (a) a resident of a county, or a county adjacent to the county, in which radioactive material is or will be located, or (b) doing business or has a legal interest in land in the county or adjacent county. A person affected may request a hearing by writing Richard Ratliff, Radiation Program Officer, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756-3189. For information call (512) 834-6688.

TRD-200407464
Cathy Campbell
Director, Legal Services
Department of State Health Services
Filed: December 22, 2004

♦ ♦ ♦

Notice of Agreed Order with Apple Chiropractic Clinic, Inc.

On December 8, 2004, the Radiation Program Officer, Department of State Health Services (department), approved the settlement agreement between the department and Apple Chiropractic Clinic, Inc. (registrant-R20739) of Houston. A total administrative penalty in the amount of $2,500 was assessed the registrant for violations of 25 Texas Administrative Code, Chapter 289. Of the total administrative penalty, $1,500 will be probated for a period of one year, and will be forgiven if the registrant complies with additional settlement agreement requirements.

A copy of all relevant material is available, by appointment, for public inspection at the Department of State Health Services, Exchange

Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, Monday-Friday, 8:00 a.m. to 5:00 p.m. (except holidays).

TRD-200407365
Cathy Campbell
Director, Legal Services
Department of State Health Services
Filed: December 17, 2004

♦ ♦ ♦

Notice of Emergency Cease and Desist Order on High Tech Institute, Inc.

Notice is hereby given that the Department of State Health Services (department) ordered High Tech Institute, Inc. (registrant-R28646) of Irving to cease and desist from deliberately applying radiation to humans with radiation machines unless authorization is received from the department.

A copy of all relevant material is available, by appointment, for public inspection at the Department of State Health Services, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, Monday-Friday, 8:00 a.m. to 5:00 p.m. (except holidays).

TRD-200407366
Cathy Campbell
Director, Legal Services
Department of State Health Services
Filed: December 17, 2004

♦ ♦ ♦

Notice of Emergency Impoundment Order on Nuclear Sources and Services, Inc.

Notice is hereby given that the Department of State Health Services (department) ordered all ring nuclear sources (Model Number NSR-N) possessed by Nuclear Sources and Services, Inc. (licensee-L02991) be impounded and not transferred without written authorization by the department.

A copy of all relevant material is available, by appointment, for public inspection at the Department of State Health Services, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, Monday-Friday, 8:00 a.m. to 5:00 p.m. (except holidays).

TRD-200407364
Cathy Campbell
Director, Legal Services
Department of State Health Services
Filed: December 17, 2004

♦ ♦ ♦

Notice of Preliminary Report for Assessment of Administrative Penalties and Notice of Violation on Brazos Valley Inspection Services, Inc.

Notice is hereby given that the Department of State Health Services (department) issued a notice of violation and proposal to assess an administrative penalty to Brazos Valley Inspection Services, Inc. (licensee - L02859) of Bryan. A total penalty of $12,000 is proposed to be assessed the licensee for alleged violations of 25 Texas Administrative Code, Chapter 289.

A copy of all relevant material is available, by appointment, for public inspection at the Department of State Health Services, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, Monday-Friday, 8:00 a.m. to 5:00 p.m. (except holidays).

TRD-200407463
Cathy Campbell
Director, Legal Services
Department of State Health Services
Filed: December 22, 2004

♦ ♦ ♦

Notice of Proposed Administrative Renewal of the Radioactive Material License of Conoco/Phillips Company

Notice is hereby given by the Department of State Health Services (department) that it proposes to grant an administrative renewal pursuant to Title 25, Texas Administrative Code (TAC), §289.260(h) for a two-year period of Radioactive Material License Number L01634 issued to Conoco/Phillips Company for a facility located in Karnes County, Texas, near Falls City, Texas.

The department has determined that the licensee has paid its license renewal fee, has a satisfactory compliance history and otherwise complies with the requirements of 25 TAC, §289.260(h).

This notice affords the opportunity for a public hearing, upon written request, by a person affected within 30 days of the date of publication of this notice as required by Texas Health and Safety Code, §401.264 and as set out in 25 TAC, §289.205(d). A "person affected" is defined as a person who demonstrates that the person has suffered or will suffer actual injury or economic damage and, if the person is not a local government, is (a) a resident of a county, or a county adjacent to a county, in which the radioactive material is or will be located; or (b) doing business or has a legal interest in land in the county or adjacent county.

A person affected may request a hearing by writing Mr. Richard A. Ratliff, P.E., Radiation Program Officer, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756-3189. Any request for a hearing must contain the name and address of the person who considers himself affected by this action, identify the subject license, specify the reasons why the person considers himself affected, and state the relief sought. If the person is represented by an agent, the name and address of the agent must be stated. Should no request for a public hearing be timely filed, the proposed issuance of the license will be final.

A public hearing, if requested, shall be conducted in accordance with the provisions of Texas Health and Safety Code, Chapter 401, the Administrative Procedure Act (Chapter 2001, Texas Government Code), the formal hearing procedures of the department (25 TAC, §1.21 et seq.) and the procedures of the State Office of Administrative Hearings (1 TAC, Chapter 155).

A copy of the proposed license and information regarding the license renewal is available for public inspection and copying, by appointment, at the office of the Radiation Safety Licensing Branch, Department of State Health Services, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, 8:00 a.m. to 5:00 p.m. Monday-Friday (except holidays). Information relative to inspection and copying the documents may be obtained by contacting Chrissie Toungate, Custodian of Records, Radiation Safety Licensing Branch.

TRD-200407460
Cathy Campbell
Director, Legal Services
Department of State Health Services
Filed: December 22, 2004

♦ ♦ ♦

Notice of Proposed Administrative Renewal of the Radioactive Material License of Exxon/Mobil Corporation

Notice is hereby given by the Department of State Health Services (department) that it proposes to grant an administrative renewal pursuant to Title 25, Texas Administrative Code (TAC), §289.260(h) for a two-year period of Radioactive Material License Number L01431 issued to Exxon/Mobil Corporation for a facility located in Live Oak County, Texas, near Three Rivers, Texas.

The department has determined that the licensee has paid its license renewal fee, has a satisfactory compliance history and otherwise complies with the requirements of 25 TAC, §289.260(h).

This notice affords the opportunity for a public hearing, upon written request, by a person affected within 30 days of the date of publication of this notice as required by Texas Health and Safety Code, §401.264 and as set out in 25 TAC, §289.205(d). A "person affected" is defined as a person who demonstrates that the person has suffered or will suffer actual injury or economic damage and, if the person is not a local government, is (a) a resident of a county, or a county adjacent to a county, in which the radioactive material is or will be located; or (b) doing business or has a legal interest in land in the county or adjacent county.

A person affected may request a hearing by writing Mr. Richard A. Ratliff, P.E., Radiation Program Officer, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756-3189. Any request for a hearing must contain the name and address of the person who considers himself affected by this action, identify the subject license, specify the reasons why the person considers himself affected, and state the relief sought. If the person is represented by an agent, the name and address of the agent must be stated. Should no request for a public hearing be timely filed, the proposed issuance of the license will be final.

A public hearing, if requested, shall be conducted in accordance with the provisions of Texas Health and Safety Code, Chapter 401, the Administrative Procedure Act (Chapter 2001, Texas Government Code), the formal hearing procedures of the department (25 TAC, §1.21 et seq.) and the procedures of the State Office of Administrative Hearings (1 TAC, Chapter 155).

A copy of the proposed license and information regarding the license renewal is available for public inspection and copying, by appointment, at the office of the Radiation Safety Licensing Branch, Department of State Health Services, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, 8:00 a.m. to 5:00 p.m. Monday-Friday (except holidays). Information relative to inspection and copying the documents may be obtained by contacting Chrissie Toungate, Custodian of Records, Radiation Safety Licensing Branch.

TRD-200407461
Cathy Campbell
Director, Legal Services
Department of State Health Services
Filed: December 22, 2004

♦ ♦ ♦

Notice of Proposed Administrative Renewal of the Radioactive Material License of Rio Grande Resources Corporation

Notice is hereby given by the Department of State Health Services (department) that it proposes to grant an administrative renewal pursuant to Title 25, Texas Administrative Code (TAC), §289.260(h) for a two-year period of Radioactive Material License Number L02402 issued to Rio Grande Resources Corporation for a facility located in Karnes County, Texas, near Panna Maria, Texas.

The department has determined that the licensee has paid its license renewal fee, has a satisfactory compliance history and otherwise complies with the requirements of 25 TAC, §289.260(h).

This notice affords the opportunity for a public hearing, upon written request, by a person affected within 30 days of the date of publication of this notice as required by Texas Health and Safety Code, §401.264 and as set out in 25 TAC, §289.205(d). A "person affected" is defined as a person who demonstrates that the person has suffered or will suffer actual injury or economic damage and, if the person is not a local government, is (a) a resident of a county, or a county adjacent to a county, in which the radioactive material is or will be located; or (b) doing business or has a legal interest in land in the county or adjacent county.

A person affected may request a hearing by writing Mr. Richard A. Ratliff, P.E., Radiation Program Officer, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756-3189. Any request for a hearing must contain the name and address of the person who considers himself affected by this action, identify the subject license, specify the reasons why the person considers himself affected, and state the relief sought. If the person is represented by an agent, the name and address of the agent must be stated. Should no request for a public hearing be timely filed, the proposed issuance of the license will be final.

A public hearing, if requested, shall be conducted in accordance with the provisions of Texas Health and Safety Code, Chapter 401, the Administrative Procedure Act (Chapter 2001, Texas Government Code), the formal hearing procedures of the department (25 TAC, §1.21 et seq.) and the procedures of the State Office of Administrative Hearings (1 TAC, Chapter 155).

A copy of the proposed license and information regarding the license renewal is available for public inspection and copying, by appointment, at the office of the Radiation Safety Licensing Branch, Department of State Health Services, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, 8:00 a.m. to 5:00 p.m. Monday-Friday (except holidays). Information relative to inspection and copying the documents may be obtained by contacting Chrissie Toungate, Custodian of Records, Radiation Safety Licensing Branch.

TRD-200407462
Cathy Campbell
Director, Legal Services
Department of State Health Services
Filed: December 22, 2004

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Schedules of Controlled Substances

PURSUANT TO THE TEXAS CONTROLLED SUBSTANCES ACT, HEALTH AND SAFETY CODE, CHAPTER 481, THESE SCHEDULES, ESTABLISHED JANUARY 1, 2005, SUPERCEDE PREVIOUS SCHEDULES AND CONTAIN THE MOST CURRENT VERSION OF THE SCHEDULES OF ALL CONTROLLED SUBSTANCES FROM THE PREVIOUS SCHEDULES AND MODIFICATIONS.

January 1, 2005

Changes to the schedules are designated by an asterisk (*). Additional information can be obtained by contacting the Department of State Health Services, Drugs and Medical Devices Group, 1100 West 49th Street, Austin, Texas 78756. The telephone number is (512) 719-0237 and the web site address is http://www.tdh.state.tx.us/bfds/dmd/ .

SCHEDULES

Nomenclature: Controlled substances listed in these schedules are included by whatever official, common, usual, chemical, or trade name they may be designated.

SCHEDULE I

Schedule I consists of:

Schedule I opiates

the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, unless specifically excepted, if the existence of these isomers, esters, ethers, and salts is possible within the specific chemical designation:

(1) Acetyl-alpha-methylfentanyl (N-[1-(1-methyl-2-phenethyl)-4-piperidinyl]- N- phenylacetamide);

(2) Allylprodine;

(3) Alphacetylmethadol (except levo-alphacetylmethadol, also known as levo-alpha-acetylmethadol, levomethadyl acetate, or LAAM);

(4) Alpha-methylfentanyl or any other derivative of Fentanyl;

(5) Alpha-methylthiofentanyl (N-[1-methyl-2-(2-thienyl) ethyl-4-piperidinyl]-N- phenyl-propanamide);

(6) Benzethidine;

(7) Beta-hydroxyfentanyl (N-[1-(2-hydroxy-2-phenethyl)-4-piperidinyl]-N-phenyl-propanamide);

(8) Beta-hydroxy-3-methylfentanyl (N-[1-(2-hydroxy-2-phenethyl)-3-methyl- 4- piperidinyl]-N- phenylpropanamide);

(9) Betaprodine;

(10) Clonitazene;

(11) Diampromide;

(12) Diethylthiambutene;

(13) Difenoxin;

(14) Dimenoxadol;

(15) Dimethylthiambutene;

(16) Dioxaphetyl butyrate;

(17) Dipipanone;

(18) Ethylmethylthiambutene;

(19) Etonitazene;

(20) Etoxeridine;

(21) Furethidine;

(22) Hydroxypethidine;

(23) Ketobemidone;

(24) Levophenacylmorphan;

(25) Meprodine;

(26) Methadol;

(27) 3-methylfentanyl (N-[3-methyl-1-(2-phenylethyl)-4-piperidyl]-N- phenylpropanamide), its optical and geometric isomers;

(28) 3-methylthiofentanyl (N-[3-methyl-1-(2-thienyl)ethyl-4-piperidinyl]-N- phenylpropanamide);

(29) Moramide;

(30) Morpheridine;

(31) MPPP (1-methyl-4-phenyl-4-propionoxypiperidine);

(32) Noracymethadol;

(33) Norlevorphanol;

(35) Norpipanone;

(36) Para-fluorofentanyl (N-(4-fluorophenyl)-N-[1-(2-phenethyl)-4-piperidinyl]- propanamide);

(37) PEPAP (1-(2-phenethyl)-4-phenyl-4-acetoxypiperidine);

(38) Phenadoxone;

(39) Phenampromide;

(40) Phencyclidine;

(41) Phenomorphan;

(42) Phenoperidine;

(43) Piritramide;

(44) Proheptazine;

(45) Properidine;

(46) Propiram;

(47) Thiofentanyl (N-phenyl-N-[1-(2-thienyl)ethyl-4-piperidinyl]-propanamide);

(48) Tilidine; and

(49) Trimeperidine;

Schedule I opium derivatives

the following opium derivatives, their salts, isomers, and salts of isomers, unless specifically excepted, if the existence of these salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Acetorphine;

(2) Acetyldihydrocodeine;

(3) Benzylmorphine;

(4) Codeine methylbromide;

(5) Codeine-N-Oxide;

(6) Cyprenorphine;

(7) Desomorphine;

(8) Dihydromorphine;

(9) Drotebanol;

(10) Etorphine (except hydrochloride salt);

(11) Heroin;

(12) Hydromorphinol;

(13) Methyldesorphine;

(14) Methyldihydromorphine;

(15) Monoacetylmorphine;

(16) Morphine methylbromide;

(17) Morphine methylsulfonate;

(18) Morphine-N-Oxide;

(19) Myrophine;

(20) Nicocodeine;

(21) Nicomorphine;

(22) Normorphine;

(23) Pholcodine; and

(24) Thebacon;

Schedule I hallucinogenic substances

unless specifically excepted or unless listed in another schedule, a material, compound, mixture, or preparation that contains any quantity of the following hallucinogenic substances or that contains any of the substance's salts, isomers, and salts of isomers if the existence of the salts, isomers, and salts of isomers is possible within the specific chemical designation (for the purposes of this Schedule I hallucinogenic substances section only, the term "isomer" includes optical, position, and geometric isomers):

(1) Alpha-ethyltryptamine (some trade or other names: etryptamine; Monase; alpha ethyl-1H-indole-3-ethanamine; 3-(2-aminobutyl) indole; alpha-ET; AET);

(2) alpha-methyltryptamine (AMT), its isomers, salts, and salts of isomers;

(3) 4-bromo-2,5-dimethoxyamphetamine (some trade or other names: 4-bromo-2,5- dimethoxy-alpha-methylphenethylamine; 4-bromo-2,5-DMA);

(4) 4-bromo-2,5-dimethoxyphenethylamine (some trade or other names: Nexus; 2C-B; 2-(4-bromo-2,5-dimethoxyphenyl)-1-aminoethane; alpha-desmethyl DOB);

(5) 2,5-dimethoxyamphetamine (some trade or other names: 2,5-dimethoxy- alpha-methylphenethylamine; 2,5-DMA);

(6) 2,5-dimethoxy-4-ethylamphetamine (some trade or other names: DOET);

(7) 2,5-dimethoxy-4-(n)-propylthiophenethylamine (2C-T-7), its optical isomers, salts and salts of isomers;

(8) 5-methoxy-N,N-diisopropyltryptamine (5-MeO-DIPT), its isomers, salts, and salts of isomers;

(9) 5-methoxy-3,4-methylenedioxy-amphetamine;

(10) 4-methoxyamphetamine (some trade or other names: 4-methoxy-alpha- methylphenethylamine; paramethoxyamphetamine; PMA);

(11) 1-methyl-4-phenyl-1,2,5,6-tetrahydro-pyridine (MPTP);

(12) 4-methyl-2,5-dimethoxyamphetamine (some trade and other names: 4-methyl-2,5-dimethoxy-alpha-methyl-phenethylamine; "DOM"; and "STP");

(13) 3,4-methylenedioxy-amphetamine;

(14) 3,4-methylenedioxy-methamphetamine (MDMA, MDM);

(15) 3,4-methylenedioxy-N-ethylamphetamine (some trade or other names: N-ethyl-alpha-methyl-3,4(methylenedioxy)phenethylamine; N-ethyl MDA; MDE; MDEA);

(16) 3,4,5-trimethoxy amphetamine;

(17) N-hydroxy-3,4-methylenedioxyamphetamine (Also known as N-hydroxy MDA);

(18) Bufotenine (some trade and other names: 3-(beta-Dimethylaminoethyl)-5- hydroxyindole; 3-(2-dimethylaminoethyl)-5-indolol; N,N-dimethylserotonin; 5-hydroxy- N,N-dimethyltryptamine; mappine);

(19) Diethyltryptamine (some trade and other names: N,N-Diethyltryptamine; DET);

(20) Dimethyltryptamine (some trade and other names: DMT);

(21) Ethylamine Analog of Phencyclidine (some trade or other names: N-ethyl-1- phenylcyclohexylamine; (1-phenylcyclohexyl) ethylamine; N-(1-phenylcyclohexyl)-ethylamine; cyclohexamine; PCE);

(22) Ibogaine (some trade or other names: 7-Ethyl-6,6-beta, 7,8,9,10,12,13-octhydro-2-methoxy-6,9-methano-5H-pyrido[1',2':1,2] azepino [5,4-b] indole; taber-nanthe iboga);

(23) Lysergic acid diethylamide;

(24) Marihuana;

(25) Mescaline;

(26) N-ethyl-3-piperidyl benzilate;

(27) N-methyl-3-piperidyl benzilate;

(28) Parahexyl (some trade or other names: 3-Hexyl-1-hydroxy-7,8,9,10-tetrahydro-6,6,9-trimethyl-6H-dibenzo [b,d] pyran; Synhexyl);

(29) Peyote, unless unharvested and growing in its natural state, meaning all parts of the plant classified botanically as *Lophophora*, whether growing or not, the seeds of the plant, an extract from a part of the plant, and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or extracts;

(30) Psilocybin;

(31) Psilocin;

(32) Pyrrolidine analog of phencyclidine (some trade or other names: 1-(1-phenyl- cyclohexyl)-pyrrolidine, PCPy, PHP);

(33) Tetrahydrocannabinols Meaning tetrahydrocannabinols naturally contained in a plant of the genus Cannabis (cannabis plant), as well as synthetic equivalents of the substances contained in the cannabis plant, or in the resinous extractives of such plant, and/or synthetic substances, derivatives, and their isomers with similar chemical structure and pharmacological activity to those substances contained in the plant, such as the following:

1 cis or trans tetrahydrocannabinol, and their optical isomers

6 cis or trans tetrahydrocannabinol, and their optical isomers

3,4 cis or trans tetrahydrocannabinol, and its optical isomers;

(Since nomenclature of these substances is not internationally standardized, compounds of these structures, regardless of numerical designation of atomic positions covered.);

(34) Thiophene analog of phencyclidine (some trade or other names: 1-[1-(2-thienyl) cyclohexyl] piperidine; 2-thienyl analog of phencyclidine; TPCP);

(35) 1-[1-(2-thienyl)cyclohexyl]pyrrolidine (some trade or other names: TCPy); and,

*[deleted no. 36]

Schedule I stimulants

unless specifically excepted or unless listed in another schedule, a material, compound, mixture, or preparation that contains any quantity of the following substances having a stimulant effect on the central nervous system, including the substance's salts, isomers, and salts of isomers if the existence of the salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Aminorex (some other names: aminoxaphen; 2-amino-5-phenyl-2-oxazoline; 4,5-dihydro- 5-phenyl-2-oxazolamine);

(2) Cathinone (some trade or other names: 2-amino-1-phenyl-1-propanone; alpha- aminopropiophenone; 2-aminopropiophenone and norephedrone);

(3) Fenethylline;

(4) Methcathinone (some other names: 2-(methylamino)-propiophenone; alpha- (methylamino) propiophenone; 2-(methylamino)-1-phenylpropan-1-one; alpha-N-methylaminopropiophenone; monomethylpropion; ephedrone; N-methylcathinone; methylcathinone; AL-464; AL-422; AL-463; and UR1432);

(5) 4-methylaminorex;

(6) N-ethylamphetamine; and,

(7) N,N-dimethylamphetamine (some other names: N,N-alpha-trimethylbenzene- ethaneamine; N,N-alpha-trimethylphenethylamine).

Schedule I depressants

unless specifically excepted or unless listed in another schedule, a material, compound, mixture, or preparation that contains any quantity of the following substances having a depressant effect on the central nervous system, including the substance's salts, isomers, and salts of isomers if the existence of the salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Gamma-hydroxybutyric acid (some other names include GHB; gamma-hydroxybutyrate; 4-hydroxybutyrate; 4-hydroxybutanoic acid; sodium oxybate; sodium oxybutyrate)

(2) Mecloqualone; and,

(3) Methaqualone.

SCHEDULE II

Schedule II consists of:

Schedule II substances, vegetable origin or chemical synthesis

the following substances, however produced, except those narcotic drugs listed in other schedules:

(1) Opium and opiate, and a salt, compound, derivative, or preparation of opium or opiate, other than thebaine-derived butorphanol, naloxone and its salts, naltrexone and its salts, and nalmefene and its salts, but including:

(1-1) Codeine;

(1-2) Dihydroetorphine;

(1-3) Ethylmorphine;

(1-4) Etorphine hydrochloride;

(1-5) Granulated opium;

(1-6) Hydrocodone;

(1-7) Hydromorphone;

(1-8) Metopon;

(1-9) Morphine;

(1-10) Opium extracts;

(1-11) Opium fluid extracts;

(1-12) Oxycodone;

(1-13) Oxymorphone;

(1-14) Powdered opium;

(1-15) Raw opium;

(1-16) Thebaine; and,

(1-17) Tincture of opium;

(2) a salt, compound, isomer, derivative, or preparation of a substance that is chemically equivalent or identical to a substance described by Paragraph (1) of Schedule II substances, vegetable origin or chemical synthesis, other than the isoquinoline alkaloids of opium;

(3) Opium poppy and poppy straw;

(4) Cocaine, including:

(4-1) its salts, its optical, position, and geometric isomers, and the salts of those isomers; and,

(4-2) coca leaves and a salt, compound, derivative, or preparation of coca leaves that is chemically equivalent or identical to a substance described by this paragraph, other than decocainized coca leaves or extractions of coca leaves that do not contain cocaine or ecgonine; and,

(5) Concentrate of poppy straw, meaning the crude extract of poppy straw in liquid, solid, or powder form that contains the phenanthrene alkaloids of the opium poppy;

Opiates

the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, if the existence of these isomers, esters, ethers, and salts is possible within the specific chemical designation:

(1) Alfentanil;

(2) Alphaprodine;

(3) Anileridine;

(4) Bezitramide;

(5) Carfentanil;

(6) Dextropropoxyphene, bulk (nondosage form);

(7) Dihydrocodeine;

(8) Diphenoxylate;

(9) Fentanyl;

(10) Isomethadone;

(11) Levo-alphacetylmethadol (some trade or other names: levo-alpha-acetylmethadol, levomethadyl acetate, LAAM);

(12) Levomethorphan;

(13) Levorphanol;

(14) Metazocine;

(15) Methadone;

(16) Methadone-Intermediate, 4-cyano-2-dimethylamino-4,4-diphenyl butane;

(17) Moramide-Intermediate, 2-methyl-3-morpholino-1,1-diphenyl-propane-carboxylic acid;

(18) Pethidine (meperidine);

(19) Pethidine-Intermediate-A, 4-cyano-1-methyl-4-phenylpiperidine;

(20) Pethidine-Intermediate-B, ethyl-4-phenylpiperidine-4-carboxylate;

(21) Pethidine-Intermediate-C, 1-methyl-4-phenylpiperidine-4-carboxylic acid;

(22) Phenazocine;

(23) Piminodine;

(24) Racemethorphan;

(25) Racemorphan;

(26) Remifentanil; and

(27) Sufentanil;

Schedule II stimulants

unless listed in another schedule and except as provided by the Texas Controlled Substances Act, Health and Safety Code, §481.033, a material, compound, mixture, or preparation that contains any quantity of the following substances having a potential for abuse associated with a stimulant effect on the central nervous system:

(1) Amphetamine, its salts, optical isomers, and salts of its optical isomers;

(2) Methamphetamine, including its salts, optical isomers, and salts of optical isomers;

(3) Methylphenidate and its salts; and,

(4) Phenmetrazine and its salts;

Schedule II depressants

unless listed in another schedule, a material, compound, mixture or preparation that contains any quantity of the following substances having a depressant effect on the central nervous system, including the substance's salts, isomers, and salts of isomers if the existence of the salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Amobarbital;

(2) Glutethimide;

(3) Pentobarbital; and,

(4) Secobarbital;

Schedule II hallucinogenic substances

(1) Nabilone (Another name for nabilone: (±)-trans-3-(1,1-dimethylheptyl)-6,6a,7,8, 10,10a-hexahydro-1-hydroxy-6,6-dimethyl-9H-dibenzo[b,d]pyran-9-one);

Schedule II precursors

unless specifically excepted or listed in another schedule, a material, compound, mixture, or preparation that contains any quantity of the following substances:

(1) Immediate precursor to methamphetamine:

(1-1) Phenylacetone and methylamine if possessed together with intent to manufacture methamphetamine;

(2) Immediate precursor to amphetamine and methamphetamine:

(2-1) Phenylacetone (some trade or other names: phenyl-2-propanone; P2P; benzyl methyl ketone; methyl benzyl ketone); and,

(3) Immediate precursors to phencyclidine (PCP):

(3-1) 1-phenylcyclohexylamine; and,

(3-2) 1-piperidinocyclohexanecarbonitrile (PCC).

SCHEDULE III

Schedule III consists of:

Schedule III depressants

unless listed in another schedule and except as provided by the Texas Controlled Substances Act, Health and Safety Code, §481.033, a material, compound, mixture, or preparation that contains any quantity of the following substances having a potential for abuse associated with a depressant effect on the central nervous system:

(1) a compound, mixture, or preparation containing amobarbital, secobarbital, pentobarbital, or any of their salts and one or more active medicinal ingredients that are not listed in a schedule;

(2) a suppository dosage form containing amobarbital, secobarbital, pentobarbital, or any of their salts and approved by the Food and Drug Administration for marketing only as a suppository;

(3) a substance that contains any quantity of a derivative of barbituric acid, or any salt of a derivative of barbituric acid, except those substances that are specifically listed in other schedules;

(4) Chlorhexadol;

(5) Any drug product containing gamma hydroxybutyric acid, including its salts, isoners, and salts of isomers, for which an application is approved under section 505 of the Federal Food Drug and Cosmetic Act:

(6) Ketamine, its salts, isomers, and salts of isomers. Some other names for ketamine: (±)-2-(2-chlorophenyl)-2-(methylamino)-cyclohexanone;

(7) Lysergic acid;

(8) Lysergic acid amide;

(9) Methyprylon;

(10) Sulfondiethylmethane;

(11) Sulfonethylmethane;

(12) Sulfonmethane; and,

(13) Tiletamine and zolazepam or any salt thereof. Some trade or other names for a tiletamine-zolazepam combination product: Telazol. Some trade or other names for tiletamine: 2-(ethylamino)-2-(2-thienyl)-cyclohexanone. Some trade or other names for zolazepam: 4-(2-fluorophenyl)-6,8-dihydro-1,3,8-trimethyl-pyrazolo-[3,4-e][1,4]-diazepin- 7(1H)-one, flupyrazapon;

Nalorphine

Schedule III narcotics

unless specifically excepted or unless listed in another schedule:

(1) a material, compound, mixture, or preparation containing limited quantities of any of the following narcotic drugs, or any of their salts:

(1-1) not more than 1.8 grams of codeine, or any of its salts, per 100 milliliters or not more than 90 milligrams per dosage unit, with an equal or greater quantity of an isoquinoline alkaloid of opium;

(1-2) not more than 1.8 grams of codeine, or any of its salts, per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(1-3) not more than 300 milligrams of dihydrocodeinone (hydrocodone), or any of its salts, per 100 milliliters or not more than 15 milligrams per dosage unit, with a fourfold or greater quantity of an isoquinoline alkaloid of opium;

(1-4) not more than 300 milligrams of dihydrocodeinone (hydrocodone), or any of its salts, per 100 milliliters or not more than

15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(1-5) not more than 1.8 grams of dihydrocodeine, or any of its salts, per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(1-6) not more than 300 milligrams of ethylmorphine, or any of its salts, per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, non-narcotic ingredients in recognized therapeutic amounts;

(1-7) not more than 500 milligrams of opium per 100 milliliters or per 100 grams, or not more than 25 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts; and,

(1-8) not more than 50 milligrams of morphine, or any of its salts, per 100 milliliters or per 100 grams with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(2) any material, compound, mixture, or preparation containing any of the following narcotic drugs or their salts:

(2-1) Buprenorphine

Schedule III stimulants

unless listed in another schedule, a material, compound, mixture or preparation that contains any quantity of the following substances having a stimulant effect on the central nervous system, including the substance's salts, optical, position, or geometric isomers, and salts of the substance's isomers, if the existence of the salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Benzphetamine;

(2) Chlorphentermine;

(3) Clortermine; and,

(4) Phendimetrazine;

Schedule III anabolic steroids and hormones

anabolic steroids, including any drug or hormonal substance, chemically and pharmacologically related to testosterone (other than estrogens, progestins, and corticosteroids) that promote muscle growth, and include the following:

(1) Boldenone;

(2) Chlorotestosterone (4-chlortestosterone);

(3) Clostebol;

(4) Dehydrochlormethyltestosterone;

(5) Dihydrotestosterone (4-dihydrotestosterone);

(6) Drostanolone;

(7) Ethylestrenol;

(8) Fluoxymesterone;

(9) Formebolone;

(10) Mesterolone;

(11) Methandienone;

(12) Methandranone;

(13) Methandriol;

(14) Methandrostenolone;

(15) Methenolone;

(16) Methyltestosterone;

(17) Mibolerone;

(18) Nandrolone;

(19) Norethandrolone;

(20) Oxandrolone;

(21) Oxymesterone;

(22) Oxymetholone;

(23) Stanolone;

(24) Stanozolol;

(25) Testolactone;

(26) Testosterone; and

(27) Trenbolone.

Schedule III hallucinogenic substances

(1) Dronabinol (synthetic) in sesame oil and encapsulated in a soft gelatin capsule in U.S. Food and Drug Administration approved drug product. (Some other names for dronabinol:(6aR-trans)-6a,7,8,10a-tetrahydro-6,6,9-tri-methyl-3-pentyl-6H-dibenzo[b,d]pyran-1-ol, or (-)-delta-9-(trans)-tetrahydrocannabinol).

SCHEDULE IV

Schedule IV consists of:

Schedule IV depressants

except as provided by the Texas Controlled Substances Act, Health and Safety Code, §481.033, a material, compound, mixture, or preparation that contains any quantity of the following substances having a potential for abuse associated with a depressant effect on the central nervous system:

(1) Alprazolam;

(2) Barbital;

(3) Bromazepam;

(4) Camazepam;

(5) Chloral betaine;

(6) Chloral hydrate;

(7) Chlordiazepoxide;

(8) Clobazam;

(9) Clonazepam;

(10) Clorazepate;

(11) Clotiazepam;

(12) Cloxazolam;

(13) Delorazepam;

(14) Diazepam;

(15) Dichloralphenazone;

(16) Estazolam;

(17) Ethchlorvynol;

(18) Ethinamate;

(19) Ethyl loflazepate;

(20) Fludiazepam;

(21) Flunitrazepam;

(22) Flurazepam;

(23) Halazepam;

(24) Haloxazolam;

(25) Ketazolam;

(26) Loprazolam;

(27) Lorazepam;

(28) Lormetazepam;

(29) Mebutamate;

(30) Medazepam;

(31) Meprobamate;

(32) Methohexital;

(33) Methylphenobarbital (mephobarbital);

(34) Midazolam;

(35) Nimetazepam;

(36) Nitrazepam;

(37) Nordiazepam;

(38) Oxazepam;

(39) Oxazolam;

(40) Paraldehyde;

(41) Petrichloral;

(42) Phenobarbital;

(43) Pinazepam;

(44) Prazepam;

(45) Quazepam;

(46) Temazepam;

(47) Tetrazepam;

(48) Triazolam;

(49) Zaleplon: and

(50) Zolpidem;

Schedule IV stimulants

unless listed in another schedule, a material, compound, mixture, or preparation that contains any quantity of the following substances having a stimulant effect on the central nervous system, including the substance's salts, optical, position, or geometric isomers, and salts of those isomers if the existence of the salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Cathine [(+)-norpseudoephedrine];

(2) Diethylpropion;

(3) Fencamfamin;

(4) Fenfluramine;

(5) Fenproporex;

(6) Mazindol;

(7) Mefenorex;

(8) Modafinil;

(9) Pemoline (including organometallic complexes and their chelates);

(10) Phentermine;

(11) Pipradrol;

(12) SPA [(-)-1-dimethylamino-1,2-diphenylethane]; and

(13) Sibutramine

Schedule IV narcotics

unless specifically excepted or unless listed in another schedule, a material, compound, mixture, or preparation containing limited quantities of the following narcotic drugs or their salts:

(1) Not more than 1 milligram of difenoxin and not less than 25 micrograms of atropine sulfate per dosage unit; and

(2) Dextropropoxyphene (Alpha-(+)-4-dimethylamino-1,2-diphenyl-3-methyl-2- propionoxybutane).

Schedule IV other substances

unless specifically excepted or unless listed in another schedule, a material, compound, substance's salts:

(1) Butorphanol, including its optical isomers; and,

(2) Pentazocine, its salts, derivatives, compounds, or mixtures.

SCHEDULE V

Schedule V consists of:

Schedule V narcotics containing non-narcotic active medicinal ingredients

a compound, mixture, or preparation containing limited quantities of any of the following narcotic drugs that also contain one or more non-narcotic active medicinal ingredients in sufficient proportion to confer on the compound, mixture or preparation valuable medicinal qualities other than those possessed by the narcotic drug alone:

(1) Not more than 200 milligrams of codeine, or any of its salts, per 100 milliliters or per 100 grams;

(2) Not more than 100 milligrams of dihydrocodeine, or any of its salts, per 100 milliliters or per 100 grams;

(3) Not more than 100 milligrams of ethylmorphine, or any of its salts, per 100 milliliters or per 100 grams;

(4) Not more than 2.5 milligrams of diphenoxylate and not less than 25 micrograms of atropine sulfate per dosage unit;

(5) Not more than 15 milligrams of opium per 29.5729 milliliters or per 28.35 grams; and,

(6) Not more than 0.5 milligram of difenoxin and not less than 25 micrograms of atropine sulfate per dosage unit;

Schedule V stimulants

unless specifically exempted or excluded or unless listed in another schedule, a compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system, including its salts, isomers and salts of isomers:

(1) Pyrovalerone.

TRD-200407459

Cathy Campbell
Director, Legal Services
Department of State Health Services
Filed: December 22, 2004

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Texas Health and Human Services Commission

Notice of Hearing on Proposed Provider Payment Rates

Hearing. The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on January 20, 2005, to receive public comment on proposed payment rates for Case Management for Children's Vocational Discovery and Development Program. This program is operated by the Texas Department of Assistive and Rehabilitative Services (DARS). These payment rates are proposed to be effective January 1, 2005. The hearing will be held in compliance with Title 1 of the Texas Administrative Code (TAC) §355.105(g), which requires public hearings on proposed payment rates. The public hearing will be held on January 20, 2005, at 9:00 a.m. in the Guadalupe Mountains Conference Room of the Braker Center Building H, at 11209 Metric Boulevard, Austin, Texas 78758-4021. Written comments regarding payment rates may be submitted in lieu of testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Tony Arreola, HHSC Rate Analysis, MC H-400, 1100 West 49th Street, Austin, Texas 78756-3101. Express mail can be sent, or written comments can be hand delivered, to Mr. Arreola, HHSC Rate Analysis, MC H-400, Braker Center Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021. Alternatively, written comments may be sent via facsimile to Mr. Arreola at (512) 491-1998. Interested parties may request to have mailed to them or may pick up a briefing package concerning the proposed payment rates by contacting Tony Arreola, HHSC Rate Analysis, MC H-400, 1100 West 49th Street, Austin, Texas 78756-3101, telephone number (512) 491-1358.

Persons with disabilities who wish to attend the hearing and require auxiliary aids or services should contact Tony Arreola, HHSC Rate Analysis, MC H-400, 1100 West 49th Street, Austin, Texas 78756-3101, telephone number (512) 491-1358, by January 18, 2005, so that appropriate arrangements can be made.

Proposal. As single state agency for the state Medicaid program, the Health and Human Services Commission proposes new rates for Case Management for Children's Vocational Discovery and Development Program operated by DARS. Payment rates effective for January 1, 2005 are proposed as follows:

	Current Rates	Proposed Rates
Case Management for Children's Vocational and Development Program	$ 107.47	$ 102.00

Methodology and justification. The proposed rates were determined in accordance with the rate setting methodology codified as 1 Texas Administrative Code Chapter 355, Subchapter J relating to Reimbursement Rates §355.8381.

TRD-200407450
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: December 21, 2004

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Notice of Revised Fiscal Note for Medicaid Estate Recovery Program Rules

The Health and Human Services Commission has revised the fiscal note attached to the Medicaid Estate Recovery Program rules proposed in the December 3, 2004 issue of the *Texas Register* (29 TexReg 11228). The fiscal note was revised to reflect a change in the start date of the program from September 1, 2004 to March 1, 2005.

Fiscal Note

Tom Suehs, Deputy Executive Commissioner for Financial Services, has determined that for the first five-year period the proposed rules are in effect there will not be a significant negative impact on state or local governments. However, the implementation of a Medicaid estate recovery program will generate estimated revenue to the State for State Fiscal Year 2005 of $0; State Fiscal Year 2006 of up to $360,080; for State Fiscal Year 2007 of up to $1,709,160; for State Fiscal Year 2008 of up to $3,327,791; for State Fiscal Year 2009 of up to $4,513,756.

TRD-200407435
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: December 21, 2004

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Public Notice

The Texas Health and Human Services Commission announces its intent to submit Transmittal Number 04-33, Amendment Number 697, to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act.

The purpose of this amendment is to revise the reimbursement methodologies for ambulatory surgical centers (ASCs), hospital-based ASCs (HASCs), and birthing centers to include an add-on payment provision for high-volume service providers. The 77th Texas Legislature provided additional funding for these high-volume providers and the 78th Texas Legislature maintained the funding for these high-volume providers. The effective date of the amendment is January 1, 2005.

The proposed amendment is estimated to result in annual aggregate increased costs of approximately $1,864,848 for state fiscal year (SFY) 2005, of which approximately $1,134,201 is federal funds and $730,647 is state general revenue, and approximately $2,797,272 in increased costs for SFY06, of which approximately $1,689,273 is federal funds and approximately $1,107,999 is state general revenue.

To obtain copies of the proposed amendment, interested parties may contact Arnulfo Gomez by mail at Policy Development Support H-600, Texas Health and Human Services Commission, P.O. Box 85200, Austin, TX 78708-5200; by telephone at (512) 491-1166; by facsimile at (512) 491-1953; or by E-mail at arnulfo.gomez@hhsc.state.tx.us.

Copies of the proposal will also be made available for public review at the local offices formally known as Department of Human Services.

TRD-200407468
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: December 22, 2004

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Public Notice Statement

The Health and Human Services Commission (HHSC), State Medicaid Office, received approval from the Centers for Medicare and Medicaid Services to amend the Title XIX Medical Assistance Plan by Transmittal Number 04-18, Amendment Number 682.

HHSC propose to amend the state plan concerning the reimbursement methodology for inpatient hospital services. The proposed amendment restores Medicaid Graduate Medical Education reimbursement based on funding available in SFY 2005. The proposed amendment also modifies the payment methodology for high-volume Standard Dollar Amount add-on payments while increasing the overall amount of these payments. The effective date of the amendment is September 1, 2004.

For more information, please contact Arnulfo Gomez, Policy Development Support at (512) 491-1166 or arnulfo.gomez@hhsc.state.tx.us.

TRD-200407448
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: December 21, 2004

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Texas Department of Housing and Community Affairs

Multifamily Housing Revenue Bonds (Creekside Manor Senior Community) Series 2005

NOTICE OF PUBLIC HEARING

Notice is hereby given of a public hearing to be held by the Texas Department of Housing and Community Affairs (the "Issuer") at Cedar Valley Elementary School, 4801 Chantz Drive, Killeen, Texas 76542, at 6:00 p.m. on January 19, 2005 with respect to an issue of tax-exempt multifamily residential rental development revenue bonds in an aggregate principal amount not to exceed $10,500,000 and taxable bonds, if necessary, in an amount to be determined, to be issued in one or more series (the "Bonds"), by the Issuer. The proceeds of the Bonds will be loaned to OHC/Killeen Ltd., a limited partnership, or a related person or affiliate thereof (the "Borrower") to finance a portion of the costs of acquiring, constructing and equipping a multifamily housing development (the "Development") described as follows: 220-unit multifamily residential rental development to be located at approximately 200 yards east of the southeast corner of the intersection of Highway 190 and O. W. Curry and approximately 300 feet south of the Highway 190 service road, Bell County, Texas. The Development initially will be owned by the Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Development and the issuance of the Bonds. Questions or requests for additional information may be directed to Robbye Meyer at the Texas Department of Housing and Community Affairs, 507 Sabine, Austin, Texas 78701; (512) 475-2213; and/or robbye.meyer@tdhca.state.tx.us.

Persons who intend to appear at the hearing and express their views are invited to contact Robbye Meyer in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Robbye Meyer prior to the date scheduled for the hearing. Individuals who require a language interpreter for the hearing should contact Robbye Meyer at least three days prior to the hearing date. Personas que hablan español y requieren un intérprete, favor de llamar a Jorge Reyes al siguiente número (512) 475-4577 por lo menos tres días antes de la junta para hacer los preparativos apropiados.

Individuals who require auxiliary aids in order to attend this meeting should contact Gina Esteves, ADA Responsible Employee, at (512) 475-3943 or Relay Texas at (800) 735-2989 at least two days before the meeting so that appropriate arrangements can be made.

TRD-200407434
Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
Filed: December 20, 2004

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Texas Department of Insurance

Company Licensing

Application to change the name of GERLING GLOBAL REINSURANCE CORPORATION- U.S. BRANCH to GLOBAL REINSURANCE CORPORATION- U.S. BRANCH, a foreign fire and/or casualty company. The home office is in New York, New York.

Application to change the name of ASSOCIATES INSURANCE COMPANY to COMMERCIAL GUARANTY CASUALTY INSURANCE COMPANY, a foreign fire and/or casualty company. The home office is in South Bend, Indiana.

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-200407452
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: December 22, 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 BUSINESSPLANS, INC, a foreign third party administrator. The home office is DAYTON, OHIO.

Application to change the name of NATLSCO, INC. to BROADSPIRE SERVICES, INC. a foreign third party administrator. The home office is WILMINGTON, DELAWARE.

Application to change the name of NEW ENGLAND BENEFIT COMPANIES, INC. to NATIONAL EMPLOYEE BENEFIT COMPANIES, INC., a foreign third party administrator. The home office is WARWICK, RHODE ISLAND.

Application to change the name of DORAL USA, LLC to VESTICA HEALTHCARE, LLC., a foreign third party administrator. The home office is MEQUON, WISCONSIN.

Application to change the name of NATIONAL WORKSITE ADVANTAGE, INC. to TRUSTMARK VOLUNTARY BENEFIT SOLUTIONS, INC., a foreign third party administrator. The home office is MEQUON, WISCONSIN.

Application to change the name of BENEFITS 2000, INC. to THE FLEX COMPANY OF AMERICA, INC., a foreign third party administrator. The home office is BROOKFIELD, WISCONSIN.

Application to change the name of BARRON RISK MANAGEMENT SERVICES, INC. to CMI BARRON RISK MANAGEMENT SERVICES, INC., a domestic third party administrator. The home office is SAN ANTONIO, TEXAS.

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-200407451
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: December 22, 2004

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Texas Lottery Commission

End of Game Notice

LEGAL NOTICE:

These Texas Lottery Commission scratch-off games will close on January 30, 2005. You have until July 29, 2005, to redeem any tickets for these games: #438 FIND THE 9'S ($1) overall odds are 1 in 4.85, #440 SIZZLIN' 7'S ($7) overall odds are 1 in 3.00, #444 GOLDEN RICHES ($3) overall odds are 1 in 3.46, #447 SUPER DEUCES ($2) overall odds are 1 in 4.34, #457 CORVETTE® CASH ($5) overall odds are 1 in 3.38, #458 RED HOT 5'S ($2) overall odds are 1 in 4.30, #464 75 GRAND ($5) overall odds are 1 in 3.27, #467 TEXAS STARS & GUITARS ($1) overall odds are 1 in 4.81, #475 DOUBLE DOLLARS ($1) overall odds are 1 in 4.62, #483 GLITTERING GOLD ($2) overall odds are 1 in 4.48, #484 DELUXE 7-11-21 ($2) overall odds are 1 in 3.94. The odds listed here are the overall odds of winning any prize in a game, including break-even prizes. Lottery retailers are authorized to redeem prizes of up to and including $599. Prizes of $600 or more must be claimed in person at a Lottery Claim Center or by mail with a completed Texas Lottery claim form; however, annuity prizes or prizes over $999,999 must be claimed in person at the Commission Headquarters in Austin. Call Customer Service at 1-800-37-LOTTO or visit the Lottery Web site at www.txlottery.org for more information and location of nearest Claim Center. The Texas Lottery is not responsible for lost or stolen tickets, or for tickets lost in the mail. Tickets, transactions, players and winners are subject to, and players and winners agree to abide by, all applicable laws, Commission rules, regulations, policies, directives, instructions, conditions, procedures and final decisions of the Executive Director. A scratch-off game may continue to be sold even when all the top prizes have been claimed. Must be 18 years of age or older to purchase a Texas Lottery ticket. Play Responsibly. Remember, it's just a game. The Texas Lottery supports Texas education by contributing to the Foundation School Fund.

TRD-200407383
Kimberely L. Kiplin
General Counsel
Texas Lottery Commission
Filed: December 20, 2004

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Public Utility Commission of Texas

Notice of Application for Waiver of Requirements

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on December 14, 2004, for waiver from the requirements in P.U.C. Substantive Rule §26.54(b)(3) and (b)(4)(C), which relate to upgrades to switched voice circuits.

Docket Title and Number: Application of Big Bend Telephone Company, Incorporated for an Extension of Waiver from Requirements in P.U.C. Substantive Rule §26.54(b)(3) and (b)(4)(C).

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. 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 30542.

TRD-200407376
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 17, 2004

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Texas Water Development Board

Request for Applications: Agricultural Water Conservation Grants - Fiscal Year 2005

The Texas Water Development Board (Board) requests the submission of Request for Applications (RFAs) for state Fiscal Year 2005 to provide agricultural water conservation grants. The total amount of the solicited grants awarded by the Board shall not exceed $600,000 from the Agricultural Water Conservation Fund. Rules governing the Agricultural Water Conservation Fund (31 Texas Administrative Code, Chapter 367), guidelines, and instruction sheet are available upon request from the Board.

Description of the Objectives and Purpose. The Board's total grant contribution is estimated not to exceed the posted dollar value indicated. RFAs are requested for the following:

(1) Grants to state agencies or political subdivisions (not to exceed a total of $500,000) for agricultural water conservation activities including: demonstrations, education, metering devices to measure irrigation water use, research, technology transfer, or training relating to water conservation practices.

(2) Grants to state agencies (not to exceed a total of $100,000) for an agricultural water conservation program for providing statewide technical assistance for irrigation water conservation practices.

Description of Applicant Criteria. The applicable scope of work, schedule, and contract amount will be negotiated after the Board selects the most qualified applicants. Failure to arrive at mutually agreeable terms of a contract with the most qualified applicant shall constitute a rejection of the Board's offer and may result in subsequent negotiations with the next most qualified applicant. The Board reserves the right to reject any or all applications if staff determines that the application(s) does not adequately meet the required criteria or if the funding available is less than the requested funding.

Deadline for Submittal, Review Criteria and Contact Person for Additional Information. Ten double-sided, double-spaced copies of a completed Application must be filed with the Board within 45 days of

the publication of this RFA. Applications can be directed either in person to Ms. Phyllis Thomas, Texas Water Development Board, Stephen F. Austin Building, Room 537, 1700 North Congress Avenue, Austin, Texas; or by mail to Ms. Phyllis Thomas, Texas Water Development Board, P.O. Box 13231--Capitol Station, Austin, Texas 78711-3231. All applicants should obtain the Board's guidelines and instruction sheet for responding to the RFA. Requests for information should be directed to Ms. Phyllis Thomas at the preceding address, by calling (512) 463-7926, or by e-mail to phyllis.thomas@twdb.state.tx.us.

TRD-200407354
Suzanne Schwartz
General Counsel
Texas Water Development Board
Filed: December 15, 2004

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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 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 representative vacancies:

Primary

* Public Health Care Facility

Alternate

* Public Health Care Facility

* Dentist

* Pharmacist

* Podiatrist

* Employer

* Employee

* General Public Representative 1

* 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 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. Voluntary service on the Medical Advisory Committee is greatly appreciated by the TWCC Commissioners and the TWCC Staff.

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.* Click on 'Commission Meetings', then 'Medical Advisory Committee'. Applications may also be obtained by calling Jane McChesney, MAC Coordinator, at 512-804-4855 or Ruth Richardson, Manager of Monitoring, Analysis and Education, Medical Review Division at 512-804-4850 .

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 TWCC Commissioners designate the chairman of the MAC. 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 meetings, 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-200407442
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Filed: December 21, 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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