TEXAS REGISTER

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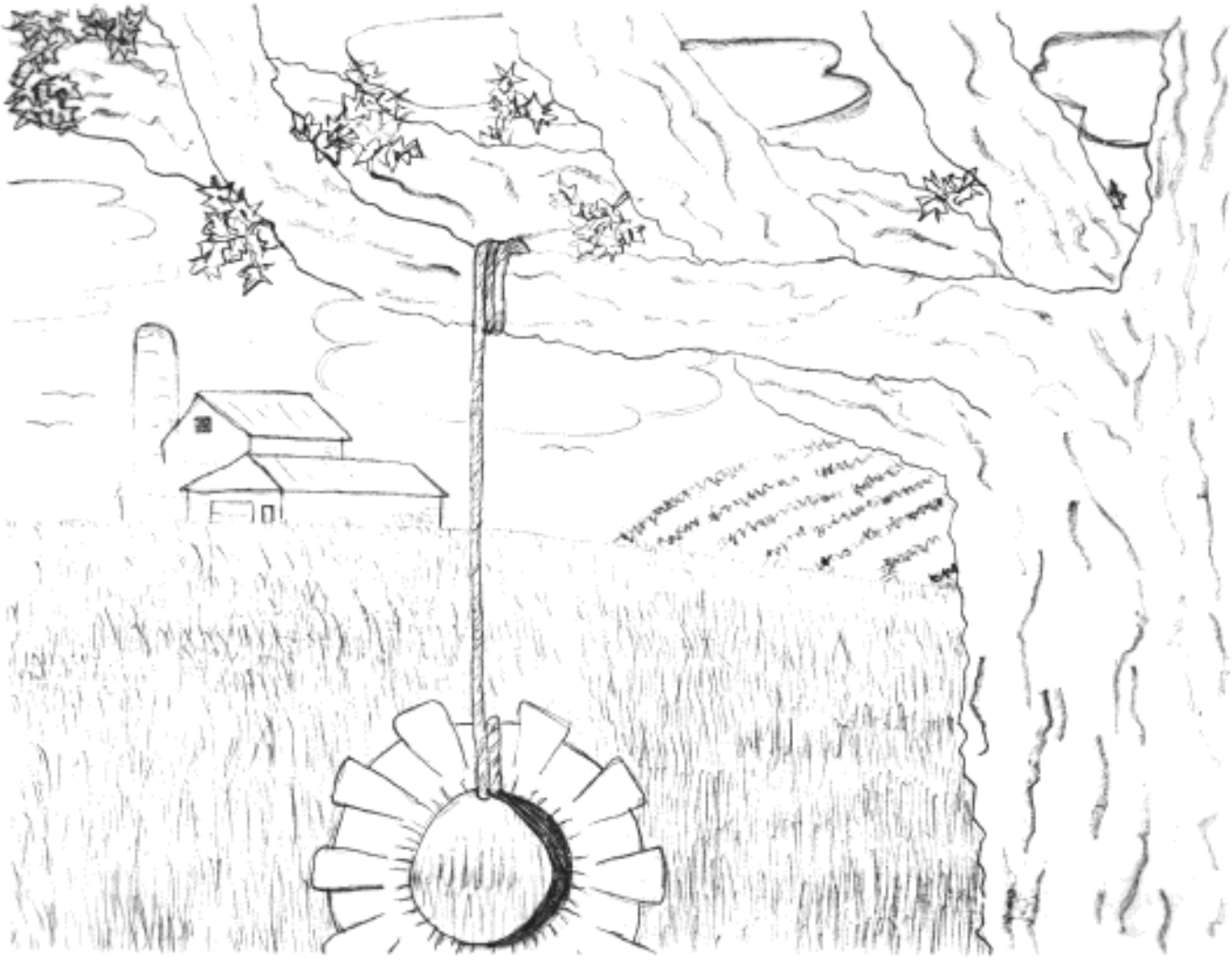

This month's front cover artwork:

Artist: *Marilyn Kocurek*

7th Grade

China Spring Middle School

School children's artwork has decorated the blank filler pages of the *Texas Register* since 1987. 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.

We will display artwork on the cover of each *Texas Register.* The artwork featured on the front cover is chosen at random.

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.* The artwork does not add additional pages to each issue and does not increase the cost of the *Texas Register.*

For more information about the student art project, please call (800) 226-7199.

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WITHDRAWN RULES

ADOPTED RULES

IN ADDITION

OFFICE OF THE ATTORNEY GENERAL

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

Letter Opinions

LO# 98–068 (RQ-1106). Request from The Honorable John W. Segrest, Criminal District Attorney, McLennan County 219 North Sixth Street, Suite 200, Waco, Texas 76701, concerning whether a county bail bond board is authorized to regulate bondsmen's use of certain assumed names and related questions.

Summary. As a general matter, a county bail bond board does not have the authority to regulate bondsmen's use of assumed names. A bail bond board does have the authority to suspend or revoke the license of an individual bondsman who uses as an assumed name the name of an unlicensed person with whom the bondsman shares or pays commissions or fees. A court might approve a carefully crafted rule prohibiting such business relationships. A corporate bail bond licensee is not authorized to operate under an assumed name unless expressly authorized to do so by the Insurance Code or Department of Insurance regulations. This limitation on the authority of a corporate surety to operate under an assumed named extends to its licensed agents.

LO# 98–069 (RQ-1096). Request from The Honorable James Warren Smith, Jr., Frio County Attorney, Box 1, Pearsall, Texas 78061-3100, Concerning jurisdiction of juvenile court after expiration of period of deferred prosecution probation.

Summary. Deferred prosecution probation pursuant to section 53.03 of the Family Code may not be revoked on account of an offense or offenses committed after the expiration of the probationary period.

LO# 98–070 (RQ-1089). Request from The Honorable Tom O'Connell, Criminal District Attorney, Collin County Courthouse, 210 South McDonald, Suite 324, McKinney, Texas 75069, concerning whether a home-rule municipality is authorized to create a retirement plan without holding an election.

Summary. Government Code section 810.001 authorizes a home-rule municipality to establish and maintain a plan qualified under section 401(a) of the Internal Revenue Code without obtaining voter approval as required by article 6243k, V.T.C.S.

LO# 98–071 (RQ-1093). Request from The Honorable Tim Curry, Criminal District Attorney, 401 West Belknap Street, Fort Worth, Texas, 76196-0201, concerning whether, under Local Government Code section 351.0415(b)(3), a sheriff must rebid a contract with a third party to operate the jail commissary every five years.

Summary. Local Government Code section 351.0415(b)(3) requires a county sheriff to accept new bids on a contract to operate a commissary for the use of county jail prisoners every five years.

LO# 98–072 (RQ-1041). Request from Honorable Ms. Kathleen M. Moss, Fannin County Auditor, Fannin County Courthouse, Bonham, Texas 75418, Concerning authority of a commissioners court to impose a limit on the farming out of county prisoners, and related questions.

Summary. The cost of maintaining the jail in a manner that comports with the rules of the Commission on Jail Standards, the statutory requirements of Local Government Code section 351.001, and the Eighth and Fourteenth Amendments to the United States Constitution falls upon the county, and may not be avoided. Accordingly, if it is necessary to farm out prisoners from the county jail in order to meet these obligations, the county may not limit the authority of the sheriff to do so, refuse to pay the sums necessary to meet its obligations, or interfere with the sheriff's legal duty to execute criminal warrants.

LO# 98–073 (RQ-1005). Request from The Honorable Lawrence E. Heffington, Henderson County Attorney, Courthouse Square, Athens, Texas 75751, concerning whether the judge of the 392nd District Court is a member of the Henderson County Juvenile Board, and related question.

Summary. The judge of the 392nd District Court is not a member of the Henderson County Juvenile Board.

TRD-9814022
Sarah Shirley
Assistant Attorney General
Office of the Attorney General
Filed: September 3, 1998

♦ ♦ ♦

Opinion

DM-482 (RQ-1121). Request from The Honorable Jose R. Rodriguez, El Paso County Attorney, 500 East San Antonio, Room 203 El Paso, Texas 79901, concerning whether a commissioners court may continue a meeting for a period of up to one week without reposting notice.

Summary. A commissioners court may continue a meeting from day to day without reposting notice under section 551.041 of the Open Meetings Act, chapter 551 of the Government Code. If a meeting is continued to any day other than the one immediately following, the commissioners court must repost notice.

TRD-9813934
Sarah Shirley
Assistant Attorney General
Office of the Attorney General
Filed: September 2, 1998

♦ ♦ ♦

Request for Opinions

RQ-1175. Requested from The Honorable Chris Harris, Chair Administration Committee, Texas State Senate, P.O. Box 12068, Austin, Texas 78711-2068, concerning renewal of a charitable bingo commercial lessor's license issued under section 13(o) of article 179d, the Bingo Enabling Act.

RQ-1176. Requested from The Honorable Gonzalo Barrientos, Chair Committee of the Whole on Legislative and Congressional Redistricting, Texas State Senate, P.O. Box 12068, Austin, Texas 78711-2068, concerning whether a municipality and a firefighters association may agree to exclude certain persons from membership in the negotiating unit.

RQ-1177. Requested from The Honorable John Branson, Fisher County Auditor, P.O. Box 126, Roby, Texas 79543, concerning whether court fees collected by the district clerk must be deposited with the county treasurer.

RQ-1178. Requested from The Honorable Richard B. Townsend, Morris County District Attorney, 500 Broadnax Street, Daingerfield, Texas 75638, concerning whether an interest fee should be retroactively deducted from trust accounts held by a county clerk.

TRD-9813911
Sarah Shirley
Assistant Attorney General
Office of the Attorney General
Filed: September 2, 1998

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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 statues: 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-449. The Ethics Commission has been asked to consider whether a legislator may have an employment relationship with a law firm that includes registered lobbyists among its partners, owners, or associates or with a law firm that owns a lobby firm.

TRD-9813606
Tom Harrison
Executive Director
Texas Ethics Commission
Filed: August 26, 1998

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Opinions

EAO-401 (AOR-439). Whether Government Code section 572.023(b)(11) requires an officeholder to report expenses paid in connection with a trip to make a speech to assist a candidate.

Summary. A state officer is not required to report the provision of transportation, meals, and lodging in connection with a campaign speech for someone else under Government Code section 572.023(b)(11) if the candidate on whose behalf the state officer makes the campaign speech is required to report the expenditures on a campaign finance report.

EAO-402 (AOR-442). Whether the requirement to file an annual personal financial disclosure statement applies to the executive head of an institution that is identified in Education Code section 61.003(6) as an "other agency of higher education."

Summary. The requirement to file an annual personal financial disclosure statement applies to the executive head of an institution that is identified in Education Code section 61.003(6) as an "other agency of higher education."

EAO-403 (AOR-443). Whether a general-purpose political committee is required to file pre-election reports under Election Code section 254.154 if, during the period covered by those reports, he committee makes a contribution to support a candidate who is unopposed in the election.

Summary. A general-purpose political committee is not required to file pre-election reports if its only reportable activity during the period covered by the pre-election reports is to make a contribution in support of a candidate who does not have an opponent whose name is to appear on the ballot in the election.

EAO-404 (AOR-445). Regarding compliance with the disclosure requirement set out in Election Code section 255.001 by a political committee that has not crossed either of the thresholds set out in Election Code section 253.031(b) and has therefore not yet filed a campaign treasurer appointment.

Summary. A political committee may use its name in the political advertising disclosure statement required by Election Code section 255.001 even if the committee has not yet filed a campaign treasurer appointment.

EAO-405 (AOR-446). Whether "a public officeholder, who desires to improve his reputation among voters that he believes in family values, may use campaign funds to pay for him and his family to attend public events."

Summary. A candidate or officeholder may not use political contributions to pay for family recreation or entertainment.

EAO-406 (AOR-447). Regarding the application of the Judicial Campaign Fairness Act in a situation in which an individual was selected in June to take the place of the deceased winner of a party primary.

Summary. A judicial candidate named in June to fill a vacancy in a nomination may accept political contributions until 120 days after the November general election, regardless of whether the candidate has an opponent in the November election.

TRD-9813605
Tom Harrison
Executive Director
Texas Ethics Commission
Filed: August 26, 1998

♦ ♦ ♦

EMERGENCY RULES

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

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

TITLE 37. PUBLIC SAFETY AND CORRECTIONS

Part I. Texas Department of Public Safety

Chapter 15. Drivers License Rules

Subchapter B. Application Requirements Original, Renewal, Duplicate, and Identification Certificates

37 TAC §15.42

The Texas Department of Public Safety adopts on an emergency basis an amendment to §15.42, concerning the eligibility of non United States residents, lawfully present in the United States, but not possessing a social security number, to obtain a driver's license. The adoptions are necessary, as the Social Security Administration (SSA) has changed its policy regarding the issuance of social security numbers (SSNs). Effective September 1, 1998, SSA will only issue SSNs to aliens lawfully in the United States for work purposes and will not issue SSNs solely for the purpose of obtaining a driver's license. The department finds that adoption of these rules on fewer than 30 days notice is required by state law.

The amendment adds new subsection (e) which sets forth the procedures and provides a means for the department to continue processing driver's license applications for individuals lawfully admitted into the United States, but ineligible to obtain an SSN.

The amendment is adopted on an emergency basis pursuant to Texas Transportation Code, §521.005 which provides the director of the Texas Department of Public Safety with the authority to adopt rules necessary to administer this chapter.

§15.42. Social Security Number.

(a) The social security number shall be obtained from all applicants for the purpose of additional identification. Texas Transportation Code, §521.142(e)[~~Civil Statutes, Article 6687b, §6~~], provides that the department may require information necessary to determine the applicant's identity, competency, and eligibility.

(b)-(d) (No change.)

(e) Individuals who do not possess a social security number will be referred to the Social Security Administration to obtain such number.

(1) Individuals lawfully admitted into the United States, but ineligible to obtain a social security number due to immigration status, must obtain a letter from the Social Security Administration indicating their noneligibility.

(2) Upon presentation of the Social Security Administration letter demonstrating the applicant's ineligibility to obtain a social security number, the department will assign the applicant an alternate numeric identifier, to be used in lieu of the social security number. Thereafter, the driver's license application will be processed in accordance with existing statutes, policies, rules, and procedures.

Filed with the Office of the Secretary of State, on August 28, 1998.

TRD-9813728
Dudley M. Thomas
Director
Texas Department of Public Safety
Effective date: September 1, 1998
Expiration date: December 30, 1998
For further information, please call: (512) 424–2890

♦ ♦ ♦

PROPOSED RULES

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

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

TITLE 1. ADMINISTRATION

Part VII. State Office of Administrative Hearings

Chapter 159. Rules of Procedure for Administrative License Suspension Hearings

1 TAC §§159.4, 159.5, 159.7, 159.9, 159.11, 159.13, 159.15, 159.17, 159.19, 159.21, 159.23, 159.25, 159.27, 159.29, 159.33, 159.35, 159.37, 159.39, 159.41

The State Office of Administrative Hearings (SOAH) proposes new §159.4 and amendments to §§159.5, 159.7, 159.9, 159.11, 159.13, 159.15, 159.17, 159.19, 159.21, 159.23, 159.25, 159.27, 159.29, 159.33, 159.35, 159.37, 159.39, and 159.41 concerning Administrative License Suspension Hearings, commonly known as the Administrative License Revocation (ALR) Program. SOAH was given jurisdiction to conduct ALR hearings beginning on January 1, 1995, pursuant to Texas Civil Statutes 6687b-1 and 6701*l*-5. As part of the state's continuing statutory revision program begun by the Texas Legislative Council, the legislature in May, 1995, repealed and recodified the original ALR statutes; the recodification went into effect on September 1, 1995, as Chapters 524 and 724, respectively in the Texas Transportation Code. The reason for proposing new §159.4, Computation of Time, is to explain the manner is which time will be computed in Administrative License Suspension Hearings. The reasons for proposing the amendments are as follows: §159.5 (concerning Notice of Suspension) is proposed to update the statutory citations located in that section; §159.7 (concerning Request for Hearing) is proposed to clarify the defendant's right to waive a request for hearing; §159.9 (concerning Scheduling of Hearing) is proposed to clarify the rights and duties of the parties for scheduling hearings; §159.11 (concerning Continuances) is proposed to specify the contents of a motion for continuance; §159.13 (concerning Pre-Hearing Discovery) is proposed to simplify and clarify the responsibilities of the Texas Department of Public Safety when it responds to discovery requests; §159.15 (concerning Request for Appearance of Department's Witnesses) is proposed to conform the language to statutory dictates; §159.17 (concerning Request for Subpoenas) is proposed to specify the number of days which are required to file a motion for continuance; §159.19 (concerning Issues) is proposed to clarify the existing rule for a hearing involving minors; §159.21 (concerning Issues in Cases Involving Commercial Drivers' Licenses) is proposed to adjust the wording to track the wording of the statute; §159.23 (concerning Hearing) is proposed to specify the affidavits which may be used in lieu of live testimony, and specify the guidelines concerning interpreters; §159.25 (concerning Telephone Hearing) is proposed to provide the requirements for telephone hearings; §159.27 (concerning Failure to Attend Hearing and Default) is proposed to set forth the requirements to vacate a default judgment; §159.33 (concerning Effective Date of Suspensions) is proposed to clarify the effective date of suspensions; §159.35 (concerning Proceeding Open to the Public) is proposed to clarify the existing rule; §159.37 (concerning Appeal of Judge's Decision) is proposed to specify the requirements for ordering a transcript; §159.39 (concerning Stay of Suspension) is proposed to update the statutory citations; and §159.41 (concerning Other Office Rules of Procedure) is proposed to update the list of the other sections under this title which apply to Administrative License Suspension Hearings.

Shelia Bailey Taylor, chief administrative law Judge, has determined that for the first five-year period that the amendments and new section are in effect, there will be no fiscal implications for state or local government as a result of the amendments.

Judge Taylor also has determined that for each year of the first five years, the amendments and new section are in effect, the public benefit anticipated as a result will be more efficient administration of the Administrative License Suspension Hearings or ALR Program. There will be no effect on small businesses. There is no anticipated increase in economic cost to individuals who are required to comply.

Comments on the proposed amendments and new section must be submitted within 30 days after publication of the proposed sections in the *Texas Register* to Debra Anderson, Legal Assistant, State Office of Administrative Hearings, P. O. Box 13025, Austin, Texas 78711-3025 or by facsimile to (512) 936-0770. An additional copy should be submitted to Ruth Casarez, Director of the ALR Division, State Office of

Administrative Hearings, P.O. Box 13025, Austin, Texas 78711-3025 or by facsimile to (512) 475-4994.

The amendments and new section are proposed under Texas Transportation Code §§522.105, 524.002 and 724.003 which authorize SOAH to promulgate rules for the administration of Chapters 522, 524 and 724 of the Texas Transportation Code.

The following statutes are affected by the proposed amendments and new section : Texas Transportation Code, Chapters 522, 524 and 724; Texas Government Code Chapters 2001 and 2003; and Texas Penal Code Chapter 49.

§159.4. Computation of Time.

In computing time periods prescribed by this chapter or by ALJ order, the day of the act, event, or default on which the designated period of time begins to run is not included. The last day of the period is included, unless it is a Saturday, a Sunday, an official State holiday, or another day on which the Office is closed, in which case the time period will be deemed to end on the next day that the Office is open. When these rules specify a deadline or set a number of days for filing documents or taking other actions, the computation of time shall be by calendar days rather than business days, unless otherwise provided in this chapter or ALJ order. However, if the period within which to act is five days or less, the intervening Saturdays, Sundays, and legal holidays are not counted, unless this chapter or ALJ order otherwise specifically provides.

§159.5. Notice of Suspension.

A notice of suspension that is served on a driver must meet the requirements set out in Texas Transportation Code, Chapter 522, Subchapter I, Chapter 524, Subchapter B or Chapter 724, Subchapter C [~~Civil Statutes, Article 6687b-1, §4~~] and in the department's ALR rules, 37 TAC Chapter 17.

§159.7. Request for Hearing.

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

(d) Waiver of Request for Hearing. The defendant may waive the request for hearing at any time before the administrative order is final. If the defendant requests a waiver after the notice of hearing issues, the Judge will enter an order accepting the waiver.

(e) Rescission of Notice of Suspension. If, after issuing a notice of hearing, the department rescinds a notice of suspension, it shall immediately inform the Office of the rescission. The Office may, on its own motion, dismiss any case from its docket once the notice of suspension has been rescinded.

§159.9. Scheduling of Hearings.

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

(c) With the consent of the parties, the hearing may be conducted by telephone conference call. Once the department issues the notice of hearing scheduling the hearing by telephone conference, the hearing may be removed from the telephone hearing docket only upon timely request pursuant to §159.11 of this title (relating to Continuances) or by agreement of the parties with consent of the Office.

(d) The hearing shall be scheduled to occur no sooner than ten days after the date the notice of hearing was sent to the defendant, unless the parties waive the ten day period. Generally, the hearing will [~~shall~~] be held within [~~no later than~~] forty days after the defendant received or is presumed to have received the notice of suspension. It is a rebuttable presumption that the department mailed the notice the same date as the date contained in the notice of hearing.

(e) In most instances, the hearing will be held within [~~the~~] forty days [~~day period~~], unless a continuance is requested and granted as provided in the following section or upon a showing of good cause by the department. Examples of good cause include, but are not limited to, a hearing set in a remote location, or a party provided inaccurate or incomplete information in the party's request for hearing.

(f) After a hearing has been scheduled to be heard by the Office, any party making a request that requires an interim order [~~, e.g., continuance, subpoena, etc.,~~] must do so in writing to the Judge hearing the case, with a copy to opposing party. Except for a request for a subpoena, the request must contain a certificate of service and a certificate of conference stating whether the opposing party has agreed to the request. Such written requests must be filed at least five calendar days prior to the scheduled hearing date, unless another time limit is specified in these rules other than §159.4 of this title (relating to Computation of Time) or unavoidable circumstances prevent compliance with such time limits. A party claiming unavoidable circumstances, must set them out in the written request.

§159.11. Continuances.

(a) (No change.)

(b) The department shall continue a hearing once, if the department receives a request for a continuance from the defendant no later than five calendar days before the date of the scheduled hearing. The department shall reschedule the hearing to a date no sooner than five days after the scheduled hearing date, unless the parties otherwise agree. The department shall immediately notify the defendant and the Office of a continuance under this subsection.

(c) A Judge may grant the defendant one [~~an~~] additional continuance, for a period not to exceed ten days, if the defendant establishes a bona fide medical condition that prevents the defendant or the defendant's [~~him or his~~] attorney from attending the hearing.

(d) A Judge may grant the department a continuance, if:

(1) (No change.)

(2) [~~after a continuance as indicated in paragraph (1) of this subsection,~~] the department establishes [~~makes a showing of~~] good cause [~~in writing no later than forty-eight hours before the date of the scheduled hearing and proves~~] that one or more witnesses indicated in §159.15(a) of this title (relating to Request for Appearance of Department's Witnesses) or §159.17(c) of this title (relating to Request for Subpoenas) cannot appear at the scheduled hearing.

(e) The granting of continuances [~~pursuant to requests of the parties~~] shall be in the sound discretion of the Judge, provided however, that the Judge shall expedite the hearings whenever possible. A party requesting a continuance shall supply three dates during which the parties would be available for rescheduling of the hearing, which dates, the Judge will consider in resetting the case. Failure to include a certificate of service, a certificate of conference, or supply three alternative dates, may result in denial of the continuance request or subsequent continuance requests in the same case.

§159.13. Pre-Hearing Discovery.

The scope of pre-hearing discovery in these proceedings is as follows:

(1) A defendant shall be allowed to review, inspect and obtain copies of any non-privileged documents or records contained in the department's file or possession [~~at any time prior to the hearing~~]. All requests for discovery must be in writing and shall be served upon the department as prescribed in 37 TAC §17.16 (Service on the

Department of Certain Items Required to Be Served on, Mailed to, or Filed with the Department). The request for discovery must be received by the department after the date of the request for hearing. Upon a showing of harm by the defendant, and upon a showing of a proper request for discovery, no document, in the department's actual possession, will be admissible unless it was provided to the defendant within five business days of the department's receipt of the request for production. If the department does not have any or all the documents in its actual possession, the department shall respond within five business days of the defendant's request, setting out that the department does not have the documents in its actual possession. The department has a duty to supplement all its discovery responses within five business days from the time the department receives possession of the discoverable documents. If a document is received by the defendant fewer than seven calendar days prior to the scheduled hearing, the Judge shall grant a continuance at the request of a party. The Judge may grant only one continuance for the department's failure to timely produce or supplement. [~~If Defendant submits a written request accompanied by an amount sufficient to pay for copying charges, (the department shall promptly notify defendant of the copying charges due), the department shall furnish copies of such documents or records to the defendant within five days of receipt of the request. Any request for production of documents or records not in the department's possession shall be denied by the Judge. Any document or record that has not been made available by the department to the defendant pursuant to request shall not be introduced into evidence by the department.~~]

(2) If a request for inspection, maintenance and/or repair records for the instrument used to test the defendant's specimen is made by the defendant, and those records are in the actual possession of the department, the department shall supply such records to the defendant within five days of receipt of the request, provided however, that the records to be provided shall be for the period covering 30 days prior to the test date and 30 days following the test date. If the department fails to provide the properly requested records, after the defendant has paid reasonable copying charges for the records, evidence of the breath/blood specimen shall not be admitted into evidence.

(3) (No change.)

(4) Notwithstanding paragraph (1) of this section, if a party believes evidence from a third party is relevant and probative to the case, the party may request issuance of a subpoena duces tecum pursuant to §159.17 of this title (relating to Request for Subpoenas) to have the evidence produced at the hearing. Should introduction of such evidence require special equipment, the party seeking admission of the evidence shall be required to supply such equipment. The Judge may condition the granting of the subpoena upon the advancement by the person requesting the subpoena of the reasonable costs of reproducing the documents requested.

§159.15. Request for Appearance of Department's Witnesses.

(a) If no later than five calendar days before the date of a scheduled hearing, the defendant files with the department and sends a copy to the Office a written or [(~~including~~] facsimile transmission[~~)~~] request for the presence of the following witnesses, the department shall produce the requested witnesses without the need for a subpoena. [~~:~~] This subsection shall apply only to cases under Chapter 524 of the Texas Transportation Code. In cases under Texas Transportation Code Chapter 724, if appropriate, the defendant may subpoena these witness pursuant to section §159.17 of this title (relating to Request for Subpoenas).

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

(b) Upon receipt of a timely request for the appearance of the breath test operator or the technical supervisor [~~such witness or witnesses~~], the department shall ensure the witness(es) appears at the hearing.

(c) If a timely request for the breath test operator or the technical supervisor [~~such witness~~] is made and the witness does not appear at a scheduled hearing, without a showing of good cause, an affidavit or other document signed by [~~of~~] such witness concerning the validity, reliability, or alcohol concentration of the breath test results shall not be admissible as provided in §159.23(c)(2) of this title (relating to Hearing). If good cause is established, the department is entitled to a continuance as provided in §159.11(d)(2) of this title (relating to Continuances).

(d) Requests for witnesses under this subsection are limited to cases under Chapter 524, Texas Transportation Code. However, in cases under Chapter 724, Texas Transportation Code, if appropriate, the defendant may subpoena the witnesses pursuant to §159.17 of this title.

§159.17. Request for Subpoenas.

(a) A request for the issuance of a subpoena to require attendance of witnesses or the production of documents shall be in writing and must be received by the Office at least five calendar days prior to the scheduled hearing, with a copy sent to the department, and shall contain:

(1)-(8) (No change.)

(b)-(d) (No change.)

(e) The decision to issue a subpoena shall be in the sound discretion of the Judge assigned to the case. The Judge shall refuse issuance of a subpoena if the testimony or evidence to be offered:

(1) (No change.)

(2) good cause has not been shown that the witness or documents are relevant and necessary [~~pertain~~] to a genuine issue in the contested case.

(f)-(g) (No change.)

(h) A subpoena issued by a Judge is in effect until the Judge releases the witness.

§159.19. Issues.

(a) The Judge, in determining the merits of the case, shall consider whether the department proved the elements of the following issues by a preponderance of the evidence:

(1) (No change.)

(2) Hearings Involving Minors.

(A) If the hearing is under Texas Transportation Code, Chapter 524, Subchapter D, §524.035, [~~as amended,~~] (test failed):

(i) whether the person was [~~is~~] a minor at the time of the stop; and

(ii) whether reasonable suspicion to stop and[~~/or~~] probable cause to arrest or take the minor into custody existed; and

(iii) (No change.)

(B) If the hearing is under Texas Transportation Code, Chapter 724, Subchapter D, [~~as amended,~~] (test refused):

(i) whether the person was a minor at the time of the [~~reasonable suspicion to~~] stop, and [~~and/or~~] probable cause to arrest or take the minor into custody existed; and

(ii) whether reasonable suspicion to stop or probable cause to arrest or take the minor into custody existed; and [~~whether probable cause existed to believe that the minor was operating a motor vehicle in a public place while intoxicated, or while having any detectable amount of alcohol in the minor's system; and~~]

(iii) whether probable cause existed to believe that the minor was operating a motor vehicle in a public place while intoxicated, or while having any detectable amount of alcohol in the minor's system; and [~~whether the minor was placed under arrest or taken into custody and was requested to submit to the taking of a specimen under Texas Transportation Code Sections 724.011, 724.012, and 724.015, as amended; and~~]

(iv) whether the minor was placed under arrest or taken into custody and was requested to submit to the taking of a specimen under Texas Transportation Code §§ 724.011, 724.012, and 724.015; and [~~whether the minor refused to submit to the taking of a specimen on proper request of the officer.~~]

(v) whether the minor refused to submit to the taking of a specimen on proper request of the officer.

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

§159.21. Issues in Cases Involving Commercial Drivers' Licenses.

The court shall authorize the department to disqualify the person from driving a commercial motor vehicle for the period authorized by Chapter 522 of the Texas Transportation Code if the court finds the following issues proven by a preponderance of the evidence: [~~The Judge, in determining the merits of the case, shall consider whether the department proved the elements of the following issues by a preponderance of the evidence~~]

(1) Probable cause existed that the person was driving a commercial motor vehicle while having alcohol, a controlled substance, or a drug in the person's system; [~~If the hearing is under Texas Civil Statutes, Article 6687b-2 §27, (test failed or refused):~~]

[~~(A) did probable cause exist to believe that the person was driving a commercial motor vehicle while having alcohol, a controlled substance, or a drug in the person's system; and~~]

[~~(B) was the person offered an opportunity to give a breath, blood, or urine specimen under the provisions of Texas Civil Statutes, Article 6687b-2, §27; and~~]

[~~(C) did the person submit a specimen that disclosed an alcohol concentration of 0.04 or more or did the person refuse to submit a specimen?~~]

(2) The person was offered an opportunity to give a specimen under Chapter 522 of the Texas Transportation Code; [~~If the Judge finds the department proved each required element by a preponderance of the evidence, the Judge will grant the petition and authorize the department to disqualify the defendant from driving a commercial motor vehicle. If the Judge does not find that the department proved all of the necessary elements, the Judge will deny the petition, and the department shall not be authorized to disqualify a defendant from driving a commercial motor vehicle.~~]

(3) The person submitted a specimen that disclosed an alcohol concentration of 0.04 or more or refused to submit a specimen.

§159.23. Hearing.

(a) Procedures.

(1) Hearings shall be conducted in accordance with the Administrative Procedure Act (APA), Texas Government Code Chapter 2001, when applicable, and with this chapter, provided that [~~except that~~] if there is a conflict between the [~~its~~] provisions of the APA and the provisions of this chapter, this chapter shall govern. If a conflict exists between the provisions of this chapter and the statutory provisions applicable to the case, pursuant to Texas Transportation Code Chapters 522, 524, or 724, and these rules cannot be harmonized with the statute, the statute controls [~~Texas Civil Statutes, Articles 6687b-1, 6701*l*-5, 6687b-2, or Penal Code Chapter 49, the provisions of those Articles or chapter shall govern~~].

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

(4) The Judge shall limit testimony or any evidence which is irrelevant, immaterial or unduly repetitious and reasonably limit the time for presentations.

(b) (No change.)

(c) Witnesses and affidavits.

(1) (No change.)

(2) An affidavit, from the certified breath test technical supervisor who is responsible for maintaining and directing the operation of breath test instruments in compliance with the department's rule, concerning the reliability of an instrument used to take or analyze a person's breath specimen to determine alcohol concentration and the validity of the results of the analysis [~~of a certified breath test technical supervisor~~] shall be admissible without the appearance of the breath test operator or the breath test technical supervisor. However, in a proceeding under Chapter 522 of the Texas Transportation Code, the certified breath test technical supervisor's affidavit is admissible only if the department serves a copy of the affidavit on the defendant not later than the seventh day before the date on which the hearing begins.

(3) An affidavit submitted under paragraph (2) of this subsection [~~section~~] must contain statements regarding [~~on~~] the reliability of the instrument, [~~and~~] the analytical results, and [~~on~~] compliance with state law in the administration of the Breath Alcohol Testing program.

(4) An affidavit may be submitted in lieu of an appearance at the hearing by the breath test operator, breath test technical supervisor, or expert witness. [~~Notwithstanding paragraph (2) of this subsection, if the defendant timely requests the breath test operator's or the supervisor's appearance pursuant to §159.15 of this title (relating to Request for Appearance of Department's Witnesses), the affidavit(s) shall not be admissible without the appearance of the witness(es).~~]

(5) An affidavit of an expert witness contesting the reliability of the instrument or the results is admissible. [~~If an affidavit of a department witness is admitted pursuant to paragraph (2) of this subsection, an affidavit of an expert witness contesting the reliability of the instrument or the results shall also be admissible.~~]

(6) An affidavit from the breath test operator, breath test technical supervisor, or expert witness, whose presence is timely requested, is inadmissible if the person fails to appear at the hearing without a showing of good cause. If good cause for failure to appear is established, the department is entitled to a continuance as provided in §159.11(d)(2) of this title (relating to Continuances). [~~A peace officer's sworn affidavit concerning probable cause to arrest shall be admissible as a public record, provided however, that the defendant shall have the right to subpoena the officer in accordance with §159.17 of this title (relating to Telephone Hearings). If the defendant timely subpoenas the officer and the officer does not appear at the scheduled hearing, the affidavit shall not be admissible.~~]

(7) An officer's sworn report of relevant information shall be admissible as a public record. However, the defendant shall have the right to subpoena the officer in accordance with § 159.17 of this title (relating to Request for Subpoenas). If the defendant timely subpoenas the officer and the officer does not appear at the scheduled hearing, the officer's report shall not be admissible. [~~The Judge, on his own motion or on request of a party and with the consent of all parties, may allow the testimony of any witness to be taken by telephone, provided steps are taken as indicated in §159.25 of this title (relating to Telephone Hearings), to properly safeguard the right to cross examination and to record the testimony in its entirety.~~]

(8) The Judge, on his or her own motion or on request of a party and with the consent of all parties, may allow the testimony of any witness to be taken by telephone, provided that all parties have the opportunity to participate in and hear the proceeding. All substantive and procedural rights apply to the telephonic appearance of such witness, subject to the limitations of the physical arrangement.

(d) Record of hearing.

(1) (No change.)

(2) The Office [~~Judge~~] shall maintain a case file which shall include all pleadings and evidence submitted by the parties and the Judge's decision.

(3) The Office shall maintain case files in accordance with the terms of its Records Retention Schedule.

(e) Interpreters.

(1) Upon defendant's written request for an interpreter filed with the Office and the department not less than seven days prior to the date of the hearing, the Office will provide an interpreter for deaf, hearing-impaired, non-English speaking defendants, or defendant's subpoenaed witnesses who appear at the hearing. If defendant fails to make a timely request, the Judge may provide an interpreter or may continue the hearing to secure an interpreter.

(2) Interpreters for deaf or hearing-impaired parties will be secured by the Office subject to the provisions of the APA §2001.055.

(3) A defendant who makes a request for an interpreter pursuant to this section and fails to appear may be subject to costs incurred by the Office in securing the interpreter or may be required to pay for securing an interpreter for a subsequent hearing.

§159.25. Telephone Hearings.

(a) Consent of the parties. The Judge may, with consent of the parties and if the Office has been notified of a telephone hearing request at least 14 days prior to the hearing date, conduct all or part of the hearing on the merits by telephone, if each participant in the hearing has an opportunity to participate in, and hear the entire proceeding. The Judge may conduct all or part of a hearing on preliminary matters by telephone, on the court's own motion, if each participant in the preliminary hearing has an opportunity to participate in and hear the entire proceeding.

(b) Procedural Rights and Duties. All substantive and procedural rights and duties [~~available to a defendant at an in-person hearing under the ALR program~~] apply to telephonic [~~telephone~~] hearings, subject only to the limitations of the physical arrangement. The parties [~~department~~] shall notify the Office [~~parties~~] of their telephone numbers for the purpose of their appearance at the [~~scheduled phone~~] hearing. The [~~and the~~] parties shall contact their respective witnesses to ensure their availability for the hearing.

(c) Documentary evidence. To be offered in a telephone hearing, copies of exhibits should [~~tangible/ documentary evidence must~~] be marked and must be filed with the Office and all parties [~~at least five days prior to the scheduled hearing, but in~~] no [~~event~~] later than one calendar day [~~two days~~] prior to the scheduled hearing, unless otherwise agreed by the parties.

(d) Default. For a telephone hearing, the following may be considered a failure to appear and grounds for default, if the conditions exist for more than ten minutes after the scheduled time for hearing:

(1) (No change.)

(2) failure to free the telephone line for a hearing; or

(3) (No change.)

§159.27. Failure To Attend Hearing and Default.

(a) Upon proof that proper notice of [~~a~~] hearing on the merits was mailed to defendant, and that notwithstanding such notice, defendant [~~a party~~] failed to appear, defendant's right to a hearing on the merits is waived. Under these circumstances, the Judge will proceed in defendant's [~~that party's~~] absence and enter a default order.

(b) If within five business days of the default, defendant [~~the party~~] files a written statement with the Office and the department, requesting the default order be vacated and showing good cause for the failure to appear and for the failure to notify the Office in advance of the hearing, the Judge may [~~shall~~] vacate the default order and reset the matter [~~will be~~] for hearing. The Judge will set the request to vacate default order for hearing, and will notify both parties of the time and place for said hearing.

§159.29. Hearing Disposition.

(a) If the Judge finds that the department proved the requisite facts as specified in Texas Transportation Code §§522.105, 524.035, or 724.042 [~~§159.19 of this title (relating to Issues) or §159.21 of this title (relating to Issues in Cases Involving Commercial Drivers' Licenses)~~] by a preponderance of the evidence, the Judge shall grant the department's petition.

(b) If the Judge finds the department did not prove all of the requisite facts by a preponderance of the evidence, the Judge shall deny the department's petition and the department shall not be authorized to suspend or deny defendant's license for the conduct at issue.

(c) (No change.)

§159.33. Effective Date of Suspensions.

(a) The [~~If a hearing is not timely requested, the~~] effective date of suspension is the 40th day after the notice of suspension is served or deemed served on the person;[~~.~~] a request for a hearing stays suspension of the person's driver's license until the date of the final decision of the Administrative Law Judge.

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

(d) Unless the suspension is stayed on appeal pursuant to Texas Transportation Code § 524.032, [~~Civil Statutes, Article 6687b-1, §7(h),~~] the suspension is effective when the Judge signs the administrative decision and order.

§159.35. Proceedings Open to the Public.

(a) Unless otherwise required [~~prohibited~~] by [~~federal or state~~] law, all proceedings before the Office are open to the public.

(b) The Judge may[~~:~~]

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

§159.37. Appeal of Judge's Decision.

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

(d) A person who appeals shall send by [~~certified~~] mail a copy of the person's certified petition[~~, certified by the clerk of the court in which the petition is filed,~~] to the main Office located [~~at its main Office~~] in Austin[~~, and to the opposing party at its address of record~~].

(e)-(j) (No change.)

§159.39. Stay of Suspension.

(a) Pursuant to Texas Transportation Code §524.042 [~~Civil Statutes, Article 6687b-1, §7(h)~~], the filing of an appeal petition stays a suspension if the person's license has not been suspended as a result of an alcohol-related or drug-related enforcement contact, as defined in §159.3 of this title (relating to Definitions), in the five years immediately preceding the date of the person's arrest, and the person has not been convicted during the 10 years preceding the date of the person's arrest of an offense under: [~~Texas Civil Statutes, Article 6701*l-1*, or Texas Penal Code §19.05(a)(2), or successor statutes, in the ten years immediately preceding the date of the person's arrest, regardless of whether the prior alcohol-related or drug-related contact or conviction occurred prior to January 1, 1995.~~]

(1) Article 6701*l-1, Texas Revised Civil Statutes, as that law existed before September 1, 1994;*

(2) Section 19.05(a)(2), Texas Penal Code, as that law existed before September 1, 1994;

(3) Section 49.04, Texas Penal Code;

(4) Sections 49.07 or 49.08, Texas Penal Code, if the offense involved the operation of a motor vehicle; or

(5) Section 106.041, Alcoholic Beverage Code.

(b) (No change.)

§159.41. Other Office Rules of Procedure.

Other Office rules of procedure found at Chapters 155, 157 and 161 of this title (relating to Rules of Procedure, Temporary Administrative Law Judges, and Requests for Records) may apply in contested cases under this chapter unless there are specific applicable procedures set out in this chapter. The [~~Among~~] rules that apply are limited to the following:

(1) §155.15[~~, (as amended),~~] of this title (relating to Powers and Duties of Judges);

(2) §155.17 of this title (relating to Assignment of ALJs to Cases [~~Recusal and Disqualification of Judges~~]);

(3) §155.21 of this title (relating to Representation of Parties) [~~155.19 of this title (relating to Substitution of Judges)~~];

(4) §155.39 of this title (relating to Stipulations) [~~155.21 of this title (relating to Appearance of Parties at Hearings; Representation)~~];

(5) §155.41 of this title (relating to Procedure at Hearing) [~~155.31 of this title (relating to Stipulations)~~];

(6) §155.49 of this title (relating to Conduct and Decorum) [~~155.41 of this title (relating to Order of Proceedings)~~];

(7)-(8) (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 August 28, 1998.

TRD-9813708
Amalija J. Hodgins
Deputy Chief Administrative Law Judge
State Office of Administrative Hearings
Earliest possible date of adoption: October 11, 1998
For further information, please call: (512) 475-4931

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Part XV. Texas Health and Human Services Commission

Chapter 355. Medicaid Reimbursement Rates

Subchapter A. Cost Determination Process

1 TAC §355.108

The Texas Health and Human Services Commission (HHSC) proposes an amendment to §355.108, concerning determination of inflation indices for Medicaid programs operated by the Texas Department of Human Services (TDHS), in its Medicaid Reimbursement Rates chapter. The amendment is proposed simultaneously with a proposal of TDHS to amend cost determination rules for non-Medicaid programs operated by TDHS.

The purpose of the amendment is to remove the special provision for the Medicaid Primary Home Care (PHC) program which requires the use of the Texas Workforce Commission (formerly Texas Employment Commission) tax rate notices received by contracted providers in determining an PHC-specific unemployment tax adjustment factor for use in determining payment rates. By elimination of this rule, PHC unemployment tax adjustment factors will be calculated using the same tax rate utilized to adjust unemployment taxes reported on the cost reports for other DHS programs.

Gary Bego, Associate Commissioner for Fiscal Policy, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Bego also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be the elimination of the need for providers to annually submit copies of their tax rate notices to DHS. There will be no adverse economic effect on small or other size businesses. This amendment eliminates the requirement of an annual submittal to DHS, and will benefit both large and small businesses. There is no anticipated economic cost to persons who are required to comply with the proposed section.

Persons requiring additional information regarding the proposed amendment may contact Kathy Hall, Texas Department of Human Services, Rate Analysis Department, at (512) 438-3702. Written comments on the proposal may be submitted to Steve Svadlenak, Associate Commissioner, Medicaid Reimbursement Department, Health and Human Services Commission, 4900 North Lamar Blvd., Fourth Floor, Austin, Texas, 78751. Comments will be accepted for 30 days following the date of publication of this proposal in the *Texas Register*.

The amendment is proposed under Texas Government Code §§531.021 and 531.033, which provide the Health and Human Services Commission with the authority to administer federal medical assistance funds and the commissioner of health and human services with the authority to adopt rules necessary to carry out the commission's duties under Chapter 531, Government Code.

The amendment implements the Human Resources Code, §§32.001-32.042.

§355.108. Determination of Inflation Indices.

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

(e) Item-specific and program-specific inflation indices. DHS may use specific indices in place of the general cost inflation index specified in subsection (d) of this section when appropriate item-specific or program-specific cost indices are available from DHS cost reports or other surveys, other Texas state agencies or independent private sources, or nationally recognized public agencies or independent private firms, and DHS has determined that these specific indices are derived from information that adequately represents the program(s) or cost(s) to which the specific index is to be applied. For example, DHS may use specific indices pertaining to cost items such as payroll taxes, key professional and non-professional staff wages, and other costs subject to specific federal or state limits. The specific indices that DHS may use include the following.

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

~~[(4) The unemployment tax inflation index for the Primary Home Care program is based on Texas Employment Commission tax rate notices submitted by providers. To calculate this index, DHS establishes a provider factor by dividing the present tax rate shown on the TEC tax-rate notice by the tax rate shown on the notice two years previously. These factors are then arrayed in a distribution from lowest to highest. The inflation index is the provider factor from the distribution array that corresponds to the median of accumulated hours of service for all contracted providers.]~~

(4) [~~(5)~~] Inflation factors for key professional and/or paraprofessional staff wages and salaries, e.g., nurses, nurse aides and attendants, are based on wage survey data pertaining to specific types of professional and paraprofessional staff in Texas when DHS has determined that reliable data of this kind are available for specific or comparable programs. Projections from the cost reporting period to the reimbursement period are based on discernible trends or experience as evidenced by the most recent reliable data available at the time proposed reimbursement is prepared for public dissemination and comment, and take into consideration economic conditions and regulatory changes which may be reasonably anticipated for the reimbursement period. When DHS has determined that reliable wage and salary data pertaining to specific types of staff in Texas are unavailable for specific or comparable programs, inflation factors for professional and/or paraprofessional staff are based on the lowest feasible forecast of the IPD-PCE. Professional and/or paraprofessional wage and benefit inflation rates for state employees are based on state employee wage and salary increases determined by the Texas Legislature.

(5) [~~(6)~~] For the Medicaid nursing facility program, determination of adjustments to historical costs of fixed capital assets are consistent with requirements of the federal Omnibus Budget Reconciliation Act of 1984 (OBRA 1984) and Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA 1985). For each program, one of two options is used.

(A) Reimbursement is in the form of a fixed capital asset use fee component of the overall reimbursement, based on facility appraisals, as described in program-specific reimbursement methodology rules.

(B) Reimbursement for fixed capital asset costs is calculated based on historical costs included in the reimbursement component designated in program-specific reimbursement methodology rules. The index used to inflate lease expense and to adjust the allowable depreciation base of assets which have undergone ownership changes is one-half the All-item Urban Consumer Price Index (CPI-U).

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 August 31, 1998.

TRD-9813788
Marina S. Henderson
Executive Deputy Commissioner
Texas Health and Human Services Commission
Earliest possible date of adoption: October 11, 1998
For further information, please call: (512) 424-6576

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Subchapter G. Telemedicine Services

1 TAC §355.6907

The Texas Health and Human Services Commission (HHSC) proposes an amendment to §355.6907, concerning reimbursement methodology for Medicaid day activity and health services: 1997 and subsequent cost reports, in Subchapter G, Telemedicine Services. The Medicaid Day Activity and Health Services Program (DAHS) program is operated by the Texas Department of Human Services (TDHS). The purpose of the amendment is to clarify the allowability of costs reported on cost reports which were incurred for the off-site storage of a DAHS transportation vehicle when the storage is for security or route efficiency management. The rules will also clarify that providers should continue to report United States Department of Agriculture revenues and related dietary expenses on the cost report, and not offset them prior to cost reporting. The amendment is proposed simultaneously with a proposal of TDHS to amend cost determination rules for non-Medicaid programs operated by TDHS.

Gary Bego, Associate Commissioner for Fiscal Policy, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Bego also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be that providers will have a better understanding of allowable transportation costs to be reported on the cost reports and of reporting USDA revenues and related dietary expenses on the cost reports. There will be no adverse economic effect on small or other size businesses. This amendment is a clarification of existing practices; therefore, no changes in practice are required of any business, large or small. There is no anticipated economic cost to persons who are required to comply with the proposed section.

Persons requiring additional information regarding the proposed amendment may contact Kathy Hall, Texas Department of Human Services, Rate Analysis Department, at (512) 438-3702. Written comments on the proposal may be submitted to Steve Svadlenak, Associate Commissioner, Medicaid Reimbursement Department, Health and Human Services Commission, 4900 North Lamar Blvd., Fourth Floor, Austin, Texas, 78751. Comments will be accepted for 30 days following the date of publication of this proposal in the *Texas Register*.

The amendment is proposed under Texas Government Code §§531.021 and 531.033, which provide the Health and Human Services Commission with the authority to administer federal medical assistance funds and the commissioner of health and human services with the authority to adopt rules necessary to carry out the commission's duties under Chapter 531, Government Code.

The amendment implements the Human Resources Code, §§32.001-32.042.

§355.6907. Reimbursement Methodology for Day Activity and Health Services: 1997 and Subsequent Cost Reports.

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

(h) DAHS-specific allowable costs. Allowable costs specific to the DAHS program are:

(1) certain medical equipment and supplies,[. ~~These are allowable costs~~] if they are related to the services for which DHS has contracted. This may include, but is not limited to, supplies and equipment considered necessary to perform client assessments, medication administration, and nursing treatment.

(2) transportation costs if they are related to the services for which DHS has contracted. This includes the costs of garaging a vehicle that is primarily used to transport clients to and from the DAHS center. The vehicle may be garaged off-site of the center for security reasons or for route efficiency management. In these cases of off-site vehicle garaging, a mileage log is not required if the vehicle is not used for personal use and is used solely (100%) for the delivery of DAHS services.

(i) DAHS-specific unallowable costs. Unallowable costs specific to the DAHS program are:

(1) physician's fees for completion of physician orders; and

[~~(2) costs for food and food services which should have been offset by the United States Department of Agriculture (USDA) revenue as specified in §355.103(b)(15)(B) of this title (relating to Specification for Allowable and Unallowable Costs);~~ and]

(2) [~~(3)~~] costs for which the provider received federal funds which should have been offset as specified in §355.103(b)(15)(B) of this title (relating to Specification for Allowable and Unallowable Costs).

(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.

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Marina S. Henderson
Executive Deputy Commissioner
Texas Health and Human Services Commission
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For further information, please call: (512) 424-6576

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Chapter 357. Medicaid Fair Hearings

1 TAC §§357.1, 357.3, 357.5, 357.7, 357.9, 357.11, 357.13, 357.15, 357.17, 357.19, 357.21, 357.23, 357.25, 357.27, 357.29

The Health and Human Services Commission proposes new §§357.1, 357.3, 357.5, 357.7, 357.9, 357.11, 357.13, 357.15, 357.17, 357.19, 357.21, 357.23, 357.25, 357.27 and 357.29 in new chapter 357, Medicaid Fair Hearings, concerning Medicaid fair hearings. This chapter describes the procedures for fair hearings for recipients in the Medicaid program. The fair hearings will be conducted by agencies operating part of the Medicaid program and are consistent with the federal regulations concerning fair hearings as described in 42 CFR §§431.200 et al.

Mr. Gary Bego, Associate Commissioner for Fiscal Policy, has determined that for each year during the first five-year period that the rules will be in effect, there will be no fiscal implications for state or local government or small businesses as a result of enforcing or administering these rules. Mr. Bego has also determined that there will be no impact on employment in the counties where the program is implemented.

Mr. Bego has determined that for each year during the first five-year period the rules will be in effect, the public benefit anticipated as a result of adopting the proposed rules will be the implementation of fair hearing procedures that are uniform across all agencies operating any part of the Medicaid program. For each of the first five years that the new sections are in effect, there will be no additional economic costs to persons required to comply with the new sections.

A public hearing sponsored by both the Health and Human Services Commission and the Department of Mental Health and Mental Retardation will be held on Tuesday, September 22, 1998, at 9:00 a.m. in the auditorium of the main Department of Mental Health and Mental Retardation Central Office Building (Building 2), 909 West 45th Street, Austin, Texas, to accept oral and written testimony concerning the proposal. The Department of Mental Health and Mental Retardation is proposing rules governing the same matter, 25 TAC §§419.301-419.317, of new Chapter 419, Subchapter G, in this same issue of the *Texas Register*. Persons requiring an interpreter for the deaf or hearing impaired or other accommodation should contact Sheila Wilkins, Office of Policy Development, Department of Mental Health and Mental Retardation, at (512) 206-4516, or should call the TDY phone number of Texas Relay, which is 1-800-735-2988, within 72 hours prior to the public hearing.

Written comments may be submitted to Stacy E. Sallee, Associate Counsel, Texas Health and Human Services Commission, 4900 North Lamar Boulevard, 4th Floor, Texas, Texas 78751, (512) 424-6548. Comments must be received no later than 30 days following publication of this proposal in the *Texas Register*.

The new rules are proposed under the Texas Government Code, chapter 531, §531.033, which authorizes the Commissioner of Health and Human Services to adopt rules necessary to carry out the Health and Human Services Commission's duties under

chapter 531, and §531.024, which requires the promulgation of uniform fair hearings rules for all Medicaid-funded services.

The new rules affect §531.024 of the Texas Government Code.

§357.1. Purpose and Scope.

(a) Purpose. The Health and Human Services Commission (HHSC) is required by state law to promulgate uniform fair hearing rules for all Medicaid-funded services. An opportunity for a fair hearing is required by federal law and regulation in any Medicaid case for a person whose claim for services is denied or not acted upon promptly. An opportunity for a fair hearing is also required when an operating agency or its designee takes action to suspend, terminate, or reduce services, including a denial of a prior authorization request for Medicaid-covered services. These fair hearing rules will also apply to any hearing involving the transfer or discharge of a person from a nursing facility or to a person adversely affected by the preadmission screening and annual resident review requirements.

(b) Scope. These rules establish fair hearing procedures which an operating agency will follow when the operating agency is required to conduct a fair hearing for Medicaid-funded services.

§357.3. Definitions.

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

(1) Action - Termination, suspension, or reduction of Medicaid eligibility or covered services by an operating agency or its designee. "Action" includes the denial of Medicaid eligibility and the denial of program eligibility. The term also means determinations by skilled nursing facilities and nursing facilities to transfer or discharge residents and adverse determinations made by an operating agency or its designee with regard to the preadmission screening and annual resident review. "Action" includes a denial of a prior authorization request for covered services affecting an individual. The term also includes the failure of an operating agency or its designee to act upon an individual's request for Medicaid covered services or for an eligibility determination within a reasonable amount of time. "Action" does not include expiration of a time-limited service.

(2) Adverse determination - Determination that the individual does not require the level of services provided by a nursing facility or that the individual does or does not require specialized services.

(3) Date of action - The intended date on which a termination, suspension, reduction, transfer, or discharge becomes effective. It also means the date of the determination made by an operating agency with regard to the preadmission screening and resident review.

(4) Designee - A contractor of an operating agency authorized to take an action or adverse determination as defined in paragraphs (1) and (2) of this section on behalf of the operating agency.

(5) Medicaid eligibility - The eligibility of an individual to receive services under the Texas Medicaid program.

(6) Operating agency - A state agency operating part of the Title XIX (Medicaid) program under the Social Security Act and includes the Department of Health, the Department of Human Services, the Rehabilitation Commission, and the Department of Mental Health and Mental Retardation.

(7) Prior authorization request - A request for services that are reimbursable only when authorization or approval is obtained before services are rendered. Prior authorized services may be limited in duration, scope, and amount. Services provided beyond those authorized are not reimbursable. If a prior authorization is limited in duration, scope, or amount, a separate request and approval must be obtained for each prior authorized service.

(8) Program eligibility - The eligibility of an individual to receive services within a particular Medicaid program.

§357.5. Notice.

(a) Agency Notice. If the action of the operating agency or its designee is the denial of Medicaid or Program eligibility or the denial of a prior authorization request, at the time of the action, the operating agency or its designee shall give an individual written notice of the individual's right to request a fair hearing on the action. If the operating agency or its designee proposes to take any other action, except for failing to act upon an individual's request for Medicaid covered services or for an eligibility determination within a reasonable amount of time, the operating agency or its designee shall deliver to the individual notice of the individual's right to request a hearing at least ten days prior to the date of action, unless the circumstances in subsection (b) of this section otherwise provide.

(b) Exceptions. The operating agency or its designee may mail written notice to an individual not later than the date of action if:

(1) the operating agency or its designee has factual information confirming the death of the individual;

(2) the operating agency or its designee receives a clear written statement signed by the individual that:

(A) he or she no longer wishes services; or

(B) gives information that requires termination or reduction in services and indicates that he or she understands that this must be the result of supplying that information;

(3) the individual has been admitted to an institution where he is ineligible for further services;

(4) the individual's whereabouts are unknown and the post office returns agency or designee mail directed to him or her indicating no forwarding address;

(5) the operating agency or its designee establishes the fact that the individual has been accepted for Medicaid services by another state;

(6) a change in the level of medical care is prescribed by the individual's physician;

(7) the notice involves an adverse determination made with regard to the preadmission screening requirements; or

(8) the action is the transfer or discharge of a resident from a nursing facility and the date of action will occur in less than ten days pursuant to 42 C.F.R. §483.12(a)(5)(ii) because:

(A) the safety or health of individuals in the facility would be endangered;

(B) the resident's health improves sufficiently to allow a more immediate transfer or discharge;

(C) an immediate transfer or discharge is required by the resident's urgent medical needs; or

(D) a resident has not resided in the facility for thirty days.

(c) Content of Notice. The notice shall contain:

(1) the action that the operating agency, its designee, or nursing facility is taking in the case of a denial of Medicaid or Program eligibility or a denial of a prior authorization request or intends to take in the case of any other action except for failing to act upon an individual's request for Medicaid covered services or for an eligibility determination within a reasonable amount of time;

(2) a statement of the reason for the action;

(3) a reference to the statutory or regulatory authority supporting the action, or the change in federal or state law that requires the action;

(4) an explanation of the individual's right to request a hearing and the procedure for requesting same;

(5) that the individual may represent himself or herself or use legal counsel, a relative, a friend, or other spokesperson; and

(6) an explanation of the circumstances under which Medicaid is continued, or a transfer or discharge is deferred, if a hearing is requested.

(d) Timeframe for Requesting a Hearing. The operating agency and its designee must allow the individual to request a hearing within 90 days from the date the notice required under subsection (a) of this section is mailed.

(1) The request for hearing must be submitted according to the instructions provided in the notice sent to the individual under subsection (a) of this section.

(2) It is a rebuttable presumption that a notice is received five days after the date the notice is placed in the United States mail, postage prepaid, properly addressed.

(3) If a request for a hearing is not received before the date of action, the action may be taken or allowed.

(4) If a request for hearing is not received within the 90-day period, the person is deemed to have waived the hearing and the action becomes final.

(5) If the action is other than a denial of Medicaid or Program eligibility or a denial of a prior authorization request and a request for hearing is received before the date of action, the action will not be taken until the final decision of the fair hearing has been made, unless the basis for the action is a change in federal or state law or regulation.

§357.7. Maintaining Benefits or Services.

(a) Except as otherwise specified in subsections (b), (d) and (e) of this section, if the individual is currently receiving a service upon which an action is taken and requests a fair hearing before the date of action, the service will be continued until a final decision is rendered following a fair hearing.

(b) The operating agency or its designee may terminate or reduce services before a hearing decision is rendered if:

(1) it is determined at the fair hearing that the sole issue is one of state or federal law or policy; and

(2) the operating agency or its designee informs the individual in writing of its intent to reduce or terminate services pending the hearing decision at least five days before the termination or reduction would be effective.

(c) The operating agency or its designee may recover or recoup the cost of any services provided to the individual to the extent that the services were furnished solely by reason of this section if the fair hearing decision supports the operating agency's or designee's action.

(d) If notice is mailed under §357.5(b) of this title (relating to Notice) and the operating agency or its designee receives the individual's request for a hearing within ten days of the mailing of the notice, and the operating agency or its designee determines that the action resulted from something other than the application of federal or state law or policy, the operating agency or its designee will reinstate and continue an individual's services until a hearing decision is rendered.

(e) The operating agency or its designee has no obligation to begin services requiring prior authorization pending a final decision.

§357.9. Hearing Official.

The operating agency shall designate an impartial person who has not been directly involved in the initial determination of the action or adverse determination in question as a hearing official to conduct the hearing and render a decision. The decision of the hearing official shall be the final administrative action of the operating agency.

§357.11. Preliminary Matters.

(a) Notification of Hearing. The hearing official shall, at least ten days prior to the date of the hearing, send a written notification of the hearing to the person who has requested the hearing.

(1) This notice will be sent to the address of record for the individual or to the address indicated in the request for hearing.

(2) The notification shall contain:

(A) the basis of the proposed action;

(B) the time, date, and place of the hearing;

(C) a statement that the individual may request the hearing to be conducted based on the taking of oral testimony (an "oral hearing"), or a hearing based on written information contained in any appropriate file and additional information that the individual may wish to submit for consideration (a "document hearing"), as is described in §357.17 of this title (relating to Document Hearing); and

(D) a statement that the individual may request any reasonable accommodation required due to disability or language comprehension;

(b) Access to Records.

(1) At a reasonable time before and during the hearing, the individual shall be given the opportunity to examine any appropriate file, and other documents or records the operating agency intends to use at the hearing.

(2) If the individual intends to introduce written medical information at the hearing, that information must be submitted to the hearing official at least seven days prior to the hearing, to allow the operating agency to obtain a review of the material by medical staff persons. The failure to so submit such medical information shall not render the material inadmissible, but the hearing official shall be permitted to keep the hearing record open until a medical review of the material has been received from the operating agency and included in the hearing record.

(c) Representation. An individual may represent himself, or be represented by legal counsel, a relative, a friend, or other designated spokesperson. If the individual does not appear at the hearing, the operating agency may require the submission of documentation demonstrating that the representative appearing on the

individual's behalf has authority to represent the individual. If the individual appears at the hearing, no such documentation is required.

(d) Additional Medical Assessment. If the hearing involves medical issues such as those concerning a diagnosis, an examining physician's report, or a medical review team's decision, and if the hearing officer considers it necessary to have a medical assessment other than that of the individual involved in making the original decision, that medical assessment must be obtained at the operating agency's expense and made part of the record.

§357.13. Location of Hearing and Accommodations.

(a) The hearing official shall determine the location of the hearing or whether it is appropriate to conduct the hearing by telecommunication as provided in §357.15 of this title (relating to Telecommunication).

(b) The operating agency shall provide any reasonable accommodation for disclosed disabilities. Requests for any reasonable accommodation should be made in writing to the hearing official at least three days prior to the hearing date.

(c) The operating agency shall provide suitable interpretation for individuals with limited English proficiency. Requests for an interpreter should be made in writing to the hearing officer at least three days prior to the hearing date.

§357.15. Telecommunication.

(a) If the hearing is an oral hearing and if telecommunication equipment is used for the hearing, it must be capable of allowing the parties to hear and speak to all other parties and to cross-examine witnesses.

(b) The hearing official must be able to hear and speak to all parties.

(c) Written documents to be submitted for consideration by the hearing official must be provided to all parties in advance of the hearing, with copies to the hearing official.

(d) If an individual cannot effectively participate in a telephonic hearing because of a disability, the individual may request that the hearing be conducted in person.

§357.17. Document Hearing.

The hearing may be conducted based on the written information contained in any appropriate file and additional written information submitted to the hearing official and the other party not less than seven days prior to the hearing without the necessity of taking oral testimony, provided that the parties are given the opportunity to respond to any written material submitted.

§357.19. Privileges.

No party to a fair hearing is required to disclose communications between a lawyer and a client, a husband and a wife, a clergy-person and a person seeking spiritual advice, or the name of an informant, or other information protected from being divulged by federal or state substantive law.

§357.21. Burden of Proof.

(a) The operating agency bears the burden of proof in a fair hearing on an action or an adverse determination.

(b) The nursing facility bears the burden of proof in a transfer or discharge case.

(c) The individual bears the burden on any issue requiring the showing of "good cause" or an affirmative defense to the action or adverse determination.

§357.23. Procedural Rights of the Individual.

The individual has the right to:

(1) examine at a reasonable time before the date of the hearing and during the hearing the contents of any appropriate file, and all documents and records to be used by the operating agency or nursing facility at the hearing;

(2) bring witnesses;

(3) establish all pertinent facts and circumstances;

(4) present an argument without undue interference; and

(5) question or refute any testimony or evidence, including the opportunity to confront and cross-examine adverse witnesses.

§357.25. Dismissal of Hearing.

The hearing official shall dismiss a request for a fair hearing and the proposed action may be taken if the individual withdraws the request in writing or fails to appear at the scheduled hearing without good cause.

§357.27. Recording.

The hearing official shall make a record of the proceeding, either through a tape recording or a court reporter.

(1) The cost of a court reporter shall be borne by the person who requests that a court reporter be present.

(2) The individual shall have the right to make an audio recording of the fair hearing.

(3) Any witness shall have the right to make an audio recording of his or her testimony.

§357.29. Hearing Decisions.

(a) Hearing decisions must be based exclusively on evidence introduced at the hearing and received in evidence.

(b) The operating agency or its designee may grant, deny, terminate, suspend, modify, or reduce services in accordance with the hearing decision as rendered following a fair hearing.

(c) Record. The record of the hearing consists of the following:

(1) A transcript or recording of testimony and exhibits received in evidence.

(2) All documents and requests for admission, together with the ruling on admissibility made by the hearing official.

(3) The hearing officer's decision, composed of a statement of the persuasive evidence, findings of fact and conclusions of law (identifying the relevant regulations and/or statutes), and a statement of restored benefits, if appropriate.

(d) The hearing decision must be made and a copy of the decision furnished to the individual within 90 days of the request for a fair hearing unless the individual waives the 90-day requirement in writing.

(e) If the individual is enrolled in a managed care organization (MCO), the operating agency will also notify the MCO of its decision. The decision of the operating agency is binding on the MCO and on any applicable designee.

(f) Hearing decisions are available to the public, subject to the requirements under federal and/or state law for safeguarding information relating to the Medicaid program.

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

Filed with the Office of the Secretary of State on August 24, 1998.

TRD-9813452
Marina S. Henderson
Executive Deputy Commissioner
Texas Health and Human Services Commission
Earliest possible date of adoption: October 11, 1998
For further information, please call: (512) 424-6576

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TITLE 7. BANKING AND SECURITIES

Part VII. State Securities Board

Chapter 115. Dealers and Salesmen

7 TAC §115.1

The State Securities Board proposes a clarifying amendment to §115.1, concerning post-registration reporting requirements for dealers, investment advisers, and their agents. The proposal makes no substantive changes to the existing reporting requirements.

Michael S. Gunst, Director, Dealer Registration Division, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Gunst also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be that dealers, investment advisers, and their agents will be apprised of the occurrence triggering an obligation to make a timely report to the Securities Commissioner concerning the occurrence of the event. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to David Weaver, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167.

The amendment is proposed under Texas Civil Statutes, Article 581-28-1. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes.

Statutes and codes affected: none applicable. The proposed amendment affects Texas Civil Statutes, Article 581-12, 581-13, and 581-18.

§115.1. General Provisions.

(a)-(f) (No change.)

(g) Post-registration reporting requirements.

(1) Each person registered as a securities dealer or investment adviser [~~or as an agent thereof~~] shall report to the Securities Commissioner within 30 days after its entry against the securities dealer, investment adviser, or an agent thereof, the matters described in this paragraph. Likewise, each person registered as an agent of a securities dealer or investment adviser shall report to the Commissioner within 30 days after its occurrence or entry against the agent the matters described in this paragraph. [~~any action by a self-regulatory organization, any state or federal administrative order, criminal conviction, or court judgment, order, or decree described in paragraph (2) of this subsection which is entered against that person or an officer or agent thereof or the filing of any declaration of bankruptcy by that person. Upon request by the Securities Commissioner, that person may be required to furnish to the Securities Commissioner copies of the order, conviction, or decree, or other documents, as applicable.~~]

[~~(2)~~] The following matters must be reported:

(A) any administrative order issued by state or federal authorities, which order:

(i) is based upon a finding that such person has engaged in fraudulent conduct; or

(ii) was entered after notice and opportunity for a hearing, denying, suspending, or revoking the person's registration as a dealer, agent, salesman, or investment adviser, or the substantial equivalent of those terms;

(B) any felony criminal action or conviction, or any misdemeanor action or conviction based on fraud, deceit, or wrongful taking of property;

(C) any order, judgment, or decree entered by any court of competent jurisdiction which temporarily or permanently restrains or enjoins such person from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security or involving any false filing with any state; or which restrains or enjoins such person from activities subject to federal or state statutes designed to protect consumers against unlawful or deceptive practices involving insurance, commodities or commodity futures, real estate, franchises, business opportunities, consumer goods, or other goods and services;

(D) any expulsion, bar, suspension, censure, fine, or penalty imposed by a self-regulatory organization; [~~and~~]

(E) any change in any other information previously disclosed to the Securities Commissioner on any application form or filing; and [~~.~~]

(F) the filing of any voluntary or involuntary bankruptcy petition.

(2) Upon request by the Securities Commissioner, a securities dealer, investment adviser, or agent may be required to furnish to the Commissioner copies of the order, conviction, or decrees, or other documents which evidence events disclosable pursuant to paragraph (1) of this subsection.

(3) For purposes of this subsection, "securities dealer" or "investment adviser" shall include any partners, directors, executive officers, or beneficial owners of 10% or more of any class of the equity securities of the registered dealer or investment adviser (beneficial ownership meaning the power to vote or direct the vote of and/or the power to dispose or direct the disposition of such securities).

(h)-(k) (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 August 25, 1998.

TRD-9813494

Denise Voigt Crawford
Securities Commissioner
State Securities Board
Earliest possible date of adoption: October 11, 1998
For further information, please call: (512) 305–8300

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7 TAC §115.3

The State Securities Board proposes an amendment to §115.3, concerning dealer examinations. The proposal would require the Series 72 examination from new applicants for a limited registration to deal exclusively in government securities. Persons already holding such a restricted registration on or before September 1, 1998, would be "grandfathered" in and would not be required to pass the Series 72 exam.

Michael S. Gunst, Director, Dealer Registration Division, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Gunst also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be to increase competency by requiring new applicants for limited registrations to deal exclusively in government securities to pass the examination, developed by NASD Regulation, Inc., aimed at practitioners engaged in this type of activity. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to David Weaver, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167.

The amendment is proposed under Texas Civil Statutes, Article 581-28-1. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes.

The proposed amendment affects Texas Civil Statutes, Article 581-12, 581-13, and 581-18.

§115.3. Examination.

(a) (No change.)

(b) Content. Each applicant must satisfy two examination requirements.

(1) Each applicant must pass an examination on general securities principles. This requirement may be satisfied by passing an examination on general securities principles administered by the NASD. As set out in subparagraph (B) of this paragraph, applicants for restricted registrations may substitute an examination dealing with a particular type of security for an examination on general securities principles.

(A) (No change.)

(B) In lieu of an examination on general securities principles, the Securities Commissioner recognizes the following limited examinations, administered by the NASD, for the corresponding restricted registrations:

(i)-(iv) (No change.)

(v) for persons seeking the type of restricted registration specified in §115.1(b)(1)(L) of this title (relating to General Provisions), the Series 62 – Corporate Securities Representative Examination; [~~and~~]

(vi) for persons seeking the type of restricted registration specified in §115.1(b)(1)(M) of this title (relating to General Provisions), either the Series 17 – General Securities Representative Examination, the Series 37 – General Securities Representative Examination, the Series 38 – General Securities Representative Examination, or the Series 47 – General Securities Representative Examination; and [~~.~~]

(vii) for persons seeking the type of restricted registration specified in §115.1(b)(1)(J) of this title (relating to General Provisions), the Series 72 – Government Securities Representative Examination. A person registered on or before September 1, 1998 for the purpose of dealing exclusively in government securities is not required to pass the Series 72 examination.

(2) (No change.)

(c) Exemptions from examination requirements.

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

(3) A partial waiver of the examination requirements of the Texas Securities Act, §13.D, is granted by the Board to the following classes of persons:

(A)-(F) (No change.)

[~~(G) applicants seeking registration for the purpose of dealing exclusively in government securities. Such persons are not required to take the general securities examination, but are required to pass an examination on state securities law as required by subsection (b)(2) of this section;~~]

(G) [~~(H)~~] applicants who are certified by the Certified Financial Planner Board of Standards, Inc. to be certified financial planners and who are seeking registration as investment advisers. These applicants are not required to take the general securities examination, but must pass the examination on state securities law as required by subsection (b)(2) of this section;

(H) [~~(I)~~] applicants who are designated by the American Institute of Certified Public Accountants as accredited personal financial specialists and who are seeking registration as investment advisers. Such persons are not required to take the general securities examination, but are required to pass an examination on state securities law as required by subsection (b)(2) of this section; and

(I) [~~(J)~~] applicants seeking registration for the purpose of acting exclusively as an agent for an investment adviser(s) and who limit their activities to disclosure of the information contained in Part II of Form ADV. Such persons are not required to take the general securities examination, but are required to pass an examination on state securities law as required by subsection (b)(2) of this section.

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

(d)-(f) (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 August 25, 1998.

TRD-9813493
Denise Voigt Crawford

Securities Commissioner
State Securities Board
Earliest possible date of adoption: October 11, 1998
For further information, please call: (512) 305–8300

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TITLE 16. ECONOMIC REGULATION

Part I. Railroad Commission of Texas

Chapter 7. Gas Utilities Division

Subchapter A. Procedural Rules

16 TAC §7.4

The Railroad Commission of Texas proposes amendments to §7.4, relating to procedure for abandonment or discontinuance of service by gas utilities. Section 7.4 sets forth procedures and standards for consideration of an application to abandon or discontinue service at a city gate or local distribution company, or to residential and commercial customers.

On May 6, 1998, the Association of Texas Intrastate Natural Gas Pipelines (ATIP) filed a petition for rulemaking to amend §7.4. Commission staff reviewed the amendments proposed by ATIP, and found that the amendments improved the clarity and applicability of the existing rule. Staff revised several elements in the proposed amendments to further strengthen the concepts established in the proposal. Staff met with ATIP on July 8, 1998, to discuss the proposed amendments, and obtain agreement on final amendment language.

The proposed amendments enhance and clarify the process by which a gas utility must file an application for abandonment or permanent discontinuance of service. The amendments will improve the effectiveness and efficiency of the regulation of gas utilities by providing more detailed guidance as to the filing requirements related to an application for abandonment and by setting out specific time lines within which the commission must act on the application.

The proposed amendments improve the current rule in several ways. First, proposed subsection (a) establishes specific guidelines for abandonment or permanent discontinuance of service to city gate or local distribution companies, and subsection (b) establishes the guidelines for abandonment or permanent discontinuance of service to residential and commercial customers. The current rule addresses only abandonment of service at a city gate or to a local distribution company.

Second, the proposed amendments expand the information to be filed with the application for abandonment. The current rule requires that a gas utility file with its abandonment application the number of affected customers in each class, the names and addresses of all affected customers, the specific reasons for the proposed abandonment, the alternative energy sources available to the affected customers, and any previous notice provided to the affected customers. In addition to the current information, the proposed amendments require for an application for abandonment of service to a city gate or a local distribution company a description, age, and condition of the pipeline or plant proposed for abandonment; the revenue from and cost to continue the existing service; the cost of the alternative energy sources on an equivalent MMBtu basis; a statement that the application is subject to commission approval; and a statement of the right of the city gate or local distribution company to intervene. For abandonment of residential and commercial customers, the amendment further requires the cost per customer of each conversion to an alternative energy source; the terms of any agreements, including qualifying offers, for the conversion to an alternative energy source; copies of any consents to abandon from the affected customers; and instead of a statement of the right to intervene, a statement of the right of the affected customers to protest the application and the procedure for doing so.

Third, the proposed amendments establish time lines for the commission to act on the abandonment applications. For abandonment of city gate or local distribution companies, the amendments specify that a formal hearing be held within 60 days after the application is filed if another party participates or intervenes, or the Director of the Gas Services Division will act on the application administratively within 45 days if no participation or intervention is granted to other parties. For abandonment of residential and commercial customers, the proposed amendments specify that a formal hearing be held within 60 days after the application is filed if a customer files a protest within 30 days after the application is filed, or the Director of the Gas Services Division will act on the application administratively within 45 days if not all customers consent to the abandonment or receive a qualifying offer, but none file a protest within 30 days after the application is filed. Also, the Director of the Gas Services Division will act on the application administratively within 30 days if all customers consent to the abandonment or receive a qualifying offer, but none file a protest within 15 days after the application is filed. In any case where the Director of Gas Services denies an application for abandonment, the proposed amendments specify that the gas utility may request a formal hearing be held within 60 days after the date the application was denied. The current rule requires a formal hearing be held if another party intervenes in an application, and allows the application to be handled administratively if there are no intervenors, but the rule sets no other time lines to act either formally or administratively.

Fourth, the proposed amendments define a qualifying offer as an offer to convert all of a residential or commercial customerþs gas burning facilities to the lowest cost available alternative energy source, including a tank filled once with a liquid alternative energy source. The amendments allow the customer to elect to receive the cash equivalent of the cost of conversion to the lowest cost alternative energy source.

Fifth, the proposed amendments require that if any residential or commercial customers become affected customers as a result of an application to abandon or permanently discontinue service to a city gate or local distribution company, then the local distribution company must file an application for abandonment of the residential and commercial customers.

Sixth, the proposed amendments explicitly delegate authority to the Director of the Gas Services Division to administratively act on applications to abandon or permanently discontinue service, subject to the conditions set forth in the amendments.

Seventh, the proposed amendments clarify the exemption for filing an application under emergency conditions. The concept of an emergency abandonment under the existing rule is replaced with the concept that a temporary termination of service due to a pipeline safety emergency is not to be considered abandonment of service. If a gas utility determines not to resume

service after a pipeline emergency, the amendments establish a time line for the gas utility to file an abandonment application of 30 days after the temporary termination of service.

Eighth, the proposed amendments explicitly state that the gas utility has the burden of proof to show that the proposed abandonment is reasonable and necessary and is not contrary to the public interest. The amendments establish conditions the commission will consider when evaluating an application, including whether continued service is no longer economically viable for the gas utility; whether the potentially abandoned customers have any alternatives and, if so, how many, and at what cost; whether any customer has made investments in reliance on continued availability of natural gas, where an alternative energy source is not viable; whether the gas utility has failed to properly maintain the facilities proposed for abandonment, rendering them unsalvageable due to neglect; and any other considerations affecting the potentially abandoned customers.

Karl J. Nalepa, Deputy Assistant Director, Gas Services Division, has determined that for the first five-year period the proposed amendments are in effect there will be no fiscal impact upon state or local governments as a result of enforcing or administering the proposed amendments. Over the previous five years, only eleven abandonment applications have been docketed by the commission. The amendments should not change the frequency or scope of the applications filed to abandon or permanently discontinue natural gas service. Rather, the amendments will help streamline the processing of applications by requiring information to be filed with the application which in the past the commission staff had to request during the course of review of the application. Although the proposed amendments include expedited time lines to act on an abandonment application, it is anticipated that the applications can be adequately evaluated within the given schedule because of the additional information initially provided with the application.

Mr. Nalepa has also determined that the cost of compliance with the proposed amendments will be the same for small and large businesses. Both small and large utilities would be subject to the same requirements regarding approval to abandon or permanently discontinue service to customers. Gas utilities which propose to abandon or permanently discontinue service to customers are currently required to prepare and submit an application to do so with the commission. The utility already incurs a cost to develop and support its application under the current rule. Any additional cost incurred by businesses to develop and submit additional information along with an application for abandonment of service would be offset by correspondingly fewer data submittals during the course of the evaluation of the application. Furthermore, the businesses would benefit because of more prompt decisions by the commission as a result of the time lines established in the proposed amendments. Because it is not possible to quantify the cost of compliance, it is not possible to analyze the impact on small businesses based on cost per employee, cost for each hour of labor, or cost for each $100 of sales.

Mr. Nalepa has determined that for each year of the first five years the proposed amendments are in effect the public benefit anticipated as a result of enforcing or administering the rule will be to ensure complete review of a utility's proposal to abandon or permanently discontinue service to a customer, and approval of abandonment only after all alternatives are considered and all affected parties have been given the opportunity to provide input. The separation of the abandonment procedures into separate sections for city gate or local distribution companies and residential and commercial customers allows a better match of the information submitted to the type of customer proposed to be abandoned. The additional information requirements will help ensure that a full review of the application is conducted. Detailed information related to costs of conversion to alternative energy sources allow the affected customers a better chance to compare options. The amendments promote more participation by affected customers by requiring a statement in the application notifying the customers that they can intervene or protest the application, and, for residential and commercial customers, also requires the utility to provide information on the procedure for doing so. The utility must send a copy of the application to all customers affected by the proposed abandonment. Time lines established in the proposed amendments clarify the schedule for participation by customers, and if the terms of abandonment are agreeable to the customers, allows the conversion to an alternative energy source to begin within a reasonable period. Finally, the proposed amendments explicitly state that the gas utility has the burden of proof to show that the proposed abandonment or permanent discontinuance of service is reasonable and necessary, and is not contrary to the public interest.

The commission has not requested a local employment impact statement pursuant to Texas Government Code, §2001.022(h).

Comments may be submitted to Mr. Karl J. Nalepa, Deputy Assistant Director, Gas Services Division, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967. Comments will be accepted for 30 days after publication in the *Texas Register* and should refer to Gas Utilities Docket (GUD) No. 8886. For additional information, call Mr. Nalepa at (512) 463- 8574.

The commission proposes the amendments under Texas Utilities Code, §104.001, which authorizes the commission to determine the classification of customers and services and to ensure that gas utilities comply with the obligation of the Code, and §121.151, which authorizes the commission to establish rules for the control and supervision of gas pipelines in their relations with the public; and under Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

Texas Utilities Code, §§104.001 and 121.151, and Texas Government Code, §2001.004, are affected by the proposed amendments.

§7.4. Procedure for Abandonment or Discontinuance of Service.

(a) Service to a Local Distribution Company or City Gate Customer. A gas utility shall obtain written commission approval prior to the abandonment or permanent discontinuance of service to any local distribution company or city gate customer that involves the removal or abandonment of facilities other than a meter.

(1) Except in pipeline safety emergencies, the gas utility shall file an application to abandon or permanently discontinue service to a local distribution company or city gate customer with the Director of the Gas Services Division at least 60 days prior to the proposed effective date of the proposed abandonment or permanent discontinuance of service. In addition to the information required in §1.25 of this title (relating to Form and Content of Pleadings), the application shall state the following:

(A) the number of affected customers in each class;

(B) the names and addresses of the local distribution company or city gate customer affected;

(C) the specific reasons for the proposed abandonment or permanent discontinuance of service;

(D) a description, age, and condition of the pipeline or plant that the gas utility proposes to abandon or through which it proposes to permanently discontinue service;

(E) the revenue from and cost to continue the existing service to the affected local distribution company or city gate customers;

(F) all reasonable alternative energy sources available to the affected local distribution company or city gate customers, and the cost of such energy sources on an MMBtu equivalent basis;

(G) the cost per customer of each conversion to available alternative energy sources;

(H) any previous notice provided by the utility to the affected local distribution company or city gate customer;

(I) a statement that the application is subject to commission approval; and

(J) a statement of the affected local distribution company or city gate customer's right to intervene in the application.

(2) The gas utility shall send a copy of the application to the affected local distribution company or the affected city gate customer on the same day that the gas utility files the application to abandon or discontinue service with the Director of the Gas Services Division.

(A) If a person files a statement of intent to participate or motion to intervene with the commission within 30 days from the date of the filing of the application, and party status is thereby subsequently established, a formal hearing shall be held within 60 days following the date on which the application is filed.

(B) If the commission does not receive and grant a timely- filed statement of intent to participate or intervention pleading, then the Director of the Gas Services Division shall act administratively on the application to abandon or permanently discontinue service within 45 days following the date on which the gas utility filed the application. In the event that the director denies the application administratively, the gas utility may request that a formal hearing be held within 60 days following the date on which the director denies the application. The gas utility shall file any request for a formal hearing within 30 days of the date the director administratively denies an application to abandon or permanently discontinue service.

(3) If any residential or commercial customer becomes a directly affected customer as a result of the application to abandon or permanently discontinue service, then the local distribution company shall file an application to abandon or permanently discontinue service under subsection (b) of this section.

(4) The Director of the Gas Services Division or the director's delegate shall have the authority to act administratively on abandonment or permanent discontinuance applications that satisfy the conditions of this subsection. The term Director of the Gas Services Division when used in this section shall mean the Director of the Gas Services Division or the director's delegate.

(5) Temporary termination of service due to a pipeline safety emergency shall not be considered to be abandonment or permanent discontinuance of service under the terms of this section. If the gas utility determines not to resume service as a result of a pipeline safety emergency, then the gas utility shall file an application under this section within 30 days of the temporary termination of service.

(6) The gas utility shall have the burden of proof to show that the proposed abandonment or permanent discontinuance of service is reasonable and necessary and is not contrary to the public interest. The conditions to be considered when making a determination regarding an application for abandonment or permanent discontinuance of service shall include:

(A) whether continued service is no longer economically viable for the gas utility;

(B) whether the potentially abandoned customers have any alternatives, how many, and at what cost;

(C) whether any customer has made investments or capital expenditures in reliance on continued availability of natural gas, where use of an alternative energy source is not viable;

(D) whether the utility has failed to properly maintain the facilities proposed for abandonment, rendering them unsalvageable due to neglect; and

(E) any other considerations affecting the potentially abandoned customers.

(b) Service to Residential and Commercial Customers. A gas utility shall obtain written commission approval prior to the abandonment or permanent discontinuance of service to any residential or commercial customer that involves the removal or abandonment of facilities other than a meter. This subsection shall not apply to discontinuance of service to residential or commercial customers for any of the reasons set forth in §7.45 of this title (relating to Quality of Service).

(1) Except in pipeline safety emergencies, the gas utility shall file an application to abandon or permanently discontinue service with the Director of the Gas Services Division at least 60 days prior to the proposed effective date of the proposed abandonment or permanent discontinuance of service to any residential or commercial customer involving the removal or abandonment of facilities other than a meter. In addition to the information required in §1.25 of this title (relating to Form and Content of Pleadings), the application shall state the following:

(A) the number of directly affected customers in each class of service;

(B) the names and addresses of all directly affected customers;

(C) the specific reasons for the proposed abandonment or permanent discontinuance of service;

(D) a description, age, and condition of the pipeline or plant that the gas utility proposes to abandon or through which it proposes to permanently discontinue service;

(E) the revenue from and cost to continue the existing service to the directly affected customers;

(F) all reasonable alternative energy sources available to the directly affected customers, and the cost of such energy sources on an MMBtu equivalent basis;

(G) the cost per customer of each conversion to available alternative energy sources;

(H) the terms of any agreements with, or offers, including qualifying offers, to, directly affected customers by the gas utility for the conversion of customers' appliances to enable the use of alternative energy sources;

(I) copies of any consents to abandonment or permanent discontinuance obtained by the utility from directly affected customers;

(J) any previous notice provided by the utility to the directly affected customer;

(K) a statement that the application is subject to commission approval; and

(L) a statement of the directly affected customer's right to protest the application and the procedure for filing such a protest.

(2) The gas utility shall send a copy of the application to all directly affected customers on the same day that the gas utility files the application to abandon or permanently discontinue service with the Director of the Gas Services Division.

(A) If any of the directly affected customers files a protest within 30 days following the date on which the application is filed, a formal hearing shall be held within 60 days following the date on which the application is filed.

(B) If all of the directly affected customers have not consented to the abandonment or permanent discontinuance of service and if the gas utility has not given all of the directly affected customers a qualifying offer, as defined in paragraph (3) of this subsection, but none of the directly affected customers files a protest within 30 days following the date on which the application is filed, the Director of the Gas Services Division shall act administratively on the application within 45 days following the date on which the application is filed. The director may seek additional information from the directly affected customers to determine whether they have received adequate information regarding the consequences of the proposed abandonment. In the event that the director denies the application administratively, the gas utility may request that a formal hearing be held within 60 days following the date on which the director denies the application. The gas utility shall file any request for a formal hearing within 30 days of the date the director administratively denies an application to abandon or permanently discontinue service.

(C) The Director of the Gas Services Division shall act administratively on the application within 30 days following the date on which the gas utility files the application if either all of the directly affected customers consent to the abandonment or permanent discontinuance of service and none of the directly affected customers files a protest within 15 days following the date on which the gas utility files the application; or the gas utility has given all of the directly affected customers a qualifying offer, as defined in paragraph (3) of this subsection and none of the directly affected customers files a protest within 15 days following the date on which the gas utility files the application. In the event that the director denies the application administratively, the gas utility may request that a formal hearing be held within 60 days following the request for a hearing. The gas utility shall file any request for a formal hearing within 30 days of the date the director administratively denies an application to abandon or permanently discontinue service.

(3) A qualifying offer for the purposes of this section means an offer to convert all of the residential or commercial customers' gas burning facilities to the lowest cost available alternative energy source, including, at a minimum, a single tank of normal size for the customer's premises filled once with any liquid alternative energy source. At the customer's election, the qualifying offer shall be the cash equivalent of the cost of conversion to the lowest cost available alternative energy source.

(4) The Director of the Gas Services Division or the director's delegate shall have the authority to act administratively on abandonment or permanent discontinuance applications that satisfy the conditions of this subsection. The term Director of the Gas Services Division when used in this section shall mean the Director of the Gas Services Division or the director's delegate.

(5) Temporary termination of service due to a pipeline safety emergency shall not be considered to be abandonment or permanent discontinuance of service under the terms of this section. If the gas utility determines not to resume service as a result of a pipeline safety emergency, then the gas utility shall file an application under this section within 30 days of the temporary termination of service.

(6) The gas utility shall have the burden of proof to show that the proposed abandonment or permanent discontinuance of service is reasonable and necessary and is not contrary to the public interest. The conditions to be considered when making a determination regarding an application for abandonment or permanent discontinuance of service shall include:

(A) whether continued service is no longer economically viable for the gas utility;

(B) whether the potentially abandoned customers have any alternatives, how many, and at what cost;

(C) whether any customer has made investments or capital expenditures in reliance on continued availability of natural gas, where use of an alternative energy source is not viable;

(D) whether the utility has failed to properly maintain the facilities proposed for abandonment, rendering them unsalvageable due to neglect; and

(E) any other considerations affecting the potentially abandoned customers.

~~[(a) Discontinuance of service by a gas utility to any city gate or local distribution company shall require prior written commission approval. Except in emergency situations, an application to abandon or discontinue service shall be filed with the director of the Transportation/Gas Utilities Division at least 60 days prior to the proposed effective date of the proposed abandonment or discontinuance of service. In addition to the information required in §1.25 of this title (relating to Form and Content of Pleadings), the application shall state the following:]~~

~~[(1) the number of directly affected customers in each class;]~~

~~[(2) the names and addresses of all directly affected customers;]~~

~~[(3) the specific reasons for the proposed abandonment;]~~

~~[(4) the alternative energy sources available to the directly affected customers; and]~~

~~[(5) any previous notice provided by the utility to the directly affected customers.]~~

~~[(b) A copy of the application shall be sent to all directly affected customers by the gas utility simultaneously with the filing of the application to abandon service with the director of the~~

~~Transportation/Gas Utilities Division. If a statement of intent to participate or motion to intervene is filed within 30 days from the date of the filing of the statement of intent, and party status is thereby subsequently established, a formal hearing shall be held. If no statement of intent to participate is filed, or no intervention pleading is filed and granted, then the matter may be handled on an informal administrative basis.]~~

~~[(c) In emergency situations, the gas utility shall file an application to abandon or discontinue service at the earliest possible time after the utility becomes aware that abandonment or discontinuance is necessary. Emergency procedures may be set up by the Transportation/Gas Utilities Division to handle these emergency situations.]~~

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

Issued in Austin, Texas, on August 26, 1998.

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Mary Ross McDonald
Deputy General Counsel
Railroad Commission of Texas
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For further information, please call: (512) 463–7008

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Subchapter B. Substantive Rules

16 TAC §7.60

The Railroad Commission proposes new §7.60, relating to informal complaint procedure for complaints about natural gas gathering and transportation services.

The commission proposes the new rule to: (1) help prevent discrimination prohibited by the Common Purchaser Act, Texas Natural Resources Code, §§111.081, *et seq.*; the Cox Act, Texas Utilities Code, Chapter 121; and the Gas Utility Regulatory Act, Texas Utilities Code, Chapter 104; and (2) encourage the resolution of natural gas gathering and transportation service conflicts without litigation or other formal, lengthy, and potentially expensive proceedings. The informal complaint process neither requires nor encourages the use of an attorney or a consultant. Its other advantages include minimal expense to the participants and a shorter time-frame compared to formal hearing proceedings. The process strives to establish and reinforce communication between decision-makers from both participants with the goal of achieving mutually acceptable compromise and resolution.

Under proposed new §7.60, any entity may complain about the actions of any other entity that provides natural gas gathering and/or transportation services to others for a fee. A respondent may be a gas utility or affiliate, as defined in the Cox Act and the Gas Utility Regulatory Act, or other gatherers, transporters, or common purchasers, as defined in the Common Purchaser Act.

Participation in the informal complaint process does not preclude formal action if the informal process is unsuccessful. If dissatisfied with the results of the informal complaint process, a participant or commission staff may initiate formal evidentiary proceedings.

Communications between parties and commission staff made as part of the informal complaint process are confidential, are not subject to disclosure in discovery, and may not be used as evidence in any further proceeding. Oral and written communications and documentary material used in or made a part of the informal complaint process are admissible or discoverable in a separate formal proceeding only if they are otherwise admissible or discoverable independent of the informal complaint process.

Each informal complaint will be facilitated by a staff member of the Regulatory Analysis and Policy section of the Gas Services Division (the "facilitator"). To qualify as a facilitator, the staff member first shall have completed 40 hours of Texas mediation training which meets the standards of the Texas Alternative Dispute Resolution Procedures Act, and shall subscribe to the ethical guidelines for mediators adopted by the Alternative Dispute Resolution Section of the State Bar of Texas.

The commission's Gas Services Division has established a Helpline at (512) 463-7077 that may be used to register complaints about natural gas gathering and transportation services. A commission employee will answer calls to the Helpline from 8:00 a.m. to 5:00 p.m. on all regular commission work days. A voice mail system will be in place to receive any calls during non-business hours.

The rule outlines the following procedure for processing informal complaints registered with the Gas Services Division: The director of the Gas Services Division or the director's delegate will assign a complaint to a Gas Services Division facilitator. The assigned facilitator will document the complaint by recording information based on a standardized set of questions. The facilitator will direct the complaining party ("complainant") to submit its complaint in writing to the facilitator, along with supporting documents, if the complainant wishes to pursue the matter. The facilitator will also direct the complainant to send a copy of these materials to the entity that is the subject of the complaint ("respondent"). The Gas Services Division will not process anonymous complaints.

Within two business days of receiving the written complaint, the facilitator will mail the respondent a cover letter from the commission and a copy of the complaint. The respondent must provide the facilitator and the complainant a written response to the complaint within 14 calendar days from the date of the commission cover letter.

Upon receipt of the complaint, the facilitator will begin preliminary research of the complaint, and will seek technical and legal assistance from the commission's Gas Services Division, the Oil & Gas Division, and the Office of General Counsel as needed. The facilitator may ask for additional written information from either participant at any point in the process.

If resolution of the complaint is not reached within 30 calendar days from the date the commission receives the written complaint, the facilitator may set an informal meeting with the participants, if they agree to such a meeting, or may refer the matter to the commission's Office of General Counsel if requested by either participant, if the respondent has not filed a timely response to the complaint, or if the Gas Services Division determines that the matter should be pursued in the public interest.

The Gas Services Division will maintain an internal report of all complaints received. This internal report shall include the informal complaint number, the participants' names, the commission district and county of the complaint, the date the complaint was received by the commission, a brief description of the complaint, and the status of the complaint. The specific points of the participants' discussions and any negotiated resolution will not be included in this internal report. The report will be circulated on a regular basis no less than once every six months to the commissioners, the Director of the Gas Services Division, and the General Counsel.

Mr. Ronald L. Kitchens, Director, Gas Services Division, has determined that for each year of the first five years that the rule as proposed will be in effect there will be no fiscal implications for state government. Mr. Kitchens estimates that approximately 3 informal complaints per month will be handled by the process codified by this rule. Mediation of the informal complaint process will be handled by existing staff of and within the current program budget for the Regulatory Analysis and Policy Section of the Gas Services Division. There will be no fiscal implications for local governments.

Mr. Kitchens anticipates that the public benefit from the proposed rule will be the availability of an alternative procedure to formal evidentiary proceedings for resolving complaints about discrimination prohibited by the Common Purchaser Act, Texas Natural Resources Code, §§111.081, *et seq.*, the Cox Act, Texas Utilities Code, Chapter 121, and the Gas Utility Regulatory Act, Texas Utilities Code, Chapter 104, and the speedier, more efficient resolution of natural gas gathering and transportation service conflicts without litigation or other formal, lengthy, and potentially expensive adversarial proceedings.

The cost of the proposed rule to a complainant is anticipated to be the cost of the time and effort required to discuss the complaint with the facilitator, to file the complaint and any other requested information in written form with the commission and to send a copy to the respondent, and, if necessary, to travel to commission headquarters in Austin for a meeting with the facilitator and the respondent. The cost of the proposed rule to a respondent is anticipated to be the cost of the time and effort required to discuss the complaint with the facilitator, to file the response to the complaint and any other requested information in written form with the commission and to send a copy to the complainant, and, if necessary, to travel to commission headquarters in Austin for a meeting with the facilitator and the complainant. The cost of making and responding to a complaint will vary by type and complexity of the complaint, the response, and the supporting documentation for each. Travel costs will vary with the distance from Austin of the complainant and respondent, the mode of transportation, and the type, if any, of overnight accommodations in Austin, and any expenses for meals or other services.

The cost of compliance with the rule for individuals and small businesses is anticipated to be the same as the costs discussed in the foregoing paragraph should either complainant or respondent be an individual or small business. Because it is not possible to quantify the cost of compliance, it is not possible to analyze the cost of compliance for small businesses in terms of cost per employee, cost for each hour of labor, or cost for each $100 of sales. The estimates of the number of complaints anticipated per month, the public benefit and cost, and the cost of compliance of this rule are based in the experience that the Gas Services Division has had administering a pilot program of an informal complaint process similar to that codified by this rule since June 27, 1996, to the present.

Comments may be submitted to Mary Ross McDonald, Deputy General Counsel, Railroad Commission of Texas, P.O. Box 12967, Austin, TX 78711-2967. Comments should include a reference to Gas Utilities Docket (GUD) No. 8895. The commission will accept comments for 30 days following publication of this proposal in the *Texas Register*. For additional information, call Mark Evarts at (512) 463-9663.

The commission proposes new §7.60 pursuant to the Texas Natural Resources Code, §111.083, which requires common purchasers, as defined in Texas Natural Resources Code, §111.081(a)(2), to purchase or take the natural gas purchased or taken by it as a common purchaser under rules prescribed by the commission in the manner, under the inhibitions against discriminations, and subject to the provisions applicable to common purchasers of oil; Texas Natural Resources Code, §111.086, which requires common purchasers to purchase without discrimination in favor of one producer or person against another producer or person in the same field and without unjust or unreasonable discrimination between fields in this state; Texas Natural Resources Code, §111.087, which prohibits common purchasers from discriminating between or against production of a similar kind or quality in favor of its own production; Texas Natural Resources Code, §111.090, which authorizes the commission to adopt rules that may be necessary to prevent discrimination; Texas Utilities Code, §102.003, which grants the commission the power to require that gas utilities report to the commission information relating to themselves and affiliated interests, both within and without the State of Texas as it may consider useful in the administration of the subtitle (Gas Utilities Regulatory Act); Texas Utilities Code, §104.003, which states that it is the duty of the regulatory authority to ensure that every rate made, demanded, or received by any gas utility, or by any two or more gas utilities jointly, is just and reasonable, and directs that rates may not be unreasonably preferential, prejudicial, or discriminatory, but must be sufficient, equitable, and consistent in application to each class of consumers; Texas Utilities Code, §104.004, which prohibits a gas utility, as to rates or services, from making or granting any unreasonable preference or advantage to any person within any classification, or subject any person within any classification to any unreasonable prejudice or disadvantage, and from establishing and maintaining any unreasonable differences as to rates of service either as between localities or between classes of service; Texas Utilities Code, §104.007, which prohibits gas utilities from discriminating against a person who sells or leases equipment or performs services in competition with the gas utility, and from engaging in a practice that tends to restrict or impair that competition; Texas Utilities Code, §121.151, which directs the commission to establish fair and equitable rules for the full control and supervision of said gas pipelines and all their holdings pertaining to the gas business in all their relations to the public, and to prescribe and enforce rules and regulations for the government and control of such pipelines in respect to their gas pipelines and producing, receiving, transporting, and distributing facilities; Texas Utilities Code, §121.104, which prohibits pipeline gas utilities from discriminating in favor of or against any person or place, either in apportioning the supply of natural gas or in charging for natural gas, and from directly or indirectly charging, demanding, collecting or receiving from anyone a greater or lesser compensation for a service provided than that from another for a similar and contemporaneous service; and Texas Government

Code, §2001.004, which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

Texas Natural Resources Code, §§111.083, 111.081, 111.086, 111.087, and 111.090; Texas Utilities Code, §§102.003, 104.003, 104.004, 104.007, 121.151, and 121.104; and Texas Government Code, §2001.004, are affected by proposed new §7.60.

§7.60. Informal Complaint Procedure for Complaints About Natural Gas Gathering and Transportation Services.

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

(1) Business day–A day that is not a Saturday, a Sunday, or an official State of Texas holiday on which the commission is closed for business.

(2) Commission–The Railroad Commission of Texas.

(3) Complainant–Complaining entity.

(4) Facilitator–Staff member of the Gas Services Division assigned to facilitate a resolution of the informal complaint.

(5) Informal complaint process–A non-judicial and informally conducted procedure for the voluntary resolution of complaints about natural gas gathering and transportation services.

(6) Participant–The complainant or the respondent in an informal complaint proceeding.

(7) Person–An individual, partnership, firm, corporation, joint venture, association, or any other business entity, a state agency or institution, county, municipality, school district, or other governmental subdivision.

(8) Respondent–Subject of the complaint.

(b) Policy. The commission encourages the resolution and early settlement of all complaints about natural gas gathering and transportation services. Commission employees are charged with the responsibility to promote resolution and settlement of such complaints, consistent with the public interest.

(c) Qualifications of facilitators. To qualify as a facilitator, a staff member shall have completed 40 hours of Texas mediation training which meets the standards of the Texas Alternative Dispute Resolution Procedures Act, and shall subscribe to the ethical guidelines for mediators adopted by the Alternative Dispute Resolution Section of the State Bar of Texas.

(d) Helpline. Persons complaining about natural gas gathering and transportation services may register such complaints with the commission using the commission Helpline at (512) 463-7077. Commission staff shall answer calls to the Helpline from 8:00 a.m. to 5:00 p.m. on all regular commission business days. A voice mail system shall be in place to receive any calls during non-business hours.

(e) Informal Complaint Process.

(1) The director of the Gas Services Division or the director's delegate shall assign a complaint to a Gas Services Division facilitator.

(2) The assigned facilitator shall document the complaint by recording the following information:

(A) complainant's name;

(B) complainant's company name;

(C) complainant's company address;

(D) complainant's company phone number;

(E) date and time of complaint;

(F) individual registering complaint, if other than complainant;

(G) description of complaint;

(H) time period of problem described in complaint;

(I) current status of negotiations between the complainant and the respondent;

(J) a description of any other actions the complainant has taken to resolve the problem; and

(K) a description of the relief sought by complainant.

(3) The facilitator shall direct the complainant to submit its complaint in writing, along with supporting documents, to the facilitator if the complainant wishes to pursue the matter. The complainant shall mail or deliver a copy of these materials to the respondent at the same time they are mailed or delivered to the commission.

(4) Within two business days of receiving the written complaint, the facilitator shall notify the respondent in writing by mailing to the respondent a copy of the complaint and all supporting documents.

(5) The respondent shall reply in writing to the facilitator and the complainant within 14 calendar days from the date of the commission's letter.

(6) Upon receipt of the complaint, the facilitator shall begin preliminary research of the complaint, and shall seek technical and legal assistance from the commission's Gas Services Division, the Oil and Gas Division, and the Office of General Counsel as needed.

(7) The facilitator may ask for additional written information from either the complainant or respondent at any point in the process.

(8) If the complainant and the respondent do not resolve the complaint within 30 calendar days from the date the commission received the written complaint, the facilitator may:

(A) set an informal meeting with the participants, if they agree to such a meeting; or

(B) refer the matter to the commission's Office of General Counsel if:

(i) either participant requests a formal hearing;

(ii) the respondent has not filed a timely response to the complaint; or

(iii) the Gas Services Division determines that the matter should be pursued in the public interest.

(f) Internal Report.

(1) The Gas Services Division shall maintain an internal report of all complaints received. The report shall be circulated no less often than once every six months to the commissioners, the Director of the Gas Services Division, and the General Counsel.

(2) The internal report shall include:

(A) the informal complaint number;

(B) the participants' names;

(C) the commission district and county of the complaint;

(D) the date the complaint was received by the commission;

(E) a brief description of the complaint; and

(F) the status of the complaint.

(3) The specific points of the participants' discussions and any negotiated resolution shall not be included in this internal report.

(g) Anonymous Complaints. The Gas Services Division shall not process anonymous complaints under this rule.

(h) Confidentiality of Communications in Informal Complaint Process.

(1) Except as provided in paragraphs (3) and (4) of this subsection, a communication relating to the subject matter made by a participant in the informal complaint process, whether before or after the institution of formal proceedings, shall be confidential, shall not be subject to disclosure in discovery, and shall not be used as evidence in any further proceeding before a commission hearings examiner.

(2) Any notes or record made of an informal complaint process shall be confidential, and participants, including the facilitator, shall not be required to testify in any proceedings relating to or arising out of the matter in dispute or be required to disclose confidential information or data relating to or arising out of the matter in dispute.

(3) Any oral communication or written material used in or made a part of an informal complaint process shall be admissible or discoverable in a separate, formal proceeding only if such communication or material is otherwise admissible or discoverable independent of the informal complaint process.

(4) If this section conflicts with other legal requirements for disclosure of communications or materials, the issue of confidentiality shall be presented to a commission hearings examiner, who may determine, *in camera* if necessary, whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order or whether the communications or materials are subject to disclosure.

(5) A facilitator shall not communicate with a commission hearings examiner or any commissioner on any material or substantive aspect of an informal complaint made confidential by this section.

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

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Chapter 12. Coal Mining Regulations

The Railroad Commission of Texas proposes amendments to 16 TAC §§12.2 (relating to Authority, Responsibility and Applicability); 12.3 (relating to Definitions); 12.188 (relating to Reclamation Plant: Protection of Hydrologic Balance); 12.201 (relating to Prime Farmland); 12.207 (relating to Public Notices of Filing of Permit Applications); 12.218 (relating to Permit Approval or Denial Actions); 12.226 (relating to Permit Revisions); 12.228 (relating to Permit Renewals: Completed Applications); 12.233 (relating to Requirements for New Permits for Persons Succeeding to Rights Granted Under a Permit); 12.237 (relating to Eligibility for Assistance); 12.243 (relating to Applicant Liability); 12.309 (relating to Terms and Conditions of the Bond); 12.312 (relating to Procedure for Seeking Release of Performance Bond); 12.313 (Criteria and Schedule for Release of Performance Bond); 12.338 (relating to Topsoil: Nutrients and Soil Amendments); 12.371 (relating to Coal Processing Waste Banks: Construction Requirements); 12.375 (relating to Disposal of Noncoal Wastes); 12.387 (relating to Backfilling and Grading: Thin Overburden); 12.388 (relating to Backfilling and Grading: Thick Overburden); 12.389 (relating to Regrading or Stabilizing Rills and Gullies); 12.399 (relating to Postmining Land Use); 12.508 (relating to Topsoil: Nutrients and Soil Amendments); and 12.568 (relating to Postmining Land Use).

The commission proposes nonsubstantive amendments to the following sections to correct internal references and grammatical errors: §§12.2(b)(4); 12.218(a)(4); 12.226(b)(2), (c), and (e); 12.228(b)(1) through (3); 12.233(b)(1); 12.338; 12.371(d); 12.375(b); 12.389; 12.399(c)(9)(A); 12.508; and 12.568(c)(9)(A).

The commission proposes amendments to §12.3 to include new definitions for "previously mined area," "thick overburden," and "thin overburden." The commission also proposes to amend the definition of "qualified laboratory" to eliminate unnecessary references within that definition. These definitions conform to language recommended for inclusion in commission rules by the federal Office of Surface Mining, Reclamation, and Enforcement, United States Department of Interior (OSM) for the commission to continue to demonstrate that its program is no less effective than the federal surface mining regulatory program. The commission also proposes to amend the §12.3 by numbering all definitions.

The commission proposes to amend §12.188(a) to include language that was left out of the rules when they were codified. The specific language relates to the requirement to include appropriate maps in a reclamation plan and is required by OSM.

The commission proposes to add new §12.201(d)(5) to address concerns expressed by OSM that Texas' program is less stringent than the federal surface mining program with respect to prime farmland. The new provision prohibits post-mining decreases in aggregate total prime farmland acreage and requires that water bodies constructed during mining and reclamation operations be located within post-reclamation non-prime farmland areas, if possible. The new provision also requires approval of the commission and consent of landowners on the creation of such water bodies. As a practical matter, this change has little impact on the commission's program because there is virtually no prime farmland on surface mined acreage in Texas.

The commission proposes to amend §12.207(c)(1) by deleting the requirement that the Texas Department of Health be notified

of the filing of a permit application. This change is made at the request of the Texas Department of Health.

The commission proposes to amend §12.237(2)(B) and (C) and §12.243(a)(4) and (5) to increase the annual production limit for those qualified to participate in the small operator assistance program from 100,000 to 300,000 tons to conform to changes in state law made during the last legislative session. Sections 12.237(2)(B) and (C) and 12.243(a)(4) and (5) are also amended to increase the ownership attribution amount from five percent to ten percent and to update the reimbursement liability provisions. All changes to §§12.237 and 12.243 are required by OSM.

The commission proposes to add new §12.309(l) to afford a person who has an interest in collateral posted as a bond to notify the commission of his or her desire to receive notification of actions pursuant to the bond. This addition is required by OSM.

The commission proposes to amend §12.312(a) to limit filing of applications for bond release to certain times or seasons, determined by the commission, in order to properly evaluate the completed reclamation operations. Such times or seasons may be adopted by rule or established in the approved reclamation plan. Amendments to this provision also require notice of a bond release application to identify for the reader the name and address to which comments or requests of hearing or informal conferences should be sent. New paragraph (3) also requires that an applicant for bond release submit a notarized statement indicating that all applicable reclamation activities have been accomplished in accordance with the requirements of the approved reclamation plan. These amendments are required by OSM.

The commission proposes to amend §12.312(b) to provide that notice of action on a bond release application shall be provided to the permittee, the surety, and any person with an interest in collateral who requests such notification pursuant to new §12.309(l). This amendment is required by OSM.

The commission proposes to amend §12.313(a) to clarify that the commission can approve a bond release for an incremental area and to eliminate the 25 percent limitation on the amount of a Phase II bond release. Amendments to this subsection also update internal references. These changes are required by OSM.

The commission proposes to amend §12.313(b) to require that notice of action on a bond release be provided to the surety and any person with an interest in collateral who requests such notice pursuant to new §12.309(l). The commission also proposes nonsubstantive editorial changes to §12.313(d) and (f). These changes are required by OSM.

The commission proposes to amend §§12.387 and 12.388 to conform the commission's rules to federal surface mining rules as required by OSM. The amendments impose flexible performance standards for reclamation of areas with thick and thin overburden, and delete existing more specific reclamation criteria for such areas. These amendments have little practical effect as there is currently no surface mined acreage in Texas with thick or thin overburden.

Melvin Hodgkiss, Director, Surface Mining and Reclamation Division, has determined that for each year of the first five years the amendments are in effect, there will be no increased costs of compliance with the amended rules. With the exception of amendments regarding the small operator assistance program, these amendments are largely housekeeping measures that are anticipated to have virtually no practical effect in Texas, but which will keep the Texas program in compliance with OSM requirements. The changes to the small operator assistance program conform to recent changes in Texas law and will decrease regulatory costs to operators who qualify for assistance under the more liberal criteria for acceptance into the program.

Mr. Hodgkiss has also determined that the public benefit from the adoption of the proposed amendments will be increased accuracy in the rules due to correction of internal cites, and continued compliance with requirements of OSM.

Mr. Hodgkiss has determined that during each year of the first five years the proposed amendments are in effect, there will be no fiscal impacts to local governments as a result of their adoption. Mr. Hodgkiss has also determined that during each year of the first five years the proposed amendments are in effect, there may be fiscal impacts to state government associated with providing laboratory services to persons who qualify for the small operator assistance program pursuant to the provisions of §12.237, as proposed. Two operators may qualify for assistance under this program. The actual costs that might be incurred by the commission are undetermined at this point. These costs will involve payment for laboratory work involving determination of the probable hydrologic consequences of the mining and reclamation operations both on and off the proposed permit area and for preparation of a statement of the results of test borings or core sampling efforts.

The commission has not requested a local employment impact statement pursuant to Texas Government Code, §2001.022(b).

Comments on the proposed amendments should be submitted to Melvin Hodgkiss, Director, Surface Mining and Reclamation Division, Railroad Commission of Texas, P. O. Box 12967, Austin, Texas 78711-2967. Comments will be accepted until 5:00 p.m. on the 13th day after publication in the *Texas Register.*

Subchapter A. General

16 TAC §12.2, §12.3

These amendments are proposed under §134.013 of the Texas Natural Resources Code, which provides the commission the authority to promulgate rules pertaining to surface coal mining operations.

The Texas Natural Resources Code, §134.013, is affected by the proposed amendments.

§12.2. Authority, Responsibility and Applicability.

(a) (No change.)

(b) This Chapter applies to all coal exploration and surface coal mining and reclamation operations, except:

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

(4) The extraction of coal incidental to the extraction of other minerals where coal does not exceed 16 2/3 percent of the total tonnage of coal and other minerals removed annually for commercial use or sale in accordance with §§12.25 - 12.33 [~~§§12.25 - 12.34~~] of this title (relating to Exemption for Coal Extraction Incidental to the Extraction of Other Minerals); and

(5) (No change.)

(c)-(f) (No change.)

§12.3. Definitions.

The following words and terms, when used in this Chapter (relating to Coal Mining Regulations), shall have the following meanings unless the context clearly indicates otherwise:

(1) Acid drainage–Water with a pH of less than 6.0 and in which total acidity exceeds total alkalinity, discharged from an active, inactive or abandoned surface coal mine and reclamation operation or from an area affected by surface coal mining and reclamation operations.

(2) Acid-forming materials–Earth materials that contain sulfide minerals or other materials which, if exposed to air, water, or weathering processes, form acids that may create acid drainage.

(3) Act or State Act–The "Texas Surface Coal Mining and Reclamation Act" (Texas Natural Resources Code, Chapter 134).

(4) Adjacent area–Land located outside the affected area or permit area, depending on the context in which adjacent area is used, where air, surface or ground water, fish, wildlife, vegetation or other resources protected by the Act may be adversely impacted by surface coal mining and reclamation operations.

(5) Administratively complete application–An application for permit approval or approval for coal exploration where required, which the Commission determines to contain information addressing each application requirement of the regulatory program and to contain all information necessary to initiate processing and public review.

(6) Affected area–Any land or water surface which is used to facilitate, or which is physically altered by surface coal mining and reclamation operations. Affected area includes the disturbed area; any area upon which surface coal mining and reclamation operations are conducted; any adjacent lands the use of which is incidental to surface coal mining and reclamation operations; all areas covered by new or existing roads used to gain access to, or for hauling coal to or from surface coal mining and reclamation operations; any area covered by surface excavations, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, shipping areas; any areas which contain sited structures, facilities, or other property material on the surface resulting from, or incident to, surface coal mining and reclamation operations; and the area located above underground workings.

(7) Agricultural activities–With respect to alluvial valley floors, the use of any tract of land for the production of animal or vegetable life, where the use is enhanced or facilitated by subirrigation or flood irrigation associated with alluvial valley floors. These uses include, but are not limited to, the pasturing, grazing or watering of livestock, and the cropping, cultivation or harvesting of plants whose production is aided by the availability of water from subirrigation or flood irrigation. Those uses do not include agricultural practices which do not benefit from the availability of water from subirrigation or flood irrigation.

(8) Agricultural use–The use of any tract of land for the production of animal or vegetable life. The uses include, but are not limited to, the pasturing, grazing, and watering of livestock, and the cropping, cultivation, and harvesting of plants.

(9) Airblast–An airborne shock wave resulting from the detonation of explosives and which may or may not be audible.

(10) Alluvial valley floors–The unconsolidated stream-laid deposits holding streams with water availability sufficient for subirrigation or flood irrigation agricultural activities but does not include upland areas which are generally overlain by a thin veneer of colluvial deposits composed chiefly of debris from sheet erosion, deposits formed by unconcentrated runoff or slope wash, together with talus, or other mass-movement accumulations, and windblown deposits.

(11) Anthracite–Coal classified as anthracite in the American Society for [~~of~~] Testing and Materials (ASTM) Standard D 388-77. Coal classifications are published by the ASTM under the title, "Standard Specification for Classification of Coals by Rank", ASTM D 388-77. This ASTM Standard is on file and available for inspection at the Office of the Surface Mining and Reclamation Division, Railroad Commission of Texas, 1701 North Congress Avenue, Austin, Texas.

(12) APA–The "Administrative Procedure Act" (Texas Government Code, Chapter 2001).

(13) Applicant–Any person seeking a permit, permit revision, renewal, and transfer, assignment, or sale of permit rights from the Commission to conduct surface or underground coal mining and reclamation operations pursuant to the Act. With respect to Subchapter G of this chapter (relating to Surface Coal Mining and Reclamation Operations Permits and Coal Exploration Procedures Systems), this term includes a person who seeks to obtain exploration approval or a permit under that subchapter and the regulatory program. With respect to Subchapter M of this chapter (relating to Training), this term includes a person who submits an application to the Commission to request blaster training, examination or certification.

(14) Application–The documents and other information filed with the Commission under this chapter (relating to Coal Mining Regulations) for the issuance of permits; revisions; renewals; and transfers, assignment, or sale of permit rights for surface coal mining and reclamation operations or, where required, for coal exploration. With respect to Subchapter M of this chapter (relating to Training), this term includes a request submitted to the Commission on a prescribed form, and including any required fee and any applicable supporting evidence or other attachments.

(15) Approximate original contour–That surface configuration achieved by backfilling and grading of the mined areas so that the reclaimed area, including any terracing or access roads, closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain, with all highwalls, spoil piles and coal refuse piles eliminated. Permanent water impoundments may be permitted where the Commission has determined that they comply with §134.092(a)(8) of the Act.

(16) Aquifer–A zone, stratum, or group of strata that can store and transmit water in sufficient quantities for a specific use.

(17) Arid or semiarid area–In the context of alluvial valley floors, an area west of the 100th meridian west longitude, experiencing water deficits, where water use by native vegetation equals or exceeds that supplied by precipitation. As an example, the Eagle Pass field in Texas is in an arid or semiarid area.

(18) Auger mining–A method of mining coal at a cliff or highwall by drilling holes into an exposed coal seam from the highwall and transporting the coal along an auger bit to the surface.

(19) Best Technology Currently Available (BTCA)–Equipment, devices, systems, methods, or techniques which will:

(A) prevent, to the extent possible, additional contributions of suspended solids to stream flow or runoff outside the permit area, but in no event result in contributions of suspended solids in excess of requirements set by applicable state or federal laws; and

(B) minimize, to the extent possible, disturbances and adverse impacts on fish, wildlife and related environmental values, and achieve enhancement of those resources where practicable. The term includes equipment, devices, systems, methods, or techniques which are currently available anywhere as determined by the Commission, even if they are not in routine use. The term includes, but is not limited to, construction practices, siting requirements, vegetative selection and planting requirements, animal stocking requirements, scheduling of activities and design of sedimentation ponds in accordance with §§12.330-12.403 and 12.500-12.572 of this title (relating to Permanent Program Performance Standards–Surface Mining Activities, and to Permanent Program Performance Standards–Underground Mining Activities). The Commission shall have the discretion to determine the best technology currently available on a case-by-case basis, as authorized by the Act and this chapter (relating to Coal Mining Regulations).

(20) Blaster–A person who is directly responsible for the use of explosives.

(21) Blaster certification–To issue to an applicant a Commission Blaster Certificate.

(22) Blasthole–A hole drilled for the placement of explosives in rock or other material to be blasted.

(23) Blasting crew–Persons whose function is to load explosive charges and assist blasters in the use of explosives.

(24) Cemetery–Any area of land where human bodies are interred.

(25) Certificate issuance–To grant to an applicant his or her first Commission blaster certificate.

(26) Certificate reissuance–To grant to an applicant, who has had a Commission blaster certificate that expired or was revoked, a subsequent certificate for which additional training and examination are required.

(27) Certificate renewal–To grant to an applicant, who holds a Commission blaster certificate that is currently valid and not expired or revoked, a subsequent certificate for which training and examination are not required.

(28) Certificate replacement–To grant to an applicant, who holds a Commission blaster certificate that is currently valid and not expired, suspended, or revoked, a duplicate certificate as a substitute for one that was lost or destroyed.

(29) Certified blaster–A person who has met the qualifications of Subchapter M of this chapter (relating to Training) and who has been issued a Commission blaster certificate that is currently valid and not expired, suspended, or revoked.

(30) CFR–The federal Code of Federal Regulations.

(31) Close of public comment period–The close of a public hearing on a surface mining permit application. When no public hearing is held, this time shall be 30 days after the last publication of the newspaper notice required by §12.207(a) of this title (relating to Public Notices of Filing of Permit Applications).

(32) Coal–Combustible carbonaceous rock, classified as anthracite, bituminous, subbituminous, or lignite by ASTM Standard D 388-77.

(33) Coal exploration–The field gathering of:

(A) Surface or subsurface geologic, physical, or chemical data by mapping, trenching, drilling, geophysical, or other techniques necessary to determine the quality and quantity of overburden and coal of an area; or

(B) The gathering of environmental data to establish the conditions of an area before beginning surface coal mining and reclamation operations under the requirements of this chapter (relating to Coal Mining Regulations).

(34) Coal exploration operation–The substantial disturbance of the surface or subsurface for the purpose of coal exploration.

(35) Coal mine waste–Coal processing waste and underground development waste.

(36) Coal mining operation–The business of developing, producing, preparing or loading bituminous coal, subbituminous coal, anthracite, or lignite, or of reclaiming the areas upon which such activities occur.

(37) Coal preparation–Chemical or physical processing and the cleaning, concentrating, or other processing or preparation of coal.

(38) Coal processing plant or coal preparation plant–A facility where coal is subjected to chemical or physical processing or cleaning, concentrating, or other processing or preparation. It includes facilities associated with coal preparation activities, including, but not limited to, the following: loading facilities; storage and stockpile facilities; sheds, shops and other buildings; water treatment and water storage facilities; settling basins and impoundments; coal processing and other waste disposal areas; and, roads, railroads and other transport facilities. It does not include facilities operated by the final consumer of the coal, such as an electricity generating power plant, when, in the opinion of the Commission, the primary purpose of the facilities is to make the coal ready for conversion into a different energy form and the facilities are located at or near the electricity generating plant or other point of final consumption away from the mine site and outside of the approved mine permit area.

(39) Coal processing waste–Earth materials which are separated and wasted from the product coal during cleaning, concentrating, or other processing or preparation of coal.

(40) Combustible material–Organic material that is capable of burning, either by fire or through oxidation, accompanied by the evolution of heat and a significant temperature rise.

(41) Commission–The Railroad Commission of Texas.

(42) Commission Blaster Certificate–A certificate issued by the Commission to a person determined to be qualified under §§12.700-12.710 of this title (relating to Training, Examination, and Certification of Blasters) to be directly responsible for the use of explosives in mining operations regulated by the Commission.

(43) Commissioner–One of the elected or appointed members of the decision making body defined as the Commission.

(44) Community or institutional building–Any structure, other than a public building or an occupied dwelling, which is used primarily for meetings, gatherings or functions of local civic organizations or other community groups; functions as an educational, cultural, historic, religious, scientific, correctional, mental-health or physical health care facility; or is used for public services, including, but not limited to, water supply, power generation or sewage treatment.

(45) Compaction–Increasing the density of a material by reducing the voids between the particles and is generally accomplished by controlled placement and mechanical effort such as from repeated application of wheel, track, or roller loads from heavy equipment.

(46) Complete and accurate application–An application for permit approval or approval for coal exploration where required, which the Commission determines to contain all information required under the Act, this chapter (relating to Coal Mining Regulations), and the regulatory program that is necessary to make a decision on permit issuance.

(47) Cropland–Land used for the production of adapted crops for harvest, alone or in a rotation with grasses and legumes, and includes row crops, small grain crops, hay crops, nursery crops, orchard crops, and other similar specialty crops, but does not include quick cover crops grown primarily for erosion control.

(48) Cumulative impact area–The area, including the permit area, within which impacts resulting from the proposed operation may interact with the impacts of all anticipated mining on surface-water and ground-water systems. Anticipated mining shall include, at a minimum, the entire projected lives through bond release of:

(A) the proposed operation;

(B) all existing operations;

(C) any operation for which a permit application has been submitted to the Commission; and

(D) all operations required to meet diligent development requirements for leased federal coal for which there is actual mine development information available.

(49) Cumulative measurement period–As used in §§12.25-12.33 of this title (relating to Exemption for Coal Extraction Incidental to the Extraction of Other Minerals), the period of time over which both cumulative production and cumulative revenue are measured.

(A) For purposes of determining the beginning of the cumulative measurement period, subject to Commission approval, the operator must select and consistently use one of the following:

(i) for mining areas where coal or other minerals were extracted prior to August 3, 1977, the date extraction of coal or other minerals commenced at that mining area or August 3, 1977; or

(ii) for mining areas where extraction of coal or other minerals commenced on or after August 3, 1977, the date extraction of coal or other minerals commenced at that mining area, whichever is earlier.

(B) For annual reporting purposes pursuant to §12.33 of this title (relating to Reporting Requirements), the end of the period for which cumulative production and revenue is calculated is either:

(i) for mining areas where coal or other minerals were extracted prior to the effective date of §§12.25-12.33 of this title (relating to Exemption from Coal Extraction Incidental to the Extraction of Other Minerals), the first anniversary of that date, and each anniversary of that date thereafter; or

(ii) for mining areas where extraction of coal or other minerals commenced on or after the effective date of §§12.25-12.33 of this title, the last day of the calendar quarter during which coal extraction commenced, and each anniversary of that date thereafter.

(50) Cumulative production–As used in §§12.25-12.33 of this title, the total tonnage of coal or other minerals extracted from a mining area during the cumulative measurement period. The inclusion of stockpiled coal and other mineral tonnages in this total is governed by §12.31 of this title (relating to Stockpiling of Minerals).

(51) Cumulative revenue–As used in §§12.25-12.33 of this title, the total revenue derived from the sale of coal or other minerals and the fair market value of coal or other minerals transferred or used, but not sold, during the cumulative measurement period.

(52) Department–The U.S. Department of the Interior.

(53) Direct financial interest–Ownership or part ownership by an employee of lands, stocks, bonds, debentures, warrants, partnership shares, or other holdings and also means any other arrangement where the employee may benefit from his or her holding in or salary from coal mining operations. Direct financial interests include employment, pensions, creditor, real property and other financial relationships.

(54) Director–The Director or Acting Director, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, or the Director's representative.

(55) Disturbed area–An area where vegetation, topsoil, or overburden is removed or upon which topsoil, spoil, coal processing waste, underground development waste, or noncoal waste is placed by surface coal mining operations. Those areas are classified as disturbed until reclamation is complete and the performance bond or other assurance of performance required by Subchapter J of this chapter (relating to Bond and Insurance Requirements for Surface Coal Mining and Reclamation Operations) is released.

(56) Diversion–A channel, embankment, or other manmade structure constructed to divert water from one area to another.

(57) Division–The Surface Mining and Reclamation Division of the Railroad Commission of Texas.

(58) Downslope–The land surface between the projected outcrop of the lowest coal bed being mined along each highwall and a valley floor.

(59) Embankment–An artificial deposit of material that is raised above the natural surface of the land and used to contain, divert, or store water, support roads or railways, or for other similar purposes.

(60) Employee–Shall include:

(A) any person employed by the Commission who performs any function or duty under the Act, including the Commissioners; and

(B) Advisory board or Commission members and consultants who perform any function or duty under the Act, if they perform decision making functions for the Commission under the authority of state law or regulations. However, members of advisory boards or commissions established in accordance with state law or regulations to represent multiple interests are not considered to be employees.

(61) Ephemeral stream–A stream which flows only in direct response to precipitation in the immediate watershed or in response to the melting of a cover of snow and ice, and which has a channel bottom that is always above the local water table.

(62) Essential hydrologic functions–The role of an alluvial valley floor in collecting, storing, regulating, and making the natural flow of surface or ground water, or both, usefully available

for agricultural activities by reason of the valley floor's topographic position, the landscape and the physical properties of its underlying materials. A combination of these functions provides a water supply during extended periods of low precipitation.

(A) The role of the valley floor in collecting water includes accumulating runoff and discharge from aquifers in sufficient amounts to make the water available at the alluvial valley floor greater than the amount available from direct precipitation.

(B) The role of the alluvial valley floor in storing water involves limiting the rate of discharge of surface water, holding moisture in soils, and holding ground water in porous materials.

(C) The role of the alluvial valley floor in regulating:

(i) the natural flow of surface water results from the characteristic configuration of the channel flood plain and adjacent low terraces; and

(ii) the natural flow of ground water results from the properties of the aquifers which control inflow and outflow.

(D) The role of the alluvial valley floor in making water usefully available for agricultural activities results from the existence of flood plains and terraces where surface and ground water can be provided in sufficient quantities to support the growth of agriculturally useful plants, from the presence of earth materials suitable for the growth of agriculturally useful plants, from the temporal and physical distribution of water making it accessible to plants throughout the critical phases of the growth cycle either by flood irrigation or by subirrigation, from the natural control of alluvial valley floors in limiting destructive extremes of stream discharge, and from the erosional stability of earth materials suitable for the growth of agriculturally useful plants.

(63) Existing structure–A structure or facility used in connection with or to facilitate surface coal mining and reclamation operations for which construction began prior to approval of the state program.

(64) Experimental practice–The use of alternative surface coal mining and reclamation operation practices for experimental or research purposes.

(65) Explosives–Any chemical compound, mixture, or device by whose decomposition or combustion gas is generated with such rapidity that it can be used for blasting.

(66) Extraction of coal as an incidental part–The extraction of coal which is necessary to enable the construction to be accomplished. For purposes of §§12.21 and 12.22 of this title (relating to Applicability, and to Information to be Maintained On Site), only that coal extracted from within the right-of-way, in the case of a road, railroad, utility line or other such construction, or within the boundaries of the area directly affected by other types of government-financed construction, may be considered incidental to that construction. Extraction of coal outside the right-of-way or boundary of the area directly affected by the construction shall be subject to the requirements of the Act and this chapter (relating to Coal Mining Regulations).

(67) Federal Act–The "Surface Mining Control and Reclamation Act of 1977" (Pub. L. 95-87).

(68) Federal lands–Any land, including mineral interests, owned by the United States, without regard to how the United States acquired ownership of the lands or which agency manages the lands. It does not include Indian lands.

(69) Federal lands program–A program established by the Secretary, pursuant to Section 523 of the Federal Act, to regulate surface coal mining and reclamation operations on federal lands.

(70) Flood irrigation–With respect to alluvial valley floors, supplying water to plants by natural overflow or the diversion of flows, so that the irrigated surface is largely covered by a sheet of water.

(71) Flyrock–Rock or other blasted material that is propelled from a blast through the air or along the ground.

(72) Fragile lands–Areas containing natural, ecologic, scientific or esthetic resources that could be significantly damaged by surface coal mining operations. Examples of fragile lands include valuable habitats for fish or wildlife, critical habitats for endangered or threatened species of animals or plants, uncommon geologic formations, paleontological sites, National Natural Landmarks, areas where mining may result in flooding, environmental corridors containing a concentration of ecologic and esthetic features, and areas of recreational value due to high environmental quality.

(73) Fugitive dust–That particulate matter not emitted from a duct or stack which becomes airborne due to the forces of wind or surface coal mining and reclamation operations or both. During surface coal mining and reclamation operations, it may include emissions from haul roads; wind erosion of exposed surfaces, storage piles, and spoil piles; reclamation operations; and other activities in which material is either removed, stored, transported, or redistributed.

(74) Fund–The Abandoned Mine Reclamation Fund established pursuant to Section 401 of the Federal Act.

(75) General area–With respect to hydrology, the topographic and ground-water basin surrounding a permit area which is of sufficient size, including areal extent and depth, to include one or more watersheds containing perennial streams and ground-water zones and to allow assessment of the probable cumulative impacts on the quality and quantity of surface- and ground-water systems in the basins.

(76) Government financing agency–A federal, state, county, municipal, or local unit of government, or a department, bureau, agency or office of the unit which, directly or through another unit of government, finances construction.

(77) Government-financed construction–Construction funded 50% or more by funds appropriated from a government financing agency's budget or obtained from general revenue bonds, but shall not mean government financing agency guarantees, insurance, loans, funds obtained through industrial revenue bonds or their equivalent, or in-kind payments.

(78) Ground cover–The area of ground covered by the combined aerial parts of vegetation and the litter that is produced naturally onsite, expressed as a percentage of the total area of measurement.

(79) Ground water–Subsurface water that fills available openings in rock or soil materials to the extent that they are considered water saturated.

(80) Half-shrub–A perennial plant with a woody base whose annually produced stems die back each year.

(81) Head-of-hollow fill–A fill structure consisting of any material, other than coal processing waste and organic material, placed in the uppermost reaches of a hollow where side slopes of the existing hollow measured at the steepest point are greater than 20 degrees or the average slope of the profile of the hollow from the

toe of the fill to the top of the fill is greater than 10 degrees. In fills with less than 250,000 cubic yards of material, associated with contour mining, the top surface of the fill will be at the elevation of the coal seam. In all other head-of-hollow fills, the top surface of the fill, when completed, is at approximately the same elevation as the adjacent ridge line, and no significant area of natural drainage occurs above the fill draining into the fill area.

(82) Highwall–The face of exposed overburden and coal in an open cut of a surface coal mining activity or for entry to underground mining activities.

(83) Historically used for cropland–Refers to:

(A) lands that have been used for cropland for any 5 years or more out of the 10 years immediately preceding the acquisition, including purchase, lease, or option, of the land for the purpose of conducting or allowing through resale, lease or option the conduct of surface coal mining and reclamation operations;

(B) lands that the Commission determines, on the basis of additional cropland history of the surrounding lands and the lands under consideration, that the permit area is clearly cropland but falls outside the specific 5-years-in-10 criterion, in which case the regulations for prime farmland may be applied to include more years of cropland history only to increase the prime farmland acreage to be preserved; or

(C) lands that would likely have been used as cropland for any 5 out of the last 10 years, immediately preceding such acquisition but for some fact of ownership or control of the land unrelated to the productivity of the land.

(84) Historic lands–Historic, cultural, or scientific resources. Examples of historic lands include archeological sites, National Historic Landmarks, properties listed on or eligible for listing on a state or National Register of Historic Places, properties having religious or cultural significance to Native Americans or religious groups, and properties for which historic designation is pending.

(85) Hydrologic balance–The relationship between the quality and quantity of water inflow to, water outflow from, and water storage in a hydrologic unit such as a drainage basin, aquifer, soil zone, lake, or reservoir. It encompasses the dynamic relationships among precipitation, runoff, evaporation, and changes in ground and surface water storage.

(86) Hydrologic regime–The entire state of water movement in a given area. It is a function of the climate and includes the phenomena by which water first occurs as atmospheric water vapor, passes into a liquid or solid form, falls as precipitation, moves along or into the ground surface, and returns to the atmosphere as vapor by means of evaporation and transpiration.

(87) Imminent danger to the health and safety of the public–The existence of any condition or practice, or any violation of a permit or other requirements of the Act in a surface coal mining and reclamation operation, which condition, practice, or violation could reasonably be expected to cause substantial physical harm to persons outside the permit area before such condition, practice, or violation can be abated. A reasonable expectation of death or serious injury before abatement exists if a rational person, subjected to the same condition or practices giving rise to the peril, would not expose himself to the danger during the time necessary for abatement.

(88) Impoundment–A closed basin, naturally formed or artificially built, which is dammed or excavated for the retention of water, sediment, or waste.

(89) Indian lands–All lands, including mineral interests, within the exterior boundaries of any federal Indian reservation, notwithstanding the issuance of any patent, and including rights-of-way, and all lands including mineral interests held in trust for or supervised by an Indian tribe.

(90) Indian tribe–Any Indian tribe, band, group, or community having a governing body recognized by the Secretary.

(91) Indirect financial interest–The same financial relationships as for direct ownership, but where the employee reaps the benefits of such interests, including interests held by his or her spouse, minor child and other relatives, including in-laws, residing in the employee's home. The employee will not be deemed to have an indirect financial interest if there is no relationship between the employee's functions or duties and the coal mining operation in which the spouse, minor children or other resident relatives hold a financial interest.

(92) In situ processes–Activities conducted on the surface or underground in connection with in-place distillation, retorting, leaching, or other chemical or physical processing of coal. The term includes, but is not limited to, in situ gasification, in situ leaching, slurry mining, solution mining, borehole mining, and fluid recovery mining.

(93) Intermittent stream–A stream or reach of a stream that:

(A) drains a watershed of at least one square mile; or

(B) is below the local water table for at least some part of the year, and obtains its flow from both surface runoff and ground-water discharge.

(94) Irreparable damage to the environment–Any damage to the environment that cannot be or has not been corrected by actions of the applicant.

(95) Knowingly–With respect to §§12.696-12.699 of this title (relating to Individual Civil Penalties), that an individual knew or had reason to know in authorizing, ordering, or carrying out an act or omission on the part of a corporate permittee that such act or omission constituted a violation, failure, or refusal.

(96) Land use–Specific uses or management-related activities, rather than the vegetation or cover of the land. Land uses may be identified in combination when joint or seasonal uses occur. Changes of land use or uses from one of the following categories to another shall be considered as a change to an alternative land use which is subject to approval by the Commission.

(A) Cropland. Land used for the production of adapted crops for harvest, alone or in a rotation with grasses and legumes, and includes row crops, small grain crops, hay crops, nursery crops, orchard crops, and other similar specialty crops. Land used for facilities in support of cropland farming operations which is adjacent to or an integral part of these operations is also included for purposes of these land use categories.

(B) Pastureland or land occasionally cut for hay. Land used primarily for the long-term production of adapted, domesticated forage plants to be grazed by livestock or occasionally cut and cured for livestock feed. Land used for facilities in support of pastureland or land occasionally cut for hay which is adjacent to or an integral part of these operations is also included.

(C) Grazingland. Includes both grasslands and forest lands where the indigenous vegetation is actively managed for grazing, browsing, or occasional hay production. Land used for

facilities in support of ranching operations which are adjacent to or an integral part of these operations is also included.

(D) Forestry. Land used or managed for the long-term production of wood, wood fiber, or wood derived products. Land used for facilities in support of forest harvest and management operations which is adjacent to or an integral part of these operations is also included.

(E) Residential. Includes single- and multiple-family housing, mobile home parks, and other residential lodgings. Land used for facilities in support of residential operations which is adjacent to or an integral part of these operations is also included. Support facilities include, but are not limited to, vehicle parking and open space that directly relate to the residential use.

(F) Industrial/Commercial. Land used for:

(i) extraction or transformation of materials for fabrication of products, wholesaling of products, or for long-term storage of products. This includes all heavy and light manufacturing facilities, such as lumber and wood processing, chemical manufacturing, petroleum refining, and fabricated metal products manufacturing. Land used for facilities in support of these operations which is adjacent to or an integral part of that operation is also included. Support facilities include, but are not limited to, all rail, road, and other transportation facilities; or

(ii) retail or trade of goods or services, including hotels, motels, stores, restaurants, and other commercial establishments. Land used for facilities in support of commercial operations which is adjacent to or an integral part of these operations is also included. Support facilities include, but are not limited to, parking, storage or shipping facilities.

(G) Recreation. Land used for public or private leisure-time use, including developed recreation facilities such as parks, camps, and amusement areas, as well as areas for less intensive uses such as hiking, canoeing, and other undeveloped recreational uses.

(H) Fish and wildlife habitat. Land dedicated wholly or partially to the production, protection or management of species of fish or wildlife.

(I) Developed water resources. Includes land used for storing water for beneficial uses, such as stockponds, irrigation, fire protection, flood control, and water supply.

(J) Undeveloped land or no current use or land management. Land that is undeveloped or, if previously developed, land that has been allowed to return naturally to an undeveloped state or has been allowed to return to forest through natural succession.

(97) Materially damage the quantity or quality of water–With respect to alluvial valley floors, changes in the quality or quantity of the water supply to any portion of an alluvial valley floor where such changes are caused by surface coal mining and reclamation operations and result in changes that significantly and adversely affect the composition, diversity, or productivity of vegetation dependent on subirrigation, or which result in changes that would limit the adequacy of the water for flood irrigation of the irrigable land acreage existing prior to mining.

(98) Mining area–As used in §§12.25-12.33 of this title, an individual excavation site or pit from which coal, other minerals, and overburden are removed.

(99) Moist bulk density–The weight of soil (oven dry) per unit volume. Volume is measured when the soil is at field moisture capacity (1/3 bar moisture tension). Weight is determined after drying the soil at 105 degrees C.

(100) Monitoring–The collection of environmental data by either continuous or periodic sampling methods.

(101) Mulch–Vegetation residues or other suitable materials that aid in soil stabilization and soil moisture conservation, thus providing micro-climatic conditions suitable for germination and growth.

(102) Natural hazard lands–Geographic areas in which natural conditions exist which pose or, as a result of surface coal mining operations, may pose a threat to the health, safety or welfare of people, property or the environment, including areas subject to landslides, cave-ins, large or encroaching sand dunes, severe wind or soil erosion, frequent flooding, avalanches and areas of unstable geology.

(103) Noxious plants–Species that have been included on official Texas list of noxious plants.

(104) Occupied dwelling–Any building that is currently being used on a regular or temporary basis for human habitation.

(105) Office–The Office of Surface Mining Reclamation and Enforcement, within the U.S. Department of the Interior, established under Title II of the Federal Act.

(106) Operator–Any person engaged in coal mining who removes or intends to remove more than 250 tons of coal from the earth or from coal refuse piles by mining within 12 consecutive calendar months in any one location.

(107) Other minerals–As used in §§12.25-12.33 of this title, any commercially valuable substance mined for its mineral value, excluding coal, topsoil, waste, and fill material.

(108) Other treatment facility–Any chemical treatments, such as flocculation or neutralization, or mechanical structures, such as clarifiers or precipitators, that have a point source discharge and are utilized:

(A) to prevent additional contributions of dissolved or suspended solids to streamflow or runoff outside the permit area; or

(B) to comply with all applicable state and federal water-quality laws and regulations.

(109) Outslope–The face of the spoil or embankment sloping downward from the highest elevation to the toe.

(110) Overburden–Material of any nature, consolidated or unconsolidated, that overlies a coal deposit, excluding topsoil.

(111) Owned or controlled and owns or controls–Any one or a combination of the following relationships:

(A) being a permittee of a surface coal mining operation;

(B) based on instrument of ownership or voting securities, owning of record in excess of 50% of an entity;

(C) having any other relationship which gives one person authority directly or indirectly to determine the manner in which an applicant, an operator, or other entity conducts surface coal mining operations; or

(D) the following relationships are presumed to constitute ownership or control unless a person can demonstrate that the person subject to the presumption does not, in fact, have the authority

directly or indirectly to determine the manner in which the relevant surface coal mining operation is conducted:

(i) being an officer or director of an entity;

(ii) being the operator of a surface coal mining operation;

(iii) having the ability to commit the financial or real property assets or working resources of an entity;

(iv) being a general partner in a partnership;

(v) based on the instruments of ownership or the voting securities of a corporate entity, owning of record 10% through 50% of the entity; or

(vi) owning or controlling coal to be mined by another person under a lease, sublease or other contract and having the right to receive such coal after mining or having authority to determine the manner in which that person or another person conducts a surface coal mining operation.

(112) Owner of record or ownership interest of record–The owner and address as shown in the tax records of the Texas Assessor-Collector of taxes for the county where the property is located.

(113) Perennial stream–A stream or part of a stream that flows continuously during all of the calendar year as a result of ground-water discharge or surface runoff. The term does not include intermittent stream or ephemeral stream.

(114) Performance bond–A surety bond, collateral bond or self-bond or a combination thereof, by which a permittee assures faithful performance of all the requirements of the Act, this chapter (relating to Coal Mining Regulations), and the requirements of the permit and reclamation plan.

(115) Performing any function or duty under this Act–Those decisions or actions, which if performed or not performed by an employee, affect the programs under the Act.

(116) Permanent diversion–A diversion remaining after surface coal mining and reclamation operations are completed which has been approved for retention by the Commission and other appropriate state and federal agencies.

(117) Permanent impoundment–An impoundment which is approved by the Commission and, if required, by other state and federal agencies for retention as part of the postmining land use.

(118) Permit–A permit to conduct surface coal mining and reclamation operations issued by the Commission.

(119) Permit area–The area of land and water indicated on the map submitted by the operator with his application, as approved by the Commission, which area shall be covered by the operator's bond as required by §§134.121-134.127 of the Act and shall be readily identifiable by appropriate markers on the site. This area shall include, at a minimum, all areas which are or will be affected by the surface coal mining and reclamation operations during the term of the permit.

(120) Permittee–A person holding or required by the Act or this chapter (relating to Coal Mining Regulations) to hold a permit to conduct surface or underground coal mining and reclamation operations issued by the Commission.

(121) Person–An individual, partnership, society, joint stock company, firm, company, corporation, business organization, governmental agency, or any organization or association of citizens.

(122) Person having an interest which is or may be adversely affected or person with a valid legal interest–Shall include any person:

(A) who uses any resources of economic, recreational, esthetic, or environmental value that may be adversely affected by coal exploration or surface coal mining and reclamation operations or any related action of the Commission; or

(B) whose property is or may be adversely affected by coal exploration or surface coal mining and reclamation operations or any related action of the Commission.

(123) Precipitation event–A quantity of water resulting from drizzle, rain, snow, sleet, or hail in a limited period of time. It may be expressed in terms of recurrence interval. As used in these regulations, precipitation event also includes that quantity of water emanating from snow cover as snowmelt in a limited period of time.

(124) Previously mined area–Land affected by surface coal mining operations prior to August 3, 1997, that has not been reclaimed to the standards of this Chapter (relating to Coal Mining Regulations).

(125) Prime farmland–Those lands which are defined by the Secretary of Agriculture in 7 CFR 657 and which have been historically used for cropland.

(126) Principal shareholder–Any person who is the record or beneficial owner of 10% or more of any class of voting stock.

(127) Probable cumulative impacts–The expected total qualitative, and quantitative, direct and indirect effects of mining and reclamation activities on the hydrologic regime.

(128) Probable hydrologic consequences–The projected result of proposed surface coal mining and reclamation operations which may reasonably be expected to change the quantity or quality of the surface- or ground-water flow, timing and pattern; the stream-channel conditions; and the aquatic habitat on the permit area and other affected areas.

(129) Professional specialist–A person whose training, experience, and professional certification or licensing are acceptable to the Commission for the limited purpose of performing certain specified duties under this chapter (relating to Coal Mining Regulations).

(130) Prohibited financial interest–Any direct or indirect financial interest in any coal mining operation.

(131) Property to be mined–Both the surface estates and mineral estates within the permit area and the area covered by underground workings.

(132) Public building–Any structure that is owned or leased, and principally used by a governmental agency for public business or meetings.

(133) Publicly-owned park–A public park that is owned by a federal, state or local governmental entity.

(134) Public office–A facility under the direction and control of a governmental entity which is open to public access on a regular basis during reasonable business hours.

(135) Public park–An area or portion of an area dedicated or designated by any federal, state, or local agency primarily for public recreational use, whether or not such use is limited to certain times or days, including any land leased, reserved, or held open to the public because of that use.

(136) Public road–Any thoroughfare open to the public for passage of vehicles.

(137) Qualified jurisdiction–A state or federal mining regulatory authority that has a blaster certification program approved by the U.S. Department of the Interior, Office of Surface Mining Reclamation and Enforcement, in accordance with the Federal Act.

(138) Qualified laboratory–A designated public agency, private [~~consulting~~] firm, institution, or analytical laboratory that [~~which~~] can provide the required determination of probable hydrologic consequences or statement of results of test borings or core samplings or other services as specified at §§12.236 and 12.240 of this title (relating to Program Services, and Data Requirements), and that meet the standards of §12.241 of this title (relating to Qualified Laboratories) [~~required under §§12.234 through 12.243 of this title (relating to Small Operator Assistance Program)~~].

(139) Recharge capacity–The ability of the soils and underlying materials to allow precipitation and runoff to infiltrate and reach the zone of saturation.

(140) Reciprocity–The conditional recognition by the Commission of a blaster certificate issued by another qualified jurisdiction.

(141) Reclamation–Those actions taken to restore mined land as required by this chapter (relating to Coal Mining Regulations) to a postmining land use approved by the Commission.

(142) Recurrence interval–The interval of time in which a precipitation event is expected to occur once, on the average. For example, the 10-year, 24-hour precipitation event would be that 24-hour precipitation event expected to occur on the average once in 10 years.

(143) Reference area–A land unit maintained under appropriate management for the purpose of measuring vegetation ground cover, productivity and plant species diversity that are produced naturally or by crop production methods approved by the Commission. Reference areas must be representative of geology, soil, slope, and vegetation in the permit area.

(144) Regional Director–A Regional Director of the Office or a Regional Director's representative.

(145) Registered professional engineer–A person who is duly licensed by the Texas State Board of Registration for Professional Engineers to engage in the practice of engineering in this state.

(146) Renewable resource lands–Aquifers and areas for the recharge of aquifers and other underground waters, areas for agricultural or silvicultural production of food and fiber, and grazing lands. With respect to Subchapter F of this chapter (relating to Lands Unsuitable for Mining), geographic areas which contribute significantly to the long-range productivity of water supply or of food or fiber products, such lands to include aquifers and aquifer recharge areas.

(147) Replacement of water supply–With respect to protected water supplies contaminated, diminished, or interrupted by coal mining operations, provision of water supply on both a temporary and permanent basis equivalent to premining quantity and quality. Replacement includes provision of an equivalent water-delivery system and payment of operation and maintenance costs in excess of customary and reasonable delivery costs for premining water supplies.

(A) Upon agreement by the permittee and the water-supply owner, the obligation to pay such operation and maintenance costs may be satisfied by a one-time payment in an amount which covers the present worth of the increased annual operation and maintenance costs for a period agreed to by the permittee and the water-supply owner.

(B) If the affected water supply was not needed for the land use in existence at the time of loss, contamination, or diminution, and if the supply is not needed to achieve the postmining land use, replacement requirements may be satisfied by demonstrating that a suitable alternative water source is available and could feasibly be developed. If the latter approach is selected, written concurrence must be obtained from the water-supply owner.

(148) Road–A surface right-of-way for purposes of travel by land vehicles used in surface coal mining and reclamation operations or coal exploration. A road consists of the entire area within the right-of-way, including the roadbed, shoulders, parking and side areas, approaches, structures, ditches, and surface. The term includes access and haulroads constructed, used, reconstructed, improved, or maintained for use in surface coal mining and reclamation operations or coal exploration, including use by coal-hauling vehicles to and from transfer, processing, or storage areas. The term does not include ramps and routes of travel within the immediate mining area or within spoil or coal mine waste disposal areas.

(149) Safety factor–The ratio of the available shear strength to the developed shear stress, or the ratio of the sum of the resisting forces to the sum of the loading or driving forces, as determined by accepted engineering practices.

(150) Secretary–The Secretary of the U.S. Department of the Interior, or the Secretary's representative.

(151) Sedimentation pond–A primary sediment control structure designed, constructed and maintained in accordance with §12.344 or §12.514 of this title (relating to Hydrologic Balance: Siltation Structures) and including but not limited to a barrier, dam, or excavated depression which slows down water runoff to allow sediment to settle out. A sedimentation pond shall not include secondary sedimentation control structures, such as straw dikes, riprap, check dams, mulches, dugouts and other measures that reduce overland flow velocity, reduce runoff volume or trap sediment to the extent that such secondary sedimentation structures drain to a sedimentation pond.

(152) Significant forest cover–An existing plant community consisting predominantly of trees and other woody vegetation.

(153) Significant, imminent environmental harm to land, air or water resources–Determined in the following context:

(A) An environmental harm is an adverse impact on land, air, or water resources, which resources include, but are not limited to, plant and animal life.

(B) An environmental harm is imminent, if a condition, practice, or violation exists which:

(i) is causing such harm; or

(ii) may reasonably be expected to cause such harm at any time before the end of the reasonable abatement time that would be set under §134.162 of the Act.

(C) An environmental harm is significant if that harm is appreciable and not immediately reparable.

(154) Significant recreational, timber, economic, or other values incompatible with surface coal mining operations–Those significant values which could be damaged by, and are not capable of existing together with, surface coal mining operations because of the undesirable effects mining would have on those values, either on the area included in the permit application or on other affected areas. Those values to be evaluated for their significance include:

(A) recreation, including hiking, boating, camping, skiing or other related outdoor activities;

(B) timber management and silviculture;

(C) agriculture, aquaculture or production of other natural, processed or manufactured products which enter commerce; and

(D) scenic, historic, archaeologic, esthetic, fish, wildlife, plants or cultural interests.

(155) Siltation structure–A sedimentation pond, a series of sedimentation ponds, or other treatment facility.

(156) Slope–Average inclination of a surface, measured from the horizontal, generally expressed as the ratio of a unit of horizontal distance to a given number of units of vertical distance (e.g., 5h:1v). It may also be expressed as a percent or in degrees.

(157) Soil horizons–Contrasting layers of soil parallel or nearly parallel to the land surface. Soil horizons are differentiated on the basis of field characteristics and laboratory data. The four master soil horizons are:

(A) A horizon. The uppermost mineral layer, often called the surface soil. It is the part of the soil in which organic matter is most abundant, and leaching of soluble or suspended particles is typically the greatest;

(B) E horizon. The layer commonly near the surface below an A horizon and above a B horizon. An E horizon is most commonly differentiated from an overlying A horizon by lighter color and generally has measurably less organic matter than the A horizon. An E horizon is most commonly differentiated from an underlying B horizon in the same sequum by color of higher value or lower chroma, by coarser texture, or by a combination of these properties;

(C) B horizon. The layer that typically is immediately beneath the E horizon and often called the subsoil. This middle layer commonly contains more clay, iron, or aluminum than the A, E, or C horizons; and

(D) C horizon. The deepest layer of soil profile. It consists of loose material or weathered rock that is relatively unaffected by biologic activity.

(158) Soil survey–A field and other investigation, resulting in a map showing the geographic distribution of different kinds of soils and an accompanying report that describes, classifies, and interprets such soils for use. Soil surveys must meet the standards of the National Cooperative Soil Survey.

(159) Spoil–Overburden that has been removed during surface coal mining operations.

(160) Stabilize–To control movement of soil, spoil piles, or areas of disturbed earth by modifying the geometry of the mass, or by otherwise modifying physical or chemical properties, such as by providing a protective surface coating.

(161) Steep slope–Any slope of more than 20 degrees or such lesser slope as may be designated by the Commission after consideration of soil, climate, and other characteristics of a region or state.

(162) Subirrigation–With respect to alluvial valley floors, the supplying of water to plants from underneath or from a semi-saturated or saturated subsurface zone where water is available for use by vegetation. Subirrigation may be identified by:

(A) diurnal fluctuation of the water table, due to the differences in nighttime and daytime evapotranspiration rates;

(B) increasing soil moisture from a portion of the root zone down to the saturated zone, due to capillary action;

(C) mottling of the soils in the root zones;

(D) existence of an important part of the root zone within the capillary fringe or water table of an alluvial aquifer; or

(E) an increase in streamflow or a rise in ground-water levels, shortly after the first killing frost on the valley floor.

(163) Substantial legal and financial commitments in a surface coal mining operation–Significant investments that have been made on the basis of a long-term coal contract in power plants, railroads, coal-handling, preparation, extraction or storage facilities and other capital-intensive activities. An example would be an existing mine, not actually producing coal, but in a substantial stage of development prior to production. Costs of acquiring the coal in place or the right to mine it without an existing mine, as described in the above example, alone are not sufficient to constitute substantial legal and financial commitments.

(164) Substantially disturb–For purposes of coal exploration, to significantly impact land, air or water resources by such activities as blasting; mechanical excavation; drilling or altering coal or water exploratory holes or wells; removal of vegetation, topsoil, or overburden; construction of roads or other access routes; placement of structures, excavated earth, or waste material on the natural surface of land; or by other such activities; or to remove more than 250 tons of coal.

(165) Successor in interest–Any person who succeeds to rights granted under a permit, by transfer, assignment, or sale of those rights.

(166) Surface coal mining and reclamation operations–Surface coal mining operations and all activities necessary or incidental to the reclamation of such operations. This term includes the term surface coal mining operations.

(167) Surface coal mining operations–Includes:

(A) activities conducted on the surface of lands in connection with a surface coal mine or, subject to the requirements of §134.015 of the Act, surface operations and surface impacts incident to an underground coal mine, the products of which enter or the operations of which directly or indirectly affect interstate commerce. Such activities include excavation for the purpose of obtaining coal, including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining; the use of explosives and blasting; in situ distillation or retorting; leaching or other chemical or physical processing; the cleaning, concentrating, or other processing or preparation of coal; and the loading of coal for interstate commerce at or near the mine-site. Provided, however, that such activities do not include the extraction of coal incidental to the extraction of other minerals, where coal does not exceed 16 2/3% of the tonnage of minerals removed annually from all sites operated by a person on contiguous tracts of land for purposes of commercial use or sale, or coal exploration subject to §§134.014 and 134.031(d) of the Act; and

provided further, that excavation for the purpose of obtaining coal includes extraction of coal from coal refuse piles; and

(B) areas upon which the activities described in subparagraph (A) of this definition occur or where such activities disturb the natural land surface. Such areas shall also include any adjacent land the use of which is incidental to any such activities, all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of those activities and for haulage and excavation, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas, and other areas upon which are site structures, facilities, or other property or material on the surface, resulting from or incident to those activities.

(168) Surface coal mining operations which exist on the date of enactment–All surface coal mining operations which were being conducted on August 3, 1977.

(169) Surface mining activities–Those surface coal mining and reclamation operations incident to the extraction of coal from the earth by removing the materials over a coal seam, before recovering the coal, by auger coal mining, or by recovery of coal from a deposit that is not in its original geologic location.

(170) Surface operations and impacts incident to an underground coal mine–All activities involved in or related to underground coal mining which are either conducted on the surface of the land, produce changes in the land surface or disturb the surface, air or water resources of the area, including all activities listed in §134.004(19) of the Act and the definition of surface coal mining operations contained in this section.

(171) Suspended solids or nonfilterable residue–Expressed as milligrams per liter, organic or inorganic materials carried or held in suspension in water which are retained by a standard glass fiber filter in the procedure outlined by the U.S. Environmental Protection Agency regulations for wastewater and analyses (40 CFR 136).

(172) Temporary diversion–A diversion of a stream or overland flow which is used during coal exploration or surface coal mining and reclamation operations and not approved by the Commission to remain after reclamation as part of the approved postmining land use.

(173) Temporary impoundment–An impoundment used during surface coal mining and reclamation operations, but not approved by the Commission to remain as part of the approved postmining land use.

(174) Thick overburden- More than sufficient spoil and other waste materials available from the entire permit area to restore the disturbed area to its approximate original contour. More than sufficient spoil and other waste materials occur where the overburden thickness times the swell factor exceeds the combined thickness of the overburden and coal bed prior to removing the coal, so that after backfilling and grading the surface configuration of the reclaimed area would not:

(A) closely resemble the surface configuration of the land prior to mining; or

(B) blend into and complement the drainage pattern of the surrounding terrain.

(175) Thin overburden- Insufficient spoil and other waste materials available from the entire permit area to restore the disturbed area to its approximate original contour. Insufficient spoil and other waste materials occur where the overburden thickness times the swell factor, plus the thickness of other available waste materials, is less than the combined thickness of the overburden and coal bed prior to removing the coal, so that after backfilling and grading the surface configuration of the reclaimed area would not:

(A) closely resemble the surface configuration of the land prior to mining; or

(B) blend into and complement the drainage pattern of the surrounding terrain.

(176) Ton–2,000 pounds avoirdupois (0.90718 metric ton).

(177) Topsoil–The A and E soil-horizon layers of the four master soil horizons.

(178) Toxic-forming materials–Earth materials or wastes which, if acted upon by air, water, weathering, or microbiological processes, are likely to produce chemical or physical conditions in soils or water that are detrimental to biota or uses of water.

(179) Toxic mine drainage–Water that is discharged from active or abandoned mines or other areas affected by coal exploration or surface coal mining and reclamation operations, which contains a substance that through chemical action or physical effects is likely to kill, injure, or impair biota commonly present in the area that might be exposed to it.

(180) Transfer, assignment, or sale of rights–A change in ownership or other effective control over the right to conduct surface coal mining operations under a permit issued by the Commission.

(181) Unconsolidated streamlaid deposits holding streams–With respect to alluvial valley floors, all flood plains and terraces located in the lower portions of topographic valleys which contain perennial or other streams with channels that are greater than 3 feet in bankfull width and greater than 0.5 feet in bankfull depth.

(182) Underground development waste–Waste rock mixtures of coal, shale, claystone, siltstone, sandstone, limestone, or related materials that are excavated, moved, and disposed of during development and preparation of areas incident to underground mining activities.

(183) Underground mining activities–Includes:

(A) surface operations incident to underground extraction of coal or in situ processing, such as construction, use, maintenance, and reclamation of roads, above-ground repair areas, storage areas, processing areas, shipping areas, areas upon which are sited support facilities including hoist and ventilating ducts, areas utilized for the disposal and storage of waste, and areas on which materials incident to underground mining operations are placed; and

(B) underground operations such as underground construction, operation, and reclamation of shafts, adits, underground support facilities, in situ processing, and underground mining, hauling, storage, and blasting.

(184) Undeveloped rangeland–For purposes of alluvial valley floors, lands where the use is not specifically controlled and managed.

(185) Unwarranted failure to comply–The failure of the permittee to prevent the occurrence of any violation of the permit or any requirement of the Act, due to the indifference, lack of diligence,

or lack of reasonable care, or the failure to abate any violation of such permit or the Act, due to indifference, lack of diligence, or lack of reasonable care.

(186) Upland areas–With respect to alluvial valley floors, those geomorphic features located outside the floodplain and terrace complex, such as isolated higher terraces, alluvial fans, pediment surfaces, landslide deposits, and surfaces covered with residuum, mud flows or debris flows, as well as highland areas underlain by bedrock and covered by residual weathered material or debris deposited by sheetwash, rillwash, or windblown material.

(187) Valid existing rights–Includes:

(A) except for haul roads:

(i) those property rights in existence on August 3, 1977, that were created by a legally binding conveyance, lease, deed, contract or other document which authorizes the applicant to produce coal by a surface coal mining operation; and

(ii) the person proposing to conduct surface coal mining operations on such lands either:

(I) had been validly issued, on or before August 3, 1977, all state and federal permits necessary to conduct such operations on those lands; or

(II) can demonstrate to the Commission that the coal is both needed for, and immediately adjacent to, an ongoing surface coal mining operation for which all permits were obtained prior to August 3, 1977;

(B) for haul roads, valid existing rights includes:

(i) A recorded right-of-way, recorded easement, or a permit for a coal haul road recorded as of August 3, 1977; or

(ii) Any other road in existence as of August 3, 1977.

(C) interpretation of the terms of the document relied upon to establish valid existing rights shall be based upon Texas case law concerning the interpretation of documents conveying mining rights. When no Texas case law exists, interpretation shall be based upon the usage and custom at the time and place where the document came into existence and upon a showing by the applicant that the parties to the document actually contemplated a right to conduct the same underground or surface mining activities for which the applicant claims a valid existing right.

(D) valid existing rights does not include mere expectation of a right to conduct surface coal mining operations or the right to conduct underground coal mining. (Examples of rights which alone do not constitute valid existing rights include, but are not limited to, coal exploration permits or licenses, applications or bids for leases, or where a person has only applied for a state or federal permit.)

(188) Valley fill–A fill structure consisting of any material other than coal waste and organic material that is placed in a valley where side slopes of the existing valley measured at the steepest point are greater than 20 degrees or the average slope of the profile of the valley from the toe of the fill to the top of the fill is greater than 10 degrees.

(189) Violation, failure, or refusal–With respect to §§12.696-12.699 of this title (relating to Individual Civil Penalties), a violation of or a failure or refusal to comply with any order of the Commission including, but not limited to, a condition of a permit, notice of violation, failure-to-abate cessation order, imminent harm cessation order, order to show cause why a permit should not be suspended or revoked, and order in connection with a civil action for relief, except an order incorporated in a decision issued under §134.175 of the Act.

(190) Violation notice–Any written notification from a governmental entity of a violation of law, whether by letter, memorandum, legal or administrative pleading, or other written communication.

(191) Water table–The upper surface of a zone of saturation, where the body of ground water is not confined by an overlying impermeable zone.

(192) Willfully–With respect to §§12.696-12.699 of this title (relating to Individual Civil Penalties), that an individual acted:

(A) either intentionally, voluntarily, or consciously; and

(B) with intentional disregard or plain indifference to legal requirements in authorizing, ordering, or carrying out a corporate permittee's action or omission that constituted a violation, failure, or refusal.

(193) Willful violation–An act or omission which violates the Act, state, or federal laws or regulations, or any permit condition required by the Act or this chapter (relating to Coal Mining Regulations), committed by a person who intends the result which actually occurs.

(194) Rangeland–Land on which the natural potential (climax) plant cover is principally native grasses, forbs, and shrubs valuable for forage. This land includes natural grass lands and savannahs, such as prairies, and juniper savannahs, such as brushlands. Except for brush control, management is primarily achieved by regulating the intensity of grazing and season of use.

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

Issued in Austin, Texas, on August 26, 1998.

Filed with the Office of the Secretary of State, on August 26, 1998.

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Mary Ross McDonald
Deputy General Counsel
Railroad Commission of Texas
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For further information, please call: (512) 463–7008

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Subchapter G. Surface Coal Mining and Reclamation Operations, Permits, and Coal Exploration Procedures Systems

Division 9. Underground Mining Permit Applications-Minimum Requirements for Reclamation and Operation Plan

16 TAC §12.188

The amendment is proposed under §134.013 of the Texas Natural Resources Code, which provides the commission the

authority to promulgate rules pertaining to surface coal mining operations.

The Texas Natural Resources Code, §134.013, is affected by the proposed amendment.

§12.188. Reclamation Plan: Protection of Hydrologic Balance.

(a) General requirements. The application shall include a hydrologic reclamation plan,with appropriate maps and descriptions, indicating how the relevant requirements of this chapter (relating to Coal Mining Regulations), including §§12.509-12.511, 12.516, 12.518 and 12.519, and 12.520-12.524 of this title (relating to Hydrologic Balance: General Requirements, to Hydrologic Balance: Water-Quality Standards and Effluent Limitations, to Hydrologic Balance: Diversions, to Hydrologic Balance: Acid-Forming and Toxic-Forming Spoil, to Hydrologic Balance: Ground-Water Protection, to Hydrologic Balance: Surface-Water Protection, to Hydrologic Balance: Surface and Ground-Water Monitoring, to Hydrologic Balance: Transfer of Wells, to Hydrologic Balance: Water Rights and Replacement, to Hydrologic Balance: Discharge of Water Into an Underground Mine, and to Hydrologic Balance: Postmine Rehabilitation of Sedimentation Ponds, Diversions, Impoundments, and Treatment Facilities), will be met. The plan shall be specific to the local hydrologic conditions. It shall contain the steps to be taken during mining and reclamation through bond release to minimize disturbances to the hydrologic balance within the permit and adjacent areas; to prevent material damage outside the permit area; to meet applicable federal and state water-quality laws and regulations; and to protect the rights of present water users. The plan shall specifically address any potential adverse hydrologic consequences identified in the PHC determination prepared under §§12.185-12.198 of this title (relating to Underground Mining Permit Applications – Minimum Requirements for Reclamation and Operation Plan) and shall include preventive and remedial measures. The plan shall identify the measures to be taken to:

(1)-(9) (No change.)

(b)-(f) (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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Division 10. Requirements for Permits for Special Categories of Mining

16 TAC §12.201

The amendment is proposed under §134.013 of the Texas Natural Resources Code, which provides the commission the authority to promulgate rules pertaining to surface coal mining operations.

The Texas Natural Resources Code, §134.013, is affected by the proposed amendment.

§12.201. Prime Farmland.

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

(d) Issuance of permit. A permit for the mining and reclamation of prime farmland may be granted by the Commission, if it first finds, in writing, upon the basis of a complete application, that:

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

(5) The aggregate total prime farmland acreage shall not be decreased from that which existed prior to mining. Water bodies, if any, to be constructed during mining and reclamation operations, shall be located within the post-reclamation non- prime farmland portions of the permit area. The creation of any such water bodies shall be approved by the Commission and the consent of all affected property owners within the permit area shall be obtained.

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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Division 11. Review, Public Participation, and Approval of Permit Applications and Permit Terms and Conditions

16 TAC §12.207, §12.218

These amendments are proposed under §134.013 of the Texas Natural Resources Code, which provides the commission the authority to promulgate rules pertaining to surface coal mining operations.

The Texas Natural Resources Code, §134.013, is affected by the proposed amendments.

§12.207. Public Notices of Filing of Permit Applications.

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

(c) The written notifications shall be sent to:

(1) The following State and federal agencies:

(A) Texas Natural Resource Conservation Commission;

[~~(B)~~ ~~Texas Department of Health;~~]

(B) [~~(C)~~] Texas Historical Commission;

(C) [~~(D)~~] University of Texas Bureau of Economic Geology;

(D) [~~(E)~~] Texas State Soil and Water Conservation Board;

(E) [~~(F)~~] Texas Parks and Wildlife Department;

(F) [~~(G)~~] Texas General Land Office;

(G) [~~(H)~~] U.S. Natural Resources Conservation Service;

(H) [~~(I)~~] U.S. Fish and Wildlife Service; and

(I) [~~(J)~~] Office of Surface Mining–Regional Office;

(2)-(5) No change.)

(d) (No change.)

§12.218. Permit Approval or Denial Actions.

(a) The Commission shall approve, require modification of, or deny all applications for permits under regulatory programs on the basis of:

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

(4) Processing and review of applications as required by §§12.207-12.221 [~~§§12.206 - 12.221~~] of this title (relating to Review, Public Participation, and Approval of Permit Applications and Permit Terms and Conditions).

(b)-(f) (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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Division 13. Permit Reviews, Revisions, and Renewals, and Transfers, Sale, and Assignment of Rights Granted Under Permits

16 TAC §§12.226, 12.228, 12.233

These amendments are proposed under §134.013 of the Texas Natural Resources Code, which provides the commission the authority to promulgate rules pertaining to surface coal mining operations.

The Texas Natural Resources Code, §134.013, is affected by the proposed amendments.

§12.226. Permit Revisions.

(a) (No change.)

(b) The application for revision shall be filed in accordance with the following:

(1) (No change.)

(2) any application for a revision which proposes significant alterations in the operations described in the materials submitted in the application for the original permit under §§12.116-12.123, 12.124-12.138, and 12.139- 12.154 of this title, (relating to Surface Mining Permit Applications – Minimum Requirements for Legal, Financial, Compliance, and Related Information, to Surface Mining Permit Applications – Minimum Requirements for Information on Environmental Resources, and to Surface Mining Permit Applications – Minimum Requirements for Reclamation and Operation Plan), or §§12.155-12.163, 12.170- 12.184, and 12.185-12.199 of this title, (relating to Underground Mining Permit Applications – Minimum Requirements for Legal, Financial, Compliance, and Related Information, to Underground Mining Permit Applications – Minimum Requirements for Information on Environmental Resources, and to Underground Mining Permit Applications – Minimum Requirements for Reclamation and Operation Plan) or in the conditions of the original permit, shall, at a minimum, be subject to the requirements of §§12.207-12.221 [~~§§12.206 - 12.221~~] of this title (relating to Review, Public Participation, and Approval of Permit Applications and Permit Terms and Conditions), and §§12.222 and 12.223 of this title (relating to Administrative and Judicial Review of Decisions by Commission on Permit Applications).

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

(c) The Commission shall approve or disapprove the complete application for revision within 90 days from receipt in accordance with the requirements of §§12.207-12.221 [~~§§12.206 - 12.221~~] of this title (relating to Review, Public Participation, and Approval of Permit Applications and Permit Terms and Conditions) and the Act.

(d) - (e) (No change.)

§12.228. Permit Renewals: Completed Applications.

(a) (No change.)

(b) Processing and review.

(1) (No change.)

(2) If a complete application for renewal of a permit includes a proposal to extend the mining and reclamation operation beyond the boundaries authorized in the existing permit, the portion of the complete application for renewal of a valid permit which addresses any new land areas shall be subject to the full standards applicable to new permit applications under the Act, §§12.103-12.108 of this title (relating to General Requirements for Permits and Permit Applications), §§12.116-12.123, 12.124- 12.138, and 12.139-12.154 of this title, (relating to Surface Mining Permit Applications – Minimum Requirements for Legal, Financial, Compliance, and Related Information, to Surface Mining Permit Applications – Minimum Requirements for Information on Environmental Resources, and to Surface Mining Permit Applications – Minimum Requirements for Reclamation and Operation Plan), §§12.155-12.163, 12.170-12.184, and 12.185- 12.199 of this title (relating to Underground Mining Permit Applications – Minimum Requirements for Legal, Financial, Compliance, and Related Information, to Underground Mining Permit Applications – Minimum Requirements for Information on Environmental Resources, and to Underground Mining Permit Applications – Minimum Requirements for Reclamation and Operation Plan), §§12.200-12.205 of this title (relating to Requirements for Permits for Special Categories of Mining), §§12.207-12.221 [~~§§12.206 - 12.221~~] (relating to Review, Public Participation, and Approval of Permit Applications and Permit Terms and Conditions), §§12.222 and 12.223 of this title (relating to Administrative and Judicial Review of Decisions by Commission on Permit Applications), §§12.225- 12.227, this section, and §§12.229-12.233, of this title (relating to Permit Reviews, Revisions, and Renewals, and Transfer, Sale, and Assignment of Rights Granted Under Permits), and Subchapter J of this chapter (relating to Bond and Insurance Requirements for Surface Coal Mining and Reclamation Operations).

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

§12.233. Requirements for New Permits for Persons Succeeding to Rights Granted Under a Permit.

(a) (No change.)

(b) Pursuant to §12.232(c)(3) of this title (relating to Transfer, Assignment, or Sale of Permit Rights: Obtaining Approval), any successor in interest seeking to change the conditions of mining or reclamation operations, or any of the terms or conditions of the original permit shall:

(1) make application for a new permit under §§12.103-12.108 of this title (relating to General Requirements for Permits and Permit Applications), §§12.109-12.115 of this title (relating to General Requirements for Coal Exploration), §§12.116-12.123, 12.124-12.138, and 12.139-12.154 of this title (relating to Surface Mining Permit Applications – Minimum Requirements for Legal, Financial, Compliance, and Related Information, to Surface Mining Permit Applications – Minimum Requirements for Information on Environmental Resources, and to Surface Mining Permit Applications – Minimum Requirements for Reclamation and Operation Plan), §§12.155-12.163, 12.170-12.184, and 12.185- 12.199 of this title (relating to Underground Mining Permit Applications – Minimum Requirements for Legal, Financial, Compliance, and Related Information, to Underground Mining Permit Applications – Minimum Requirements for Information on Environmental Resources, to and Underground Mining Permit Applications – Minimum Requirements for Reclamation and Operation Plan), §§12.200-12.205 and 12.207-12.221 [~~§§12.206-12.221~~] of this title (relating to Requirements for Permits for Special Categories of Mining, and to Review, Public Participation, and Approval of Permit Applications and Permit Terms and Conditions), and §§12.222 and 12.223 of this title (relating to Administrative and Judicial Review of Decisions by Commission on Permit Applications), if the change involves conducting operations outside the original permit area; or

(2) (No change.)

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Division 14. Small Operator Assistance

16 TAC §12.237, §12.243

These amendments are proposed under §134.013 of the Texas Natural Resources Code, which provides the commission the authority to promulgate rules pertaining to surface coal mining operations.

The Texas Natural Resources Code, §134.013, is affected by the proposed amendments.

§12.237. Eligibility for Assistance.
An applicant is eligible for assistance if he or she:

(1) (No change)

(2) establishes that his or her probable total actual and attributed production from all locations during any consecutive 12-month period either during the term of his or her permit or during the first 5 years after issuance of his or her permit, whichever period is shorter, will not exceed 300,000 [~~100,000~~] tons. Production from the following operations shall be attributed to the permittee:

(A) (No change.)

(B) the pro rata share, based upon percentage of beneficial ownership, of coal produced by operations in which the applicant owns more than a 10% [~~5%~~] interest;

(C) all coal produced by persons who own more than 10% [~~5%~~] of the applicant or who directly or indirectly control the applicant by reason of stock ownership, direction of the management or in any other manner whatsoever;

(D)-(E) (No change.)

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

§12.243. Applicant Liability.

(a) A coal operator who has received assistance pursuant to §§12.236 and 12.240 of this title (relating to Program Services, and to Data Requirements) [~~The applicant~~] shall reimburse the Commission for the cost of the [~~laboratory~~] services rendered [~~performed pursuant to this section and §§12.234-12.242 of this title (relating to Small Operator Assistance)~~] if the applicant:

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

(4) if the Commission finds that the operator's [~~applicant's~~] actual and attributed annual production of coal for all locations exceeds 300,000 [~~100,000~~] tons during the 12 months immediately following the date on which the operator is issued the surface coal mining and reclamation permit [~~any consecutive 12-month period either during the term of the permit for which assistance is provided or during the first 5 years after issuance of the permit, whichever is shorter~~]; or

(5) the permit is sold, transferred, or assigned to another person and the transferee's total actual and attributed production exceeds the 300,000-ton [~~100,000-ton~~] production limit during the 12 months immediately following the date on which the permit was originally issued [~~any consecutive 12-month period of the remaining term of the permit~~]. Under this subsection, the applicant and its successor are jointly and severally obligated to reimburse the Commission.

(b) (No change.)

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Subchapter J. Bond and Insurance Requirements for Surface Coal Mining and Reclamation Operations

Division 3. Form, Conditions, and Terms of Performance Bond and Liability Insurance

16 TAC §12.309

The amendment is proposed under §134.013 of the Texas Natural Resources Code, which provides the commission the authority to promulgate rules pertaining to surface coal mining operations.

The Texas Natural Resources Code, §134.013, is affected by the proposed amendment.

§12.309. Terms and Conditions of the Bond.

(a)-(k) (No change.)

(l) Persons with an interest in collateral posted as a bond, and who desire notification of actions pursuant to the bond, shall request the notification in writing to the commission at the time collateral is offered.

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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Division 4. Procedures, Criteria, and Schedule for Release of Performance Bond

16 TAC §12.312, §12.313

These amendments are proposed under §134.013 of the Texas Natural Resources Code, which provides the commission the authority to promulgate rules pertaining to surface coal mining operations.

The Texas Natural Resources Code, §134.013, is affected by the proposed amendments.

§12.312. Procedure for Seeking Release of Performance Bond.

(a) Bond release application.

(1) The permittee may file a request with the Commission for the release of all or part of a performance bond or deposit. Applications may be filed only at times or during seasons authorized by the Commission in order to properly evaluate the completed reclamation operations. The times or seasons appropriate for the evaluation of certain types of reclamation shall be established in the regulatory program or identified in the mining and reclamation plan required in Subchapter G of this chapter (relating to Surface Coal Mining and Reclamation Operations Permits and Coal Exploration Procedures Systems) and approved by the Commission.

(2) Within 30 days after any application for bond or deposit release has been filed with the Commission, the operator shall submit a copy of an advertisement placed at least once a week for four successive weeks in a newspaper of general circulation in the locality of the surface coal mining operation. Such advertisement shall be considered part of any bond release application and shall contain the permittee's name, a notification of the precise location of the land affected, the number of acres, the permit number and date approved, the amount of the bond filed and the portion sought to be released, and the type and appropriate dates of reclamation work [~~was~~] performed, and a description of the results achieved as they relate to the operator's approved reclamation plan,and the name and address of the Commission office to which written comments, objections, or requests for public hearings and informal conferences on the specific bond release may be submitted pursuant to §12.313(d) and (e) of this title (relating to Criteria and Schedule for Release of Performance Bond). In addition , as part of any bond release application, the permittee [~~applicant~~] shall submit copies of letters which he or she has sent to adjoining property owners, local governmental bodies, planning agencies, [~~and~~] sewage and water treatment authorities, and [~~or~~] water companies in the locality in which the surface coal mining and reclamation activities took place, notifying them of the [~~his~~] intention to seek release from the bond.

(3) The permittee shall include in the application for bond release a notarized statement which certifies that all applicable reclamation activities have been accomplished in accordance with the requirements of the Act, the regulatory program, and the approved reclamation plan. Such certification shall be submitted for each application or phase of bond release.

(b) Inspection by Commission.

(1) Upon receipt of the bond release application [~~notification and request~~], the Commission shall, within 30 days, or as soon thereafter as weather conditions permit, conduct an inspection and evaluation of the reclamation work involved. Such evaluation shall consider, among other things, the degree of difficulty to complete any remaining reclamation, whether pollution of surface and subsurface water is occurring, the probability of future occurrence of such pollution, and the estimated cost of abating such pollution. The surface owner, agency, or lessee shall be given notice of such inspection and may participate with the Commission in making the bond release inspection. The Commission may arrange with the permittee to allow access to the permit area, upon request by any person with an interest in bond release, for the purpose of gathering information relevant to the proceeding.

(2) Within 60 days from the filing of the bond release application, if no public hearing is held pursuant to §12.313(d) of this title (relating to Criteria and Schedule for Release of Performance Bond), or, within 30 days after a public hearing has been held pursuant to §12.313(d), the Commission shall notify in writing the permittee, the surety, or other persons with an interest in bond collateral who have requested notification under §12.309(l) of this title (relating to Terms and Conditions of the Bond), and the persons who either filed objections in writing or objectors who were a party to the hearing proceedings, if any, of its decision to release or not to release all or part of the performance bond.

[~~(c) The Commission shall notify the permittee in writing of its decision to release or not release all or part of the performance bond or deposit, within 60 days from the filing of the request, if no public hearing pursuant to §12.313(c) of this title (relating to Criteria and Schedule for Release of Performance Bond), and if there has been a public hearing pursuant to §12.313(d) of this title (relating to~~

Criteria and Schedule for Release of Performance Bond), within 30 days thereafter.]

§12.313. Criteria and Schedule for Release of Performance Bond.

(a) The Commission may release all or [in whole or in] part of the [said] bond for the entire permit area or incremental area [or deposit] if the Commission is satisfied that the reclamation or a phase of the reclamation covered by the bond or deposit or portion thereof has been accomplished in accordance with the following schedules for reclamation of Phases I, II, and III [as required by the Act according to the following schedule]:

(1) at the completion of Phase I, after [when] the operator completes the backfilling, regrading (which may include the replacement of topsoil), and drainage control of a bonded area in accordance with the [his] approved reclamation plan, [the release of] 60% of the bond or collateral for the applicable area [permit];

(2) at the completion of Phase II, after [after] revegetation has been established on the regraded mined lands in accordance with the approved reclamation plan, an additional amount of bond [the Commission may release up to 25% of the original bond amount]. When determining the amount of bond to be released after successful revegetation has been established, the Commission shall retain that amount of bond for the revegetated area which would be sufficient [for a third party] to cover the cost of reestablishing revegetation if completed by a third party and for the period specified for operator responsibility in §§134.091-134.109 of the Act for reestablishing revegetation. No part of the bond or deposit shall be released under this Subsection so long as the lands to which the release would be applicable are contributing suspended solids to streamflow or runoff outside the permit area in excess of the requirements set by §134.092(a)(10) of the Act and Subchapter K of this chapter (relating to Permanent Program Performance Standards), [§§12.330-12.403 of this title (relating to Permanent Program Performance Standards – Surface Mining Activities)] or until soil productivity for prime farmlands has returned to the equivalent levels of yield as nonmined land of the same soil type in the surrounding area under equivalent management practices as determined from the soil survey performed pursuant to §134.052(a)(16) of the Act and §§12.620-12.625 of this title (relating to Special Permanent Program Performance Standards — Operations on Prime Farmland). Where a silt dam is to be retained as a permanent impoundment pursuant to Subchapter K of this Chapter, the Phase II portion of the bond may be released under this paragraph so long as provisions [provision] for sound further maintenance by the operator or the landowner have been made with the Commission; and

(3) at the completion of Phase III, after [when] the operator has completed successfully all surface coal mining and reclamation activities, the release of the remaining portion of the bond, but not before the expiration of the period specified for operator responsibility in §12.395 of this title (relating to Revegetation: Standards for Success) or §12.560 of the title (relating to Revegetation: Standards for Success). However, [§§134.091-134.109 of the Act; provided, however, that] no bond shall be fully released until all reclamation requirements of the Act and the permit are fully met.

(b) If the Commission disapproves the application for release of the bond or portion thereof, the Commission shall notify the permittee, the surety, and any person with an interest in collateral as provided for in §12.309(l) of this title (relating to Terms and Conditions of the Bond), in writing, stating the reasons for disapproval and recommending corrective action necessary to secure said release and allowing opportunity for a public hearing.

(c) (No change.)

(d) Any person with a valid legal interest which might be adversely affected by release of the bond, or the responsible officer or head of any federal, state, or local government agency which has jurisdiction by law or special expertise with respect to any environmental, social, or economic impact involved in the operation, or is authorized to develop and enforce environmental standards with respect to such operations, shall have the right to file written objection to the proposed release from bond to the Commission within thirty days after the last publication of the above notice. If written objections are filed, and a hearing requested, the Commission shall inform all interested parties of the time and place of the hearing, and hold a public hearing in the locality of the surface coal mining operation proposed for bond release, or at the State capital, at the option of the objector, within 30 days of the request for such hearing. The date, time, and location of such public hearing shall be advertised by the Commission in a newspaper of general circulation in the locality for two consecutive weeks. [, and shall hold a public hearing in the locality of the surface coal mining operation proposed for bond release, or at the State capital, at the option of the objector, within 30 days of the request for such hearing.]

(e) (No change.)

(f) For the purpose of such hearings under subsection (d) of this section, the Commission shall have the authority to administer oaths, subpoena witnesses or written or printed materials, compel the attendance of witnesses or production of [the] materials, and take evidence including, but not limited to, inspections of the land affected and other surface coal mining operations carried on by the applicant in the general vicinity. A verbatim record of each public hearing shall be made, and a transcript made available on the motion of any party or by order of the Commission.

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Subchapter K. Permanent Program Performance Standards

Division 2. Permanent Program Performance Standards-Surface Mining Activities

16 TAC §§12.338, 12.371, 12.375, 12.387, 12.388, 12.389, 12.399

These amendments are proposed under §134.013 of the Texas Natural Resources Code, which provides the commission the authority to promulgate rules pertaining to surface coal mining operations.

The Texas Natural Resources Code, §134.013, is affected by the proposed amendments.

§12.338. Topsoil: Nutrients and Soil Amendments.

Nutrients and soil amendments in the amounts determined by soil tests shall be applied to the redistributed surface soil layer, so that it supports the approved postmining land use and meets the revegetation requirements of §§12.390-12.393 and 12.395 [~~§§12.390-12.393, 12.395, and 12.396~~] of this title (relating to Revegetation: General Requirements, to Revegetation: Use of Introduced Species, to Revegetation: Timing, to Revegetation: Mulching and Other Stabilizing Practices, and to Revegetation: Standards for Success[~~, and to Revegetation: Tree and Shrub Stocking for Forest Land~~]). All soil tests shall be performed by a qualified laboratory using standard methods approved by the Commission.

§12.371. Coal Processing Waste Banks: Construction Requirements.

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

(d) Following grading of the coal processing waste bank, the site shall be covered with a minimum of 4 feet of the best available non-toxic and non-combustible material, in accordance with §12.335(e) of this title (relating to Topsoil: Removal), and in a manner that does not impede flow from subdrainage systems. The coal processing waste bank shall be revegetated in accordance with §§12.390-12.393 and 12.395 [~~§§12.390-12.393, 12.395, and 12.396~~] of this title (relating to Revegetation: General Requirement, to; Revegetation: Use of Introduced Species, to Revegetation: Timing, to Revegetation: Mulching and Other Stabilizing Practices, and to Revegetation: Standards for Success [~~, and to Revegetation: Tree and Shrub Stocking for Forest Land~~]). The Commission may allow less than 4 feet of cover material based on physical and chemical analyses which show that the requirements of §§12.390- 12.393 and 12.395 of this title [~~§§12.390-12.393, 12.395, and 12.396 of this title (relating to Revegetation: General Requirements, to Revegetation: Use of Introduced Species, to Revegetation: Timing, to Revegetation: Mulching and Other Stabilizing Practices, Revegetation: Standards for Success, and to Revegetation: Tree and Shrub Stocking for Forest Land)~~] will be met.

§12.375. Disposal of Noncoal Wastes.

(a) (No change.)

(b) Final disposal of noncoal wastes shall be in a designated disposal site in the permit area. Disposal sites shall be designed and constructed with appropriate water barriers on the bottom and sides of the designated site. Wastes shall be routinely compacted and covered to prevent combustion and wind- born waste. When the disposal is completed a minimum of 2 feet of soil cover shall be placed over the site, slopes stabilized, and revegetation accomplished in accordance with §§12.390- 12.393 and 12.395 [~~§§12.390-12.393, 12.395, and 12.396~~] of this title (relating to Revegetation: General Requirements, to Revegetation: Use of Introduced Species, to Revegetation: Timing, to Revegetation: Mulching and Other Stabilizing Practices, and to Revegetation: Standards for Success) [~~, and to Revegetation: Tree and Shrub Stocking for Forest Land) will be met~~]. Operation of the disposal site shall be conducted in accordance with all local, State, and Federal requirements.

(c)-(d) (No change.)

§12.387. Backfilling and Grading: Thin Overburden.

Where thin overburden occurs within the permit area, the permittee, at a minimum, shall:

(1) use all spoil and other waste materials available from the entire permit area to attain the lowest practicable grade, but not more than the angle of repose; and

(2) meet the requirements of §§12.385 and 12.386 of this title (relating to Backfilling and Grading: General Requirements, and to Backfilling and Grading: Covering Coal and Acid- and Toxic-Forming Materials).

[~~(a) The provisions of this section apply only where the final thickness is less than 0.8 times the initial thickness. Initial thickness is the sum of the overburden thickness and coal thickness prior to removal of coal. Final thickness is the product of the overburden thickness prior to removal of coal, times the bulking factor to be determined for each permit area. The provisions of this section apply only when surface mining activities cannot be carried out to comply with §12.384 of this title (relating to Backfilling and Grading: General Requirements) to achieve the approximate original contour.~~]

[~~(b) In surface mining activities carried out continuously in the same limited pit area for more than one year from the day coal removal operations begin and where the volume of all available spoil and suitable waste materials over the permit area is demonstrated to be insufficient to achieve the approximate original contour of the lands disturbed, surface mining activities shall be conducted to meet, at a minimum, the following standards:~~]

[~~(1) haul or convey, backfill, and grade, using all available spoil and suitable waste materials from the entire mine area, to attain the lowest practicable stable grade, to achieve a static safety factor of 1.3, and to provide adequate drainage and long- term stability of the regraded areas and cover all acid-forming and toxic-forming materials;~~]

[~~(2) eliminate highwalls by grading or backfilling to stable slopes not exceeding 2h:1v (50%), or such lesser slopes as the Commission may specify to reduce erosion, maintain the hydrologic balance, or allow the approved postmining land use;~~]

[~~(3) haul or convey, backfill, grade, and revegetate in accordance with §§12.390-12.393 and 12.395 of this title (relating to Revegetation: General Requirements, to Revegetation: Use of Introduced Species, to Revegetation: Timing, to Revegetation: Mulching and Other Stabilizing Practices, and to Revegetation: Standards for Success), to achieve an ecologically sound land use compatible with the prevailing use in unmined areas surrounding the permit area; and~~]

[~~(4) haul or convey, backfill and grade, to ensure impoundments are constructed only where:~~]

[~~(A) it has been demonstrated to the Commission's satisfaction that all requirements of §§12.339-12.341 and §§12.343-12.354 of this title (relating to Hydrologic Balance: General Requirements, to Hydrologic Balance: Water-Quality Standards and Effluent Limitations, to Hydrologic Balance: Diversions, to Hydrologic Balance: Sediment Control Measures, to Hydrologic Balance: Siltation Structures, to Hydrologic Balance: Discharge Structures, to Hydrologic Balance: Acid-Forming and Toxic-Forming Spoil, to Hydrologic Balance: Permanent and Temporary Impoundments, to Hydrologic Balance: Ground-Water Protection, to Hydrologic Balance: Surface-Water Protection, to Hydrologic Balance: Surface and Ground-Water Monitoring, to Hydrologic Balance: Transfer of Wells, to Hydrologic Balance: Water Rights and Replacement, to Hydrologic Balance: Discharge of Water Into an Underground Mine, and to Hydrologic Balance: Postmining Rehabilitation of Sedimentation Ponds, Diversions, Impoundments, and Treatment Facilities) have been met; and~~]

[~~(B) the impoundments have been approved by the Commission as suitable for the approved postmining land use and as meeting the requirements of §§12.330-12.386, this section, and §§12.388- 12.403 of this title (relating to Permanent Program~~

Performance Standards – Surface Mining Activities) and all other applicable federal and state laws and regulations.]

§12.388. Backfilling and Grading: Thick Overburden.

Where thick overburden occurs within the permit area, the permittee at a minimum shall:

(1) restore the approximate original contour and then use the remaining spoil and other waste materials to attain the lowest practicable grade, but not more than the angle of repose;

(2) meet the requirements of §§12.385 and 12.386 of this title (relating to Backfilling and Grading: General Requirements, and to Backfilling and Grading: Covering Coal and Acid- and Toxic-Forming Materials); and

(3) dispose of any excess spoil in accordance with §§12.363-12.366 of this title (relating to Disposal of Excess Spoil: General Requirements, to Disposal of Excess Spoil: Valley Fills, to Disposal of Excess Spoil: Head-of-Hollow Fills, and to Disposal of Excess Spoil: Durable Rock Fills).

[(a) The provisions of this section apply only where the final thickness is greater than 1.2 times the initial thickness. Initial thickness is the sum of the overburden thickness and coal thickness prior to removal of coal. Final thickness is the product of the overburden thickness prior to removal of coal times the bulking factor to be determined for each permit area. The provisions of this Section apply only when surface mining activities cannot be carried out to comply with §12.384 of this title (relating to Backfilling and Grading: General Requirements) to achieve the approximate original contour.]

[(b) In surface mining activities when the volume of spoil over the permit area is demonstrated to be more than sufficient to achieve the approximate original contour, surface mining activities shall be conducted to meet, at a minimum, the following standards:]

[(1) haul or convey, backfill, and grade all spoil and wastes, not required to achieve the approximate original contour of the permit area, to the lowest practicable grade, to achieve a static factor of safety of 1.3 and cover all acid-forming and other toxic-forming materials;]

[(2) haul or convey, backfill, and grade excess spoil and wastes only within the permit area, and dispose of such materials in accordance with §§12.363-12.366 of this title (relating to Disposal of Excess Spoil: General Requirements, to Disposal of Excess Spoil: Valley Fills, to Disposal of Excess Spoil: Head-of- Hollow Fills, and to Disposal of Excess Spoil: Durable Rock Fills);]

[(3) haul or convey, backfill, and grade excess spoil and wastes to maintain the hydrologic balance, in accordance with §§12.339-12.341 and §§12.343-12.355 of this title (relating to Hydrologic Balance: General Requirements, to Hydrologic Balance: Water-Quality Standards and Effluent Limitations, to Hydrologic Balance: Diversions, to Hydrologic Balance: Sediment Control Measures, to Hydrologic Balance: Siltation Structures, to Hydrologic Balance: Discharge Structures, to Hydrologic Balance: Acid-Forming and Toxic-Forming Spoil, to Hydrologic Balance: Permanent and Temporary Impoundments, to Hydrologic Balance: Ground-Water Protection, to Hydrologic Balance: Surface-Water Protection, to Hydrologic Balance: Surface and Ground-Water Monitoring, to Hydrologic Balance: Transfer of Wells, to Hydrologic Balance: Water Rights and Replacement, to Hydrologic Balance: Discharge of Water Into an Underground Mine, to Hydrologic Balance: Postmining Rehabilitation of Sedimentation Ponds, Diversions, Impoundments, and Treatment Facilities, and to Hydrologic Balance: Stream Buffer Zones) and to provide long-term stability by preventing slides, erosion and water pollution;]

[(4) haul or convey, backfill, grade, and revegetate wastes and excess spoil to achieve an ecologically sound land use approved by the Commission as compatible with the prevailing land uses in unmined areas surrounding the permit area;]

[(5) eliminate all highwalls and depressions by backfilling with spoil and suitable waste materials; and]

[(6) meet the vegetation requirements of §§12.390-12.393 and 12.395 of this title (relating to Revegetation: General Requirements, to Revegetation: Use of Introduced Species, to Revegetation: Timing, to Revegetation: Mulching and Other Stabilizing Practices, and to Revegetation: Standards for Success) for all disturbed areas.]

§12.389. Regrading or Stabilizing Rills and Gullies.

When rills and gullies deeper than 9 inches form in areas that have been regraded and topsoiled, the rills and gullies shall be filled, graded, or otherwise stabilized and the area reseeded or replanted according to §§12.390-12.393 and 12.395 [§§12.390-12.393, 12.395, and 12.396] of this title (relating to Revegetation: General Requirements, to Revegetation: Use of Introduced Species, to Revegetation: Timing, to Revegetation: Mulching and Other Stabilizing Practices, and to Revegetation: Standards for Success[, and to Revegetation: Tree and Shrub Stocking for Forest Land]). The Commission shall specify that rills or gullies of lesser size be stabilized and the area reseeded or replanted if the rills or gullies are disruptive to the approved postmining land use or may result in additional erosion and sedimentation.

§12.399. Postmining Land Use.

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

(c) Alternative land uses. Prior to the release of lands from the permit area in accordance with §12.313 of this title (relating to Criteria and Schedule for Release of Performance Bond), the permit area shall be restored, in a timely manner, either to conditions capable of supporting the uses they were capable of supporting before any mining, or to conditions capable of supporting approved alternative land uses. Alternative land uses may be approved by the Commission after consultation with the landowner or the land management agency having jurisdiction over the lands, if the following criteria are met:

(1)-(8) (No change.)

(9) proposals to change premining land uses of range, fish and wildlife habitat, forestland, hayland, or pasture to a postmining cropland use, where the cropland would require continuous maintenance such as seeding, plowing, cultivation, fertilization, or other similar practices to be practicable or to comply with applicable federal, state, and local laws, are reviewed by the Commission to ensure that:

(A) there is a firm written commitment by the person who conducts surface mining activities or by the landowner or land manager to provide sufficient crop management after release of applicable performance bonds under Subchapter J of this Chapter (relating to Bond and Insurance Requirements for Surface Coal Mining and Reclamation Operations) and §§12.390-12.393 and 12.395 [§§12.390-12.393, 12.395, and 12.396] of this title (relating to Revegetation: General Requirements, to Revegetation: Use of Introduced Species, to Revegetation: Timing, to Revegetation: Mulching and Other Stabilizing Practices, and to Revegetation: Standards for Success[, and to Revegetation: Tree and Shrub Stocking for Forest Land]), to assure that the proposed postmining cropland use remains practical and reasonable;

(B)-(C) (No change.)

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

Issued in Austin, Texas, on August 26, 1998.

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Mary Ross McDonald
Deputy General Counsel
Railroad Commission of Texas
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For further information, please call: (512) 463–7008

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Division 3. Permanent Program Performance Standards-Underground Mining Activities

16 TAC §12.508, §12.568

These amendments are proposed under §134.013 of the Texas Natural Resources Code, which provides the commission the authority to promulgate rules pertaining to surface coal mining operations.

The Texas Natural Resources Code, §134.013, is affected by the proposed amendments.

§12.508. Topsoil: Nutrients and Soil Amendments.
Nutrients and soil amendments in the amounts determined by soil tests shall be applied to the redistributed surface soil layer so that it supports the postmining land use approved by the Commission and meets the revegetation requirements of §§12.555-12.560 [~~§§12.555-12.561~~] of this title (relating to Revegetation: General Requirements, to Revegetation: Use of Introduced Species, to Revegetation: Timing, to Revegetation: Mulching and Other Stabilizing Practices, to Revegetation: Grazing, and to Revegetation: Standards for Success [~~, and to Revegetation: Tree and Shrub Stocking for Forest Land~~]). All soil tests shall be performed by a qualified laboratory using standard methods approved by the Commission.

§12.568. Postmining Land Use.
(a)-(b) (No change.)

(c) Alternative land uses. Prior to the release of lands from the permit area in accordance with §12.313 of this title (relating to Criteria and Schedule for Release of Performance Bond), the permit area shall be restored in a timely manner, either to conditions capable of supporting the uses they were capable of supporting before any mining or to conditions capable of supporting approved alternative land uses. Alternative land uses may be approved by the Commission after consultation with the landowner or the land management agency having jurisdiction over the lands, if the following criteria are met:

(1)-(8) (No change.)

(9) proposals to change premining land uses of range, fish and wildlife habitat, forestland, hayland, or pasture to a postmining cropland use, where the cropland would require continuous maintenance such as seeding, plowing, cultivation, fertilization, or other similar practices to be practicable or to comply with applicable federal, state, and local laws, have been reviewed by the Commission to ensure that:

(A) there is a firm written commitment by the person who conducts underground mining activities or by the landowner or land manager to provide sufficient crop management after release of applicable performance bonds under Subchapter J of this Chapter (relating to Bond and Insurance Requirements for Surface Coal Mining and Reclamation Operations) and §§12.555-12.560 [~~§§12.555-12.561~~] of this title (relating to Revegetation: General Requirements, to Revegetation: Use of Introduced Species, to Revegetation: Timing, to Revegetation: Mulching and Other Soil Stabilizing Practices, to Revegetation: Grazing, and to Revegetation: Standards for Success [~~, and to Revegetation: Tree and Shrub Stocking for Forest Land~~]), to assure that the proposed postmining cropland use remains practical and reasonable;

(B)-(C) (No change.)

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

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Part II. Public Utility Commission of Texas

Chapter 22. Practice and Procedure

Subchapter F. Parties

16 TAC §§22.102, 22.103, §22.105

The Public Utility Commission of Texas proposes amendments to §§22.102 relating to Classification of Parties, 22.103 relating to Standing to Intervene, and 22.105 relating to Alignment of Parties. The proposed amendments will enable these sections to more accurately reflect commission policy and procedures. Project Number 17709 has been assigned to this proceeding.

Paula Mueller, deputy chief, Office of Regulatory Affairs, has determined that for each year of the first five-year period the proposed sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Ms. Mueller has determined that for each year of the first five years the proposed sections are in effect the public benefits anticipated as a result of enforcing the sections will be rules that more accurately reflect commission policy and procedures. There will be no effect on small businesses as a result of enforcing these sections. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

Ms. Mueller has also determined that for each year of the first five years the proposed sections are in effect there will be no impact on employment in the geographic area affected by implementing the requirements of the sections.

Comments on the proposed amendment (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 N. Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, within 30 days after publication. The Appropriations Act of 1997, House Bill 1, Article IX, Section 167 requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Such reviews shall include, at a minimum, an assessment by the agency as to whether the reason for adopting or readopting the rule continues to exist. The commission invites specific comments regarding whether the reason for adopting these sections continues to exist in considering the proposed amendments. All comments should refer to Project Number 17709 and reference Procedural Rules, Subchapter F.

These amendments are proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052 (Vernon 1998) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure.

Cross Index to Statutes: Public Utility Regulatory Act §14.002 and §14.052.

§22.102. Classification of Parties.

(a) Parties. Parties to proceedings before the commission shall be classified into the following categories:

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

(4) Office of Regulatory Affairs[~~general counsel~~].

(b) Rights of Parties. Subject to the alignment of parties pursuant to §22.105 of this title (relating to Alignment of Parties), parties to proceedings have the right to present a direct case, cross-examine all witnesses, conduct discovery, make oral or written legal arguments, and otherwise fully participate in any proceeding. The Office of Regulatory Affairs [~~general counsel~~] shall have no right to seek judicial review of any commission decision.

(c) (No change.)

§22.103. Standing to Intervene.

(a) Office of Regulatory Affairs[~~General Counsel~~]. The Office of Regulatory Affairs [~~general counsel~~] shall have standing in all proceedings before the commission, and need not file a motion to intervene.

(b) (No change.)

(c) Dispute resolution pursuant to the federal Telecommunications Act of 1996 (FTA96). Standing to intervene in proceedings concerning dispute resolution and approval of agreements pursuant to the commission's authority under FTA96 is subject to the requirements of Subchapter P of this chapter (relating to Dispute Resolution).

§22.105. Alignment of Parties.

Parties, except for the Office of Public Utility Counsel and the Office of Regulatory Affairs [~~General Counsel~~], may be aligned for the purposes of participating in a hearing or portions of a hearing if the parties have the same positions on issues of fact or law. To the extent alignment is determined to be necessary, the presiding officer shall order alignment of the parties at the earliest reasonable opportunity so as to avoid unnecessary duplication of effort and to allow aligned parties an adequate opportunity to prepare for hearing. The presiding officer may limit the number of representatives of aligned parties who conduct cross-examination of any particular witness during the hearing on the merits.

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 August 27, 1998.

TRD-9813646
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
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For further information, please call: (512) 936–7308

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Chapter 26. Substantive Rules Applicable to Telecommunications Service Providers

Subchapter D. Records, Reports and Other Required Information

16 TAC §26.84

The Public Utility Commission of Texas (commission) proposes new §26.84 relating to Annual Reporting of Affiliate Transactions of DCTUs. This section is proposed under Project Number 18811. Section 26.84 replaces the rule provision currently located at §23.11(c) of this title, relating to General Reports, and requires that dominant certificated telecommunications utilities (DCTUs) report to the commission annually on affiliate activities.

The commission seeks comments from interested parties on the proposed rule. Parties are encouraged to provide specific rule language where applicable. The commission will seek comment at a later date on the substance and format of the annual reports required in proposed §26.84.

Meena Thomas, Assistant Director, Office of Regulatory Affairs, and Katherine Farroba, Administrative Law Judge, Office of Policy Development, have determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Ms. Thomas and Ms. Farroba also have determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of enforcing this section will be improved regulatory oversight of DCTUs and enhanced competition in the provision of telecommunications-related services.

The proposed section replaces the rule provision formerly located at §23.11(c). It is anticipated that there will be no economic costs incurred by persons who are required to comply with the new section as proposed in addition to costs already imposed by former §23.11(c).

For each year of the first five years the section is in effect, there will be no effect on small businesses as a result of enforcing the proposed section.

Ms. Thomas and Ms. Farroba have further determined that for the first five years the proposed section is in effect there will be no impact on the opportunities for employment in the geographic

areas of Texas affected by implementing the requirements of the rule.

Comments on the proposed rule (16 copies) may be submitted to Filing Clerk, Public Utility Commission of Texas, 1701 N. Congress Avenue, P.O. Box 13326, Austin, Texas, 78701-3326, within 30 days after publication. Reply comments may be submitted within 45 days after publication. All comments should refer to Project Number 18811. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the section. The commission will consider the costs and benefits in deciding whether to adopt the section.

The commission staff will conduct a public hearing on this rulemaking under Government Code §2001.029 at the commission's offices on October 14, 1998, at 10:00 a.m.

The new section is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated (Vernon 1998) (PURA) §§14.001, 14.002, 14.003, and 14.151. Section 14.001 grants the commission the general power to regulate and supervise the business of each utility within its jurisdiction. Section 14.002 provides the commission authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction. Section 14.003 grants the commission authority to require submission of information by the utility regarding its affiliate activities. Section 14.151 grants the commission authority to prescribe the manner of accounting for all business transacted by the utility.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.001, 14.002, 14.003, 14.151.

§26.84. Annual Reporting of Affiliate Transactions of DCTUs.

(a) Purpose. This section establishes annual reporting requirements for transactions between dominant certificated telecommunications utilities (DCTUs) and their affiliates.

(b) Application. This section applies to all DCTUs, as defined in §26.5 of this title (relating to Definitions), operating in the State of Texas, and to affiliates as defined in Public Utility Regulatory Act (PURA) §11.003 (2) to the extent specified herein.

(c) Annual report of affiliate activities. A "Report of Affiliate Activities" shall be filed annually with the commission. Using forms approved and provided by the commission, a DCTU shall report activities among itself and its affiliates. The report shall be filed by June 1, and shall encompass the time period from January 1 through December 31 of the immediately preceding year.

(d) Filing of Contracts. A DCTU shall reduce to writing and file with the commission copies of any contracts or agreements it has with its affiliates. The requirements of this subsection are not satisfied by the filing of an earnings report.

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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Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
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For further information, please call: (512) 936–7308

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16 TAC §26.88

The Public Utility Commission of Texas (PUC or commission) proposes new §26.88 relating to Traffic Usage Studies. The proposed new section will enable the commission to ensure that dominant certificated telecommunications utilities (DCTUs) have adequate data that is required to calculate the grade of service as related to trunking facilities. Proposed §26.88 will replace §23.61(g) of this title (relating to Telephone Utilities) as it pertains to traffic usage studies. Project Number 17709 has been assigned to this proceeding.

The Appropriations Act of 1997, House Bill 1, Article IX, Section 167 (Section 167) requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Such reviews shall include, at a minimum, an assessment by the agency as to whether the reason for adopting or readopting the rule continues to exist. The PUC held three workshops to conduct a preliminary review of its rules. As a result of these workshops, the PUC is reorganizing its current substantive rules located in 16 Texas Administrative Code (TAC) Chapter 23 to (1) satisfy the requirements of Section 167; (2) repeal rules no longer needed; (3) update existing rules to reflect changes in the industries regulated by the commission; (4) do clean-up amendments made necessary by changes in law and commission organizational structure and practices; (5) reorganize rules into new chapters to facilitate future amendments and provide room for expansion; and (6) reorganize the rules according to the industry to which they apply. Chapter 26 has been established for all commission substantive rules applicable to telecommunications service providers.

The commission will accept comments on the Section 167 requirement as to whether the reason for adopting or readopting §23.61(g) continues to exist in adopting §26.88. Section 23.61 will be proposed for repeal once all its subsections have been absorbed into Chapter 26.

General changes to rule language:

The proposed new section reflects different section, subsection, and paragraph designations due to the reorganization of the rules. The text as it existed in §23.61(g) has been divided into two subsections in §26.88. There are no substantive changes to the language. The *Texas Register* will publish this section as all new text. Persons who desire a copy of the proposed new section as it reflects changes to the existing section in Chapter 23 may obtain a redlined version from the commission's Central Records under Project Number 17709.

Mr. Nara Srinivasa, assistant director, Telecommunications Industry Analysis, has determined that for each year of the first five-year period the proposed section is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Srinivasa has determined that for each year of the first five years the proposed section is in effect, the public benefit anticipated as a result of enforcing the section will be that the commission will be able to ensure that DCTUs have adequate trunking and switching facilities to handle the traffic in a service area. There will be no effect on small businesses as a result of enforcing this section. The economic cost to persons who are required to comply with the section as proposed is the same as that which existed under §23.61(g). There are no

new requirements under §26.88 that will affect the economic cost to persons who are required to comply with the section as proposed.

Mr. Srinivasa has also determined that for each year of the first five years the proposed section is in effect, there will be no impact on employment in the geographic area affected by implementing the requirements of the section.

Comments on the proposed section (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 N. Congress Avenue, PO Box 13326, Austin, Texas 78711-3326, within 30 days after publication. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed section. The commission will consider the costs and benefits in deciding whether to adopt the section. All comments should refer to Project Number 17709 - §26.88 relating to Traffic Usage Studies.

This section is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002.

§26.88. Traffic Usage Studies.

(a) Frequency of studies.

(1) In all dominant certificated telecommunications utilities (DCTUs) central offices serving 2,000 or fewer access lines, traffic usage studies shall be performed at least once every three years unless otherwise authorized by the commission.

(2) In all DCTU central offices serving in excess of 2,000 customer access lines, traffic usage studies shall be performed at least annually unless otherwise authorized by the commission.

(b) Requirements of studies.

(1) Traffic usage studies shall include:

(A) at least three days (within a consecutive five-day period or five days within a consecutive seven-day period); and

(B) a usage record on at least an hourly basis.

(2) The usage record shall be in centum call second (CCS) or similar measurement (peg counts are not acceptable for this purpose).

(3) Record of the most recent study shall be maintained and made available on request for commission review.

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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Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: October 11, 1998
For further information, please call: (512) 936–7308

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16 TAC §26.89

The Public Utility Commission of Texas (PUC or commission) proposes new §26.89 relating to Information Regarding Rates and Services of Nondominant Carriers. The proposed new section will enable the commission to monitor the types of services provided by nondominant carriers and the rates charged for those services. Proposed §26.89 will replace §23.61(j) of this title (relating to Telephone Utilities) as it pertains to information regarding rates and services of nondominant carriers. Project Number 17709 has been assigned to this proceeding.

The Appropriations Act of 1997, House Bill 1, Article IX, Section 167 (Section 167) requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Such reviews shall include, at a minimum, an assessment by the agency as to whether the reason for adopting or readopting the rule continues to exist. The PUC held three workshops to conduct a preliminary review of its rules. As a result of these workshops, the PUC is reorganizing its current substantive rules located in 16 Texas Administrative Code (TAC) Chapter 23 to (1) satisfy the requirements of Section 167; (2) repeal rules no longer needed; (3) update existing rules to reflect changes in the industries regulated by the commission; (4) do clean-up amendments made necessary by changes in law and commission organizational structure and practices; (5) reorganize rules into new chapters to facilitate future amendments and provide room for expansion; and (6) reorganize the rules according to the industry to which they apply. Chapter 26 has been established for all commission substantive rules applicable to telecommunications service providers.

The commission will accept comments on the Section 167 requirement as to whether the reason for adopting or readopting §23.61(j) continues to exist in adopting §26.89. Section 23.61 will be proposed for repeal once all its subsections have been absorbed into Chapter 26.

General changes to rule language:

The proposed new section reflects different section, subsection, and paragraph designations due to the reorganization of the rules. Part of the text as it existed in §23.61(j) has been moved to a separate subsection, but there are no substantive changes to the language. A new subsection has been added to reference the registration requirements for nondominant carriers. The *Texas Register* will publish this section as all new text. Persons who desire a copy of the proposed new section as it reflects changes to the existing subsection in Chapter 23 may obtain a redlined version from the commission's Central Records under Project Number 17709.

Mr. Rick Akin, senior economic analyst, Office of Policy Development has determined that for each year of the first five-year period the proposed section is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Akin has determined that for each year of the first five years the proposed section is in effect, the public benefit anticipated as a result of enforcing the section will be the commission's ability to provide information to the public concerning the rates and services of nondominant carriers, and to ensure compliance by nondominant carriers with the Public Utility Regulatory Act, Texas Utilities Code Annotated (Vernon 1998) §52.103. There will be no effect on small businesses as a result of enforcing

this section. The economic cost to persons who are required to comply with the section as proposed is the same as that which existed under §23.61(j). There are no new requirements under §26.89 that will affect the economic cost to persons who are required to comply with the section as proposed.

Mr. Akin has also determined that for each year of the first five years the proposed section is in effect, there will be no impact on employment in the geographic area affected by implementing the requirements of the section.

Comments on the proposed section (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 N. Congress Avenue, PO Box 13326, Austin, Texas 78711-3326, within 30 days after publication. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed section. The commission will consider the costs and benefits in deciding whether to adopt the section. All comments should refer to Project Number 17709 - §26.89 relating to Information Regarding Rates and Services of Nondominant Carriers.

This section is proposed under the Public Utility Regulatory Act (PURA), Texas Utilities Code Annotated §14.002 (Vernon 1998), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, and specifically PURA §52.103(b), which requires nondominant carriers to file with the commission the information required by this section.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §52.103(b).

§26.89. Information Regarding Rates and Services of Nondominant Carriers.

(a) All nondominant carriers, including those holding a certificate of operating authority or a service provider certificate of operating authority, shall file the information set forth in paragraphs (1) - (3) of this subsection. This information shall be updated and kept current at all times.

(1) A description of the type(s) of communications service provided;

(2) For each service listed in response to paragraph (1) of this subsection, the locations in the state (by city) in which service is originated and/or terminated. If service is provided statewide, either origination or termination, the carrier shall so state; and

(3) A tariff, schedule or list showing all recurring and nonrecurring rates for each service provided.

(b) By June 30 of each year, each nondominant carrier that during the previous 12 months has not filed changes to the information required pursuant to subsection (a) of this section shall file with the commission a letter informing the commission that no changes have occurred. An uncertificated nondominant carrier failing to file either this letter or the updates required by subsection (a) of this section during the 12-month period ending June 30 may no longer be considered to be registered with the commission.

(c) All nondominant carriers shall comply with the registration requirements in §26.107 of this title (relating to Registration of Nondominant Telecommunications Carriers).

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 August 27, 1998.

TRD-9813644
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: October 11, 1998
For further information, please call: (512) 936–7308

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Subchapter E. Certification, Licensing and Registration

16 TAC §26.107

The Public Utility Commission of Texas (PUC or commission) proposes new §26.107 relating to Registration of Nondominant Telecommunications Carriers. The proposed new section will enable the commission to monitor nondominant carriers providing telecommunications service in the State of Texas. Proposed §26.107 will replace §23.61(i) of this title (relating to Telephone Utilities) as it pertains to the registration of nondominant telecommunications carriers. Project Number 17709 has been assigned to this proceeding.

The Appropriations Act of 1997, House Bill 1, Article IX, Section 167 (Section 167) requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Such reviews shall include, at a minimum, an assessment by the agency as to whether the reason for adopting or readopting the rule continues to exist. The PUC held three workshops to conduct a preliminary review of its rules. As a result of these workshops, the PUC is reorganizing its current substantive rules located in 16 Texas Administrative Code (TAC) Chapter 23 to (1) satisfy the requirements of Section 167; (2) repeal rules no longer needed; (3) update existing rules to reflect changes in the industries regulated by the commission; (4) do clean-up amendments made necessary by changes in law and commission organizational structure and practices; (5) reorganize rules into new chapters to facilitate future amendments and provide room for expansion; and (6) reorganize the rules according to the industry to which they apply. Chapter 26 has been established for all commission substantive rules applicable to telecommunications service providers.

The commission will accept comments on the Section 167 requirement as to whether the reason for adopting or readopting §23.61(i) continues to exist in adopting §26.107. Section 23.61 will be proposed for repeal once all its subsections have been absorbed into Chapter 26.

General changes to rule language:

The proposed new section reflects different section, subsection, and paragraph designations due to the reorganization of the rules. Part of the text as it existed in §23.61(i) has been moved to a separate subsection, but there are no substantive changes to the language. A new subsection has been added to reference the reporting requirements for nondominant carriers. The *Texas Register* will publish this section as all new text. Persons who desire a copy of the proposed new section as it reflects changes to the existing section in Chapter 23 may obtain a redlined version from the commission's Central Records under Project Number 17709.

Mr. Rick Akin, senior economic analyst, Office of Policy Development has determined that for each year of the first five-year period the proposed section is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Akin has determined that for each year of the first five years the proposed section is in effect the public benefit anticipated as a result of enforcing the section will be the commission's ability to provide information to the public concerning nondominant carriers in Texas, and to ensure compliance by nondominant carriers with the Public Utility Regulatory Act, Texas Utilities Code Annotated (Vernon 1998) §52.103. There will be no effect on small businesses as a result of enforcing this section. The economic cost to persons who are required to comply with the section as proposed is the same as that which existed under §23.61(i). There are no new requirements under §26.107 that will affect the economic cost to persons who are required to comply with the section as proposed.

Mr. Akin has also determined that for each year of the first five years the proposed section is in effect, there will be no impact on employment in the geographic area affected by implementing the requirements of the section.

Comments on the proposed section (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 N. Congress Avenue, PO Box 13326, Austin, Texas 78711-3326, within 30 days after publication. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed section. The commission will consider the costs and benefits in deciding whether to adopt the section. All comments should refer to Project Number 17709 - proposed §26.107 relating to Registration of Nondominant Telecommunications Carriers.

This section is proposed under the Public Utility Regulatory Act (PURA), Texas Utilities Code Annotated §14.002 (Vernon 1998), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, and specifically PURA §52.103, which requires a telecommunications utility to register with the commission.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §52.103.

§26.107. Registration of Nondominant Telecommunications Carriers.

(a) Each nondominant carrier not holding a certificate of operating authority or service provider certificate of operating authority and not currently registered with the commission shall file with the commission the information set forth in paragraphs (1)-(7) of this subsection within 30 days of commencing service in Texas. Each uncertificated nondominant carrier shall keep this information updated and current at all times. Each certificated nondominant carrier also shall keep updated and current the similar information included in its application for a certificate:

(1) Legal name and assumed names, if any;

(2) Address and telephone number of the principal office;

(3) Date service commenced in Texas;

(4) Name, address, and office location of each partner (if applicable) or each officer;

(5) Names and addresses of five largest shareholders (if applicable);

(6) Name, address, and telephone number of registered agent or designated person who can be contacted by the commission; and

(7) Name, address, and telephone number of attorney, if any.

(b) By June 30 of each year, each nondominant carrier that during the previous 12-months has not filed changes to the information required pursuant to subsection (a) of this section shall file with the commission a letter informing the commission that no changes have occurred. An uncertificated nondominant carrier failing to file either the letter or the updates required by subsection (a) of this section during the 12-month period ending June 30 may no longer be considered to be registered with the commission.

(c) All nondominant carriers shall comply with the reporting requirements in §26.89 of this title (relating to Information Regarding Rates and Services of Nondominant Carriers).

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 August 27, 1998.

TRD-9813645
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: October 11, 1998
For further information, please call: (512) 936–7308

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Part III. Texas Alcoholic Beverage Commission

Chapter 45. Marketing Practices

Subchapter D. Advertising and Promotion-All Beverages

16 TAC §45.110

The Texas Alcoholic Beverage Commission proposes an amendment to §45.110 governing inducements. The proposed amendment, contained in §45.110(c)(4) of the rule, would forbid members of the manufacturing and wholesale tiers of the alcoholic beverage industry from providing entertainment to members of the retail tier.

Lou Bright, General Counsel, has determined that for the first five years this rule is in effect, there will be no fiscal impact for state or local government as a result of enforcing this rule.

Mr. Bright has determined that the public will benefit by this rule in that the rules promulgated by the agency will be simpler and easier to understand and enforce. Further, the exchange of value between tiers of the alcoholic beverage industry will be limited with the consequent limitation of the risk of unfair anti-competitive trade practices within the industry.

There is no anticipated adverse costs imposed by the rule on persons subject to the rule or on small business.

Comments may be directed to Lou Bright, General Counsel, Texas Alcoholic Beverage Commission, P. O. Box 13127, Austin, Texas 78711.

This rule is proposed under the Alcoholic Beverage Code, §5.31, which provides the Texas Alcoholic Beverage Commission with the authority to prescribe and publish rules necessary to carry out the provisions of the Alcoholic Beverage Code.

Cross Reference: Alcoholic Beverage Code, §§102.04, 102.07, 102.12, 108.06, are affected by this rule.

§45.110. Inducements.

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

(c) Inducements. Notwithstanding any other provision of these rules, practices and patterns of conduct that place retailer independence at risk constitute an illegal inducement as that term is used in the Alcoholic Beverage Code. Examples of unlawful inducements are:

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

(4) furnishing entertainment or recreation to retailers or their agents or employees. Members of the manufacturing and wholesale tiers may however provide food and[,] beverages [~~and entertainment~~] to members of the retail tier. Food and beverages provided must be consumed in the presence of the manufacturing or wholesale tier member[~~. Food, beverages and entertainment provided may not cost more than $300.00 per occasion~~];

(5)-(6) (No change.)

(d) (No change.)

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

Filed with the Office of the Secretary of State, on August 28,1998.

TRD-9813684
Doyne Bailey
Administrator
Texas Alcoholic Beverage Commission
Earliest possible date of adoption: October 11, 1998
For further information, please call: (512) 206–3204

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16 TAC §45.113

The Texas Alcoholic Beverage Commission proposes an amendment to §45.113, concerning Gifts, Services and Sales. The proposed amendment contained in §45.113(b) seeks to change the ability of manufacturers and distributors of beer to give novelty items to retailers. The proposed amendment would allow manufacturers and distributors to give novelty items to consumers. Such items could only transfer to retailers by sale, however.

Lou Bright, General Counsel, has determined that for the first five years this rule is in effect, there will be no fiscal impact on state or local government as a result of enforcing this rule.

Mr. Bright has determined that the public will benefit by this rule in that the exchange of value between tiers of the alcoholic beverage industry will be limited with a consequent limit of the risk of unfair and anti-competitive practices within the beer industry.

Comments may be directed to Lou Bright, General Counsel, Texas Alcoholic Beverage Commission, P. O. Box 13127, Austin, Texas 78711.

This rule is proposed under the authority of the Alcoholic Beverage Code, §5.31 which provides the Texas Alcoholic Beverage Commission with the authority to prescribe and publish rules necessary to carry out the provisions of the Alcoholic Beverage Code.

Cross Reference: Alcoholic Beverage Code, §§108.04, 108.06, are affected by this rule.

§45.113. Gifts, Services and Sales.

(a) (No change.)

(b) Gifts to [~~Retailers and~~] Consumers. Manufacturers and distributors may furnish novelty items and beer to [~~retailers and~~] consumers[~~, and beer to consumers~~].

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

(c)-(f) (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 August 28,1998.

TRD-9813685
Doyne Bailey
Administrator
Texas Alcoholic Beverage Commission
Earliest possible date of adoption: October 11, 1998
For further information, please call: (512) 206–3204

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Part IV. Texas Department of Licensing and Regulation

Chapter 60. Texas Commission of Licensing and Regulation

The Texas Department of Licensing and Regulation proposes the repeal of §§60.1, 60.21-60.26, 60.80-60.82, 60.100-60.109, 60.120-60.124, 60.150-60.159, 60.170-60.177, 60.190-60.195 and new §§60.1, 60.10, 60.60-60.65, 60.80-60.82, 60.100-60.108, 60.120-60.124, 60.150-60.160, 60.170-60.174, 60.190-60.192 concerning the Texas Commission of Licensing and Regulation. The proposed new rules replace existing rules which are simultaneously proposed for repeal. The new rules rearrange, consolidate and revise existing language for clarification, along with deleting several items already stated in the Department's enabling legislation, Texas Revised Civil Statutes Annotated, Article 9100 (Vernon 1991).

Jimmy G. Martin, Manager, Consumer Protection Section, has determined that for the first five-year period these sections are in effect, there will be no foreseeable additional fiscal implications for state or local government as a result of enforcing or administering these rules.

Mr. Martin has also determined that for each year of the first five years these sections are in effect the public benefit as a result of enforcing these sections will be enhanced enforcement of statutes and improved licensee/consumer knowledge of

hearing proceedings. The anticipated economic effect on small businesses and persons required to comply with these sections as proposed will be approximately the same as it presently is with no anticipated additional cost to small businesses nor to persons who may be required to comply with the sections.

Comments on the proposal may be submitted to Jimmy G. Martin, Manager, Consumer Protection Section, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711.

Subchapter A. Authority

16 TAC §60.1

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

The repeal is proposed under Texas Revised Civil Statutes Annotated, article 9100 (Vernon 1991) which authorizes the Texas Department of Licensing and Regulation to promulgate and enforce a code of rules and take all action necessary to assure compliance with the intent and purpose of the Act.

The repeal affects Texas Civil Statutes Annotated, article 8861 (Vernon 1993); Texas Civil Statutes Annotated, article 9102 (Vernon 1995); Texas Civil Statutes Annotated, article 8700 (Vernon 1991); Texas Health and Safety Code Annotated, §755 (1991); Texas Revised Civil Statutes Annotated, article 8501-1 (Vernon 1995); article 5221a-8 (Vernon 1993); Texas Health and Safety Code Annotated §754 (1995); Texas Revised Civil Statutes Annotated, article 5221f-1 (Vernon 1989); Texas Revised Civil Statutes Annotated, article 5221a-7 (Vernon 1989); Texas Revised Civil Statutes Annotated, article 8886 (Vernon 1995); Texas Labor Code Annotated ˘91 (1997); Texas Revised Civil Statutes Annotated, article 5221a-9 (Vernon 1989); Texas Labor Code Annotated §92 (Vernon 1995); Texas Revised Civil Statutes Annotated, article 6675(e) (Vernon 1997), Texas Water Code, Chapters 32 and 33 (1997).

§60.1. Authority.

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

Filed with the Office of the Secretary of State on August 31, 1998.

TRD-9813744
Rachelle A. Martin
Executive Director
Texas Department of Licensing and Regulation
Earliest possible date of adoption: October 11, 1998
For further information, please call: (512) 463-7357

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Subchapter A. Authority and Responsibilities

16 TAC §60.1, §60.10

The new rules are proposed under Texas Revised Civil Statutes Annotated, article 9100 (Vernon 1991) which authorizes the Texas Department of Licensing and Regulation to promulgate and enforce a code of rules and take all action necessary to assure compliance with the intent and purpose of the Act.

The new rules affect Texas Civil Statutes Annotated, article 8861 (Vernon 1993); Texas Civil Statutes Annotated, article 9102 (Vernon 1995); Texas Civil Statutes Annotated, article 8700 (Vernon 1991); Texas Health and Safety Code Annotated, §755(1991); Texas Revised Civil Statutes Annotated, article 8501-1 (Vernon 1995); article 5221a-8 (Vernon 1993); Texas Health and Safety Code Annotated §754 (1995); Texas Revised Civil Statutes Annotated, article 5221f-1 (Vernon 1989); Texas Revised Civil Statutes Annotated, article 5221a-7 (Vernon 1989); Texas Revised Civil Statutes Annotated, article 8886 (Vernon 1995); Texas Labor Code Annotated §91 (1997); Texas Revised Civil Statutes Annotated, article 5221a-9 (Vernon 1989); Texas Labor Code Annotated §92 (Vernon 1995); Texas Revised Civil Statutes Annotated, article 6675(e) (Vernon 1997), Texas Water Code, Chapters 32 and 33 (1997). Subchapter A. Authority and Responsibilities.

§60.1. Authority.
These rules are promulgated under the authority of the Texas Department of Licensing and Regulation, Texas Civil Statute, Article 9100.

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

(1) Address of record - In the case of a person licensed, certified, or registered by the Department, the address which is filed by the licensee or registrant with the Department.

(2) APA - The Administration Procedure Act (Tex. Gov't. Code, Chapter 2001).

(3) Applicant - Any person seeking a license, certificate, registration, title or permit from the Department.

(4) Claimant - Any person seeking payment from the Department from any fund it administers.

(5) Complainant - Any person who has filed a complaint with the Department against any person whose activities are subject to the jurisdiction of the Department.

(6) Contested case or proceeding - A proceeding in which the legal rights, duties, or privileges of a party are to be determined by the Department after an opportunity for adjudicative hearing.

(7) Final decision maker - The Commission and/or the Executive Director, both of whom are authorized by law to render the final decision in a contested case.

(8) Hearings Examiner, Examiner, Administrative Law Judge - A person appointed by the Executive Director to conduct hearings in contested cases.

(9) License - The whole or part of any Departmental registration, license, Commission, certificate of authority, approval, permit, endorsement, title or similar form of permission required or permitted by law.

(10) Party - A person admitted to participate in a case before the final decision maker.

(11) Person - any individual, partnership, corporation, or other legal entity, including a state agency or governmental subdivision.

(12) Pleading - A written document submitted by a party, or a person seeking to participate in a case as a party, which requests procedural or substantive relief, makes claims, alleges facts, makes legal argument, or otherwise addresses matters involved in the case.

(13) Respondent - Any person, licensed or unlicensed, who has been charged with violating a law establishing a regulatory program administered by the Department or a rule or order issued by the Commission or the Executive Director.

(14) Rule - Any Departmental statement of general applicability that implements, interprets, or prescribes law or policy, or describes the procedure or practice requirements of the Department and is filed with the Texas Register.

(15) T.R.C.P. - Texas Rules of Civil Procedure

(16) U.S.P.S. - United States Postal Service.

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

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TRD-9813748
Rachelle A. Martin
Executive Director
Texas Department of Licensing and Regulation
Earliest possible date of adoption: October 11, 1998
For further information, please call: (512) 463-7357

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Subchapter B. Organization of the Commission of Licensing and Regulation

16 TAC §§60.21-60.26

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

The repeal is proposed under Texas Revised Civil Statutes Annotated, article 9100 (Vernon 1991) which authorizes the Texas Department of Licensing and Regulation to promulgate and enforce a code of rules and take all action necessary to assure compliance with the intent and purpose of the Act.

The repeal affects Texas Civil Statutes Annotated, article 8861 (Vernon 1993); Texas Civil Statutes Annotated, article 9102 (Vernon 1995); Texas Civil Statutes Annotated, article 8700 (Vernon 1991); Texas Health and Safety Code Annotated, §755(1991); Texas Revised Civil Statutes Annotated, article 8501-1 (Vernon 1995); article 5221a-8 (Vernon 1993); Texas Health and Safety Code Annotated §754 (1995); Texas Revised Civil Statutes Annotated, article 5221f-1 (Vernon 1989); Texas Revised Civil Statutes Annotated, article 5221a-7 (Vernon 1989); Texas Revised Civil Statutes Annotated, article 8886 (Vernon 1995); Texas Labor Code Annotated §91 (1997); Texas Revised Civil Statutes Annotated, article 5221a-9 (Vernon 1989); Texas Labor Code Annotated ˘92 (Vernon 1995); Texas Revised Civil Statutes Annotated, article 6675(e) (Vernon 1997), Texas Water Code, Chapters 32 and 33 (1997).

§60.21. General Provisions.
§60.22. Offices.
§60.23. Commission Members.
§60.24. Meetings.
§60.25. General Powers and Duties of Commission.
§60.26. Duties Assigned to the Executive Director.

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

Filed with the Office of the Secretary of State on August 31, 1998.

TRD-9813745
Rachelle A. Martin
Executive Director
Texas Department of Licensing and Regulation
Earliest possible date of adoption: October 11, 1998
For further information, please call: (512) 463-7357

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Subchapter B. Organization

16 TAC §§60.60-60.65

The new rules are proposed under Texas Revised Civil Statutes Annotated, article 9100 (Vernon 1991) which authorizes the Texas Department of Licensing and Regulation to promulgate and enforce a code of rules and take all action necessary to assure compliance with the intent and purpose of the Act.

The new rules affect Texas Civil Statutes Annotated, article 8861 (Vernon 1993); Texas Civil Statutes Annotated, article 9102 (Vernon 1995); Texas Civil Statutes Annotated, article 8700 (Vernon 1991); Texas Health and Safety Code Annotated, §755(1991); Texas Revised Civil Statutes Annotated, article 8501-1 (Vernon 1995); article 5221a-8 (Vernon 1993); Texas Health and Safety Code Annotated §754 (1995); Texas Revised Civil Statutes Annotated, article 5221f-1 (Vernon 1989); Texas Revised Civil Statutes Annotated, article 5221a-7 (Vernon 1989); Texas Revised Civil Statutes Annotated, article 8886 (Vernon 1995); Texas Labor Code Annotated §91 (1997); Texas Revised Civil Statutes Annotated, article 5221a-9 (Vernon 1989); Texas Labor Code Annotated §92 (Vernon 1995); Texas Revised Civil Statutes Annotated, article 6675(e) (Vernon 1997), Texas Water Code, Chapters 32 and 33 (1997). Subchapter B. Organization.

§60.60. Responsibilities of the Commission - General Provisions.

(a) The Commission, along with the Executive Director, (the statutory Commissioner) governs the Texas Department of Licensing and Regulation, which is the primary state agency responsible for oversight of businesses, industries, general trades, and occupations regulated by the state as each entity is assigned to the Department by the legislature.

(b) It is the intent of the Commission that the rules of the Commission be interpreted in the best interest of the public and the state.

(c) Through these rules, the Commission intends to establish procedures with which to receive public interest information and complaints from the general public and the regulated entities, assure that access to agency programs is made available to all citizens, to set fees appropriately, and to establish practice and procedures for administering the programs.

§60.61. Responsibilities of the Commission - Meetings.

(a) Meetings will be conducted under Robert's Rules of Order (Revised 1998).

(b) When a quorum, that is, a majority of the members, is present, a motion before the Commission is carried by an affirmative vote of the majority of the Commissioners present.

(c) Meetings will be conducted as public meetings under the Open Meetings Act, Government Code, Chapter 551.

(d) The Commission will determine on a case by case basis, the number of and the location of cameras and recording devices in order to maintain order during Commission meetings.

(e) The Commission may limit the amount of time that each speaker may present testimony on a given subject.

§60.62. General Powers and Duties of the Commission.

(a) Citizen complaints against a person or entity regulated by the Department are accepted in all forms, and under all circumstances.

(b) A complaint must be filed within two years of the event giving rise to the complaint. Complaints filed after the above stated period will not be accepted by the Department unless the complainant can show good cause to the Executive Director for the late filing.

(c) Citizens who do not speak English or who have a physical, mental, or developmental disability will be provided reasonable access to the Commission meetings and to the Commission's programs.

(d) The Commission welcomes appropriate citizen input and communications at Commission meetings and upon prior reasonable notice to the Commission, the Department will provide interpreters and/or sign language specialists to assist the citizen in presenting their input to the Commission.

(e) In assessing a sanction or penalty, the following factors shall be considered:

(1) the seriousness of the violation;

(2) the history of previous violations;

(3) the amount necessary to deter future violations;

(4) efforts made to correct the violation; and

(5) any other matters that justice may require.

§60.63. Responsibilities of the Department and Executive Director.

(a) The Executive Director shall implement the sanctions described in and set forth in Texas Civil Statutes, Article 9100, and issue orders accordingly.

(b) The Executive Director may deny licensure application, suspend, or revoke any license, or license renewal, if:

(1) the license was obtained by fraud or false representation;

(2) any required documents submitted as part of the application packet are falsified;

(3) the person refused to permit or interfered with an inspection or investigation of the licensed premises by an authorized representative of the Commission or Executive Director;

(4) the person permitted the use or display of their license, registration, certification, waiver, delay, variance, approval or any other Department issued operating permit in the conduct of a business for the benefit of a person not authorized by law; or

(5) The person has been convicted of, or is on a deferred sentence for a crime of moral turpitude or an offense which carries the possibility of imprisonment in a state facility.

(c) In ordering an administrative sanction or penalty, the Executive Director shall consider the factors set forth in §60.62(e)(1)-(5) of this title (relating to General Powers and Duties of the Commission) and:

(1) issue a written reprimand to the person that specifies the violation;

(2) revoke or suspend the person's license, registration, certificate, or permit; or

(3) place on probation a person whose license, registration, certificate, or permit has been suspended.

(d) if the suspension of a license registration, certificate, or permit is probated, the Executive Director may require the person to:

(1) report regularly to the Executive Director on matters that are the basis of the probation;

(2) limit practice to the areas prescribed by the Executive Director; or

(3) continue or renew professional education until the person attains a degree of skill satisfactory to the Executive Director in those areas that are the basis for the probation.

(e) The Executive Director shall give notice of his and/or the Commission's order to all parties. The notice must include:

(1) separate statements of the findings of fact and conclusions of law;

(2) the amount of any penalty assessed, if any;

(3) whether or not a motion for rehearing is required as a prerequisite for appeal; and

(4) the motion for rehearing time table.

(f) Licensees, registrants, certificate and permit holders will be notified at least thirty days in advance of impending expiration of the licenses, registrations, certificates, or permits.

(g) Special accommodation exams will be made available as required by the American with Disabilities Act of 1990, Public Law 101-336. Upon request, exams may be offered in a foreign language at the expense of the requestor.

(h) The Executive Director shall require license holders to notify consumers and service recipients of the name, mailing address, and telephone numbers of the Department for purposes of directing complaints to the Department. The notification shall be included on:

(1) the written contract for services of an individual or entity regulated by the Department;

(2) a sign prominently displayed in the place of business of each individual or entity regulated by the Department if the consumers or service recipients must visit the place of business for said service or products; and

(3) a bill for service provided by an individual or entity regulated by the Department.

(i) The Executive Director by rule may provide for prorating fees for the issuance of a license, registration, certificate, permit or title, so that a person regulated by the Department pays only that portion of the applicable fee that is allocable to the number of months during which the license, registration, certificate, permit or title is valid.

§60.64. Duration of Advisory Committee/Boards/Councils.

In accordance with Texas Government Code Annotated, §2110.008 the Commission establishes the following automatic abolishment dates for the committees/boards/councils as indicated unless the Commission subsequently establishes a different date:

(1) Architectural Barriers Advisory Committee - 09/01/2001;

(2) Air Conditioning & Refrigeration Advisory Council - 09/01/2001;

(3) Auctioneer Education Advisory Board - 09/01/2000;

(4) Board of Boiler Rules - 09/01/2002;

(5) Elevator Advisory Board - 09/01/2001;

(6) Property Tax Consultants Advisory Council - 09/01/2000; and

(7) Water Well Driller Advisory Council - 09/01/2001.

§60.65. Petition for Adoption of Rules.

Any interested party may request adoption of a rule(s) by submitting a letter of request to the Department with a draft of the rule(s) attached. As a minimum the request should contain:

(1) items to be deleted should be bracketed or lined through;

(2) items added should be underlined; and

(3) the rationale for the requested rule 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 August 31, 1998.

TRD-9813749
Rachelle A. Martin
Executive Director
Texas Department of Licensing and Regulation
Earliest possible date of adoption: October 11, 1998
For further information, please call: (512) 463-7357

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Subchapter C. Fee.

16 TAC §§60.80-60.82

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

The repeal is proposed under Texas Revised Civil Statutes Annotated, article 9100 (Vernon 1991) which authorizes the Texas Department of Licensing and Regulation to promulgate and enforce a code of rules and take all action necessary to assure compliance with the intent and purpose of the Act.

The repeal affects Texas Civil Statutes Annotated, article 8861 (Vernon 1993); Texas Civil Statutes Annotated, article 9102 (Vernon 1995); Texas Civil Statutes Annotated, article 8700 (Vernon 1991); Texas Health and Safety Code Annotated, §755(1991); Texas Revised Civil Statutes Annotated, article 8501-1 (Vernon 1995); article 5221a-8 (Vernon 1993); Texas Health and Safety Code Annotated §754 (1995); Texas Revised Civil Statutes Annotated, article 5221f-1 (Vernon 1989); Texas Revised Civil Statutes Annotated, article 5221a-7 (Vernon 1989); Texas Revised Civil Statutes Annotated, article 8886 (Vernon 1995); Texas Labor Code Annotated §91 (1997); Texas Revised Civil Statutes Annotated, article 5221a-9 (Vernon 1989); Texas Labor Code Annotated ˘92 (Vernon 1995); Texas Revised Civil Statutes Annotated, article 6675(e) (Vernon 1997), Texas Water Code, Chapters 32 and 33 (1997).

§60.80. Program Fees.

§60.81. Charges for Providing Copies of Public Information.

§60.82. Dishonored Check Fee.

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

Filed with the Office of the Secretary of State on August 31, 1998.

TRD-9813746
Rachelle A. Martin
Executive Director
Texas Department of Licensing and Regulation
Earliest possible date of adoption: October 11, 1998
For further information, please call: (512) 463-7357

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16 TAC §§60.80-60.82

The new rules are proposed under Texas Revised Civil Statutes Annotated, article 9100 (Vernon 1991) which authorizes the Texas Department of Licensing and Regulation to promulgate and enforce a code of rules and take all action necessary to assure compliance with the intent and purpose of the Act.

The new rules affect Texas Civil Statutes Annotated, article 8861 (Vernon 1993); Texas Civil Statutes Annotated, article 9102 (Vernon 1995); Texas Civil Statutes Annotated, article 8700 (Vernon 1991); Texas Health and Safety Code Annotated, §755(1991); Texas Revised Civil Statutes Annotated, article 8501-1 (Vernon 1995); article 5221a-8 (Vernon 1993); Texas Health and Safety Code Annotated §754 (1995); Texas Revised Civil Statutes Annotated, article 5221f-1 (Vernon 1989); Texas Revised Civil Statutes Annotated, article 5221a-7 (Vernon 1989); Texas Revised Civil Statutes Annotated, article 8886 (Vernon 1995); Texas Labor Code Annotated §91 (1997); Texas Revised Civil Statutes Annotated, article 5221a-9 (Vernon 1989); Texas Labor Code Annotated §92 (Vernon 1995); Texas Revised Civil Statutes Annotated, article 6675(e) (Vernon 1997), Texas Water Code, Chapters 32 and 33 (1997).

§60.80. Program Fees.

Fees set by the Commission are published in the rules accompanying the statutes assigned to the Department. Department rules are found at Title 16, Texas Administrative Code.

§60.81. Charges for Providing Copies of Public Information.

Cost for providing public information is that as promulgated by the General Services Commission under Title 1, Texas Administrative Code, §§111.61 - 111.70 (Cost of Public Information).

§60.82. Dishonored Check Fee.

If a check, drawn to the Texas Department of Licensing and Regulation is dishonored by a payor, the Department shall charge a fee of $25 to the drawer or endorser for processing the dishonored check. The Department shall notify the drawer or endorser of the fee by sending a request for payment of the dishonored check and the processing fee by certified mail to the last known business address of the person as shown in the records of the Department. If the Department has sent a request for payment in accordance with the

provisions of this section, the failure of the drawer or endorser to pay the processing fee within 15 days after the Department has mailed the request is a violation of these rules.

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

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Subchapter D. Practice and Procedure

16 TAC §§60.100-60.109, 60.120-60.124, 60.150-60.159, 60.170-60.177, 60.190-60.195

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

The repeal is proposed under Texas Revised Civil Statutes Annotated, article 9100 (Vernon 1991) which authorizes the Texas Department of Licensing and Regulation to promulgate and enforce a code of rules and take all action necessary to assure compliance with the intent and purpose of the Act.

The repeal affects Texas Civil Statutes Annotated, article 8861 (Vernon 1993); Texas Civil Statutes Annotated, article 9102 (Vernon 1995); Texas Civil Statutes Annotated, article 8700 (Vernon 1991); Texas Health and Safety Code Annotated, §755(1991); Texas Revised Civil Statutes Annotated, article 8501-1 (Vernon 1995); article 5221a-8 (Vernon 1993); Texas Health and Safety Code Annotated §754 (1995); Texas Revised Civil Statutes Annotated, article 5221f-1 (Vernon 1989); Texas Revised Civil Statutes Annotated, article 5221a-7 (Vernon 1989); Texas Revised Civil Statutes Annotated, article 8886 (Vernon 1995); Texas Labor Code Annotated §91 (1997); Texas Revised Civil Statutes Annotated, article 5221a-9 (Vernon 1989); Texas Labor Code Annotated ˘92 (Vernon 1995); Texas Revised Civil Statutes Annotated, article 6675(e) (Vernon 1997), Texas Water Code, Chapters 32 and 33 (1997).

§60.100. Purpose and Scope.

§60.101. Definitions.

§60.102. Filing, Computation of Time, and Notice.

§60.103. Agreements to be in Writing.

§60.104. Hearing Examiner.

§60.105. Conduct and Decorum.

§60.106. Ex Parte Consultations.

§60.107. Parties.

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§60.124. Prepared Testimony and Exhibits.

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§60.175. Admissibility of Prepared Testimony and Exhibits.

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§60.191. Proposals for Decision.

§60.192. Filing of Exceptions and Replies.

§60.193. Form of Exceptions and Replies.

§60.194. Final Orders, Motions for Rehearing, and Emergency Orders.

§60.195. Remittitur of Administrative Penalty.

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

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Rachelle A. Martin
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Texas Department of Licensing and Regulation
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16 TAC §§60.100-60.108, 60.120-60.124, 60.150-60.160, 60.170-60.174, 60.190-60.192

The new rules are proposed under Texas Revised Civil Statutes Annotated, article 9100 (Vernon 1991) which authorizes the Texas Department of Licensing and Regulation to promulgate and enforce a code of rules and take all action necessary to assure compliance with the intent and purpose of the Act.

The new rules affect Texas Civil Statutes Annotated, article 8861 (Vernon 1993); Texas Civil Statutes Annotated, article 9102 (Vernon 1995); Texas Civil Statutes Annotated, article 8700 (Vernon 1991); Texas Health and Safety Code Annotated, §755(1991); Texas Revised Civil Statutes Annotated, article 8501-1 (Vernon 1995); article 5221a-8 (Vernon 1993); Texas Health and Safety Code Annotated §754 (1995); Texas Revised Civil Statutes Annotated, article 5221f-1 (Vernon 1989); Texas Revised Civil Statutes Annotated, article 5221a-7 (Vernon 1989); Texas Revised Civil Statutes Annotated, article 8886 (Vernon 1995); Texas Labor Code Annotated §91 (1997); Texas Revised Civil Statutes Annotated, article 5221a-9 (Vernon 1989); Texas Labor Code Annotated §92 (Vernon 1995); Texas Revised Civil Statutes Annotated, article 6675(e) (Vernon 1997), Texas Water Code, Chapters 32 and 33 (1997).

§60.100. Purpose and Scope.

(a) Purpose. Unless otherwise provided by statute or by the provisions of this subchapter, this subchapter will govern the processes followed in handling all adjudicative matters under the Administrative Procedure Act (APA), Tex. Gov't Code Ann. Chapter 2001.

(b) Scope. These rules govern the institution, conduct, and determination of adjudicative proceedings required or permitted by law, whether instituted by the Department or by the filing of an application, claim, complaint, or any other pleading. These rules shall not be construed so as to enlarge, diminish, modify, or otherwise alter the jurisdiction, powers, or authority of the Commission, the Executive Director, or the substantive rights of any person or agency.

§60.101. Filing, Computation of Time, and Notice.

(a) Computation of Time. Unless otherwise required by statute, in computing time periods prescribed by this subchapter or by order of the Hearings Examiner, the day of the act, event, or default on which the designated period of time begins to run is not included. The last day of the period is included, unless it is not a business day, in which case the time period will be deemed to end on the next business day. When these rules specify a deadline or set a number of days for filing documents or taking other actions, the computation of time shall be by calendar days rather than business days, unless otherwise provided in this chapter or order of the Hearings Examiner. However, if the period to act is five days or less, the intervening Saturdays, Sundays, and legal holidays are not counted.

(b) Notice. The Department shall provide notice to all Parties in accordance with APA §2001.052 and the following:

(1) If, after investigation of a possible violation and the facts surrounding that possible violation, the Department determines that a violation has occurred, the Department shall issue a notice of the alleged violation, stating the facts on which the conclusion that a violation occurred is based, recommending that an administrative penalty or administrative sanction, or both be imposed on the person charged, and recommending the amount of that proposed penalty and/or type of sanction. The Department shall base the recommendation on the factors set forth in subsection §60.62(e) of this title (relating to General Powers and Duties of the Commission).

(2) The written notice of the violation shall include:

(A) a brief summary of the charges;

(B) a statement of the amount of the penalty and/or sanction recommended; and

(C) a statement of the right of the Respondent to a hearing.

(c) Request for Hearing. Not later than the 20th day after the date on which the notice is received, the Respondent may accept the determination of the Department, including the recommended penalty and/or sanction, or make a written request for a hearing on that determination.

(d) Place for Filing Original Materials. The original of all pleadings and other documents requesting action or relief in a contested case shall be sent to: Office of the Hearings Examiner, Texas Department of Licensing and Regulation, P. O. Box 12157, Austin, Texas 78711 or delivered to the Hearings Examiner, Ernest O. Thompson State Office Building, 920 Colorado Street, 7th Floor, Austin, Texas, Fax number (512) 463-1376. The date of filing shall be determined by the file stamp affixed by the Hearings Examiner's office. Unless otherwise ordered by the Hearings Examiner, only the original copies of any pleading or document shall be filed.

(e) Time of Filing. Documents may be filed with or served on the Hearings Examiner's Office until 5:00 p.m. local time on business days, unless otherwise ordered by the Hearings Examiner.

(f) Facsimile Filings. Documents containing 20 or fewer pages, including exhibits, may be filed with the Hearings Examiner by facsimile transmission.

§60.102. Agreements to be in Writing.

No stipulation or agreement between the Parties, their attorneys, or representatives, with regard to any matter involved in any contested case shall be enforced unless it shall have been reduced to writing and signed by the Parties or their authorized representatives, or unless it shall have been dictated into the record by them during the course of a hearing, or incorporated in an order bearing or incorporating their written approval.

§60.103. Hearings Examiner.

(a) Every hearing before the Department shall be conducted by a Hearings Examiner, except as set forth in subsection (c) of this section. The Hearings Examiner shall have the authority and duty to:

(1) conduct a full, fair, and impartial hearing;

(2) take action to avoid unnecessary delay in the disposition of the proceeding; and

(3) maintain order.

(b) The Hearings Examiner shall have the power to regulate prehearing matters, the hearing, and the conduct of the Parties and authorized representatives, including the power to:

(1) convene hearings;

(2) administer oaths and affirmations;

(3) issue subpoenas to compel the attendance of witnesses and the production of papers and documents;

(4) commission and require the taking of depositions and issue discovery orders;

(5) receive evidence and testimony;

(6) call and examine witnesses;

(7) rule on the admissibility of evidence;

(8) rule on discovery issues;

(9) issue orders relating to hearing and prehearing matters, including orders imposing sanctions;

(10) admit or deny party status;

(11) close the hearing or take other appropriate action to protect information deemed privileged and confidential by statute when such information is offered or admitted into evidence at a hearing;

(12) limit irrelevant, immaterial, and unduly repetitious testimony and reasonably limit the time for presentations;

(13) rule on motions of Parties or the Hearings Examiner's own motion, including granting or denying continuance;

(14) request Parties to submit legal memoranda, proposed findings of fact and conclusions of law;

(15) issue proposals for decision and amendments thereto pursuant to APA §2001.062;

(16) impose appropriate sanctions against a party or its representative for:

(A) filing a motion or pleading that is groundless and brought:

(i) in bad faith;

(ii) for the purpose of harassment; or

(iii) for any other improper purpose, such as to cause unnecessary delay or needless increase in the cost of the proceeding;

(B) abuse of the discovery process in seeking, making, or resisting discovery; or

(C) failure to obey an order of the Hearings Examiner or of the state agency on behalf of which the hearing is being conducted; and

(17) where appropriate and justified by party or representative behavior described in §60.107(b)(16) of this title (relating to Representative Appearances) and after notice and opportunity for hearing, issue an order:

(A) disallowing further discovery of any kind or of a particular kind by the offending party;

(B) charging all or any part of the expenses of discovery against the offending party or its representatives;

(C) holding that designated facts be considered admitted for purposes of the proceeding;

(D) refusing to allow the offending party to support or oppose a designated claim or defense or prohibiting the party from introducing designated matters in evidence;

(E) disallowing in whole or in part requests for relief by the offending party and excluding evidence in support of those requests; and

(F) striking pleadings or testimony, or both, in whole or in part.

(18) any and all other things necessary to provide a fair, just, and proper hearing.

(c) If for any reason the Hearings Examiner cannot continue on a contested case, the Executive Director may either appoint another Hearings Examiner or refer the case to the State Office of Administrative Hearings.

§60.104. Conduct and Decorum.

(a) Parties, representatives, and other participants shall conduct themselves with dignity, shall show courtesy and respect for one another and for the Hearings Examiner, shall follow any additional guidelines of decorum prescribed by the Hearings Examiner in the proceeding, and shall adhere to the times scheduled for beginning the proceeding, and to the times established for each period of recess, and for ending the proceeding. Disorderly conduct will not be tolerated.

(b) To maintain and enforce proper conduct and decorum, and to assure promptness at a proceeding, the Hearings Examiner may take appropriate action, including but not limited to:

(1) issue a warning;

(2) exclude a person or persons from the proceeding; and

(3) recess the proceeding.

§60.105. Ex Parte Consultations.

Ex parte communications are prohibited in contested cases as provided in APA §2001.061.

§60.106. Parties.

(a) A person must have a justiciable interest in the proceedings in order to be designated a Party.

(b) If there is an error in a party's designation in its pleadings, the Hearings Examiner may assign a party an appropriate designation.

(c) The Hearings Examiner may align Parties according to the nature of the proceeding.

§60.107. Representative Appearances.

(a) An individual may represent himself or herself, or may appear by authorized representative.

(b) A party's authorized representative shall enter his or her appearance with the Office.

(c) A party's attorney of record shall remain the attorney of record in the absence of a formal request to withdraw and an order from the Hearings Examiner approving the request.

§60.108. Form and Content of Pleadings.

(a) All pleadings shall be typewritten or printed on is 8 1/2 inches wide and 11 inches long paper, with at least one-inch margins, or on the appropriate Department form. Exhibits attached to a pleading shall be the same size as pleadings or folded to that size. The impression shall only be on one side of the paper and shall be double or one and one-half spaced, except that footnotes and lengthy quotations may be single spaced. Photocopies are acceptable, provided all copies are clear and legible. All pleadings shall be timely filed and shall contain or be accompanied by:

(1) the name of the party seeking relief;

(2) the docket number assigned to the case by the Department;

(3) the style of the case;

(4) a concise statement of facts relied upon by the pleader;

(5) a clear statement of the type of relief, action, or order desired by the pleader, and identification of the specific grounds supporting the relief requested;

(6) an indication whether a hearing is needed on the relief sought;

(7) a certificate of service;

(8) any other matter required by statute or rule;

(9) supporting affidavits or other proof, when the party filing the request has asserted "good cause" in the request;

(10) the signature of the submitting party or the party's authorized representative; and

(11) the filing party's business address, telephone number, and, if applicable, telecopier number or, if filed by an authorized representative, the business address, telephone number, and, if applicable, the representative's state bar number and telecopier number.

(b) The signed original or a copy of said original shall be filed with the Office of the Hearings Examiner. When a copy of the signed original is filed, the party or the party's authorized representative shall maintain the signed original for examination by the Hearings Examiner or any party to the proceedings, should a question arise as to its authenticity.

(c) Pleadings shall be liberally construed. The Hearings Examiner may construe a document as a pleading if the intent of the document is evident.

§60.120. Motions.

All motions, except those made during a hearing, shall be considered to be pleadings and shall follow the rules set forth herein as relating to pleadings. If based upon matters which do not appear in the record, the motion shall be supported by affidavits and/or certified copies of documents. Any motion made after the Hearings Examiner has filed a proposal for decision shall be filed with the Hearings Examiner, who shall act upon the motion at the earliest practicable time.

§60.121. Service of Documents on Parties.

(a) Service on all Parties. Any person filing a document with the Hearings Examiner shall, on the same date as the document is filed, provide a copy to each party.

(b) Electronically transmitted documents. By agreement of the Parties, documents may be served on Parties by electronic mail according to the following requirements.

(1) With the exception of documents produced pursuant to a discovery request, the sender shall also file the original of the document with the Hearings Examiner.

(2) The sender has the burden of proving date and time of receipt of the document.

(c) Presumption of receipt. Any document served upon a party is prima facie evidence of receipt if it is directed to the complete, correct address of record. This presumption is rebuttable. Failure to claim properly addressed certified or registered mail will not support a finding of nondelivery.

§60.122. Examination and Correction of Pleadings.

Any pleading which does not comply substantially with applicable statutes and these rules is subject to being stricken upon motion of a party or upon the Hearings Examiner's own motion. The party filing the pleading shall have the right to file a corrected pleading, provided that the filing of the corrected pleading shall not be permitted to delay any hearing unless the party seeking to file the corrected pleadings establishes that the delay is necessary in order to prevent injustice or to protect the public interest and welfare.

§60.123. Amended Pleadings.

Any pleading may be amended at any time, provided that it does not act as a surprise to the opposite party. Any amended pleading which operates as a surprise to the opposite party may be granted upon a showing that no harm will result.

§60.124. Prepared Testimony and Exhibits.

The Hearings Examiner may require and designate the date that prepared testimony and exhibits be filed and served on all other Parties of record prior to the day set for hearing.

§60.150. Dismissal Without Hearing.

The Hearings Examiner may entertain motions for dismissal without a hearing for any of the following reasons:

(1) failure to prosecute;

(2) unnecessary duplication of proceedings, res adjudicata, collateral estoppel, or estoppel by judgment;

(3) withdrawal;

(4) moot questions or obsolete petitions;

(5) lack of jurisdiction; or

(6) any other reason which bars the proceeding.

§60.151. Disposition by Agreement.

(a) Disposition by agreement of any contested case may be made by stipulation, agreed settlement, or consent order, unless precluded by law.

(b) Parties agreeing to such informal disposition shall prepare a settlement agreement, containing proposed findings of fact and conclusions of law, which shall be signed by all the Parties and their designated representatives. The settlement agreement shall be filed with the general counsel.

(c) The general counsel shall promptly make a recommendation to the Executive Director and/or the Commission on the settlement agreement.

(d) Upon receipt of the settlement agreement and the general counsel's recommendation, the Executive Director and/or the Commission may:

(1) adopt the settlement agreement and issue a final order;

(2) reject the settlement agreement and remand the contested case for a hearing before the Hearings Examiner;

(3) reject the settlement agreement and order further investigation by the Department; or

(4) take such other action as the Executive Director and/or the Commission find just.

(e) The Commission may designate it's chairman to adopt or reject agreed orders.

§60.152. Prehearing Conference.

(a) The Hearings Examiner may direct the Parties, the Parties' authorized representatives, or both, to appear at a prehearing conference to consider:

(1) motions and other preliminary matters relating to the proceeding, including discovery;

(2) settlement of the case or simplification of the issues;

(3) amendment of pleadings;

(4) admissions or stipulations which will avoid the unnecessary introduction of evidence;

(5) limitations on the number of witnesses;

(6) time to be allotted to each party for presentation of its direct case or for cross-examination at the hearing;

(7) procedures to be followed at the hearing; and

(8) other matters that may aid in the disposition of the proceeding.

(b) The Hearings Examiner shall notify the Parties in writing of the disposition of and rulings made on all matters considered at the prehearing conference.

§60.153. Postponement, Continuance, Withdrawal, or Dismissal.

(a) Motions for postponement, continuance, withdrawal, or dismissal of any contested case which has been set for hearing shall be served on all Parties not less than five days prior to the hearing date. The movant shall include a statement that the other party/ Parties have been contacted and whether they have opposition to a continuance. Movant shall also provide a list of suggested future dates for consideration by the Hearings Examiner.

(b) Those motions shall make reference to all prior motions of the same nature filed in the same proceedings.

(c) Failure to comply with the requirements of this section, except for good cause shown, shall be sufficient grounds for the Hearings Examiner to deny that motion.

(d) After the commencement of a hearing, the Hearings Examiner shall not grant a postponement in or continuance of the hearing without the consent of all Parties unless the Hearings Examiner finds that a failure to grant the requested postponement or continuance would be unjust, inequitable, or not in the public interest.

§60.154. Consolidation.

The Hearings Examiner upon his own motion, or upon motion by any party, may consolidate for hearing two or more proceedings which involve substantially the same Parties or issues. Proceedings shall not be consolidated without the consent of all of the Parties, unless the Hearings Examiner finds that the two or more proceedings involve common questions of law or fact, and shall further find that separate hearings would result in unwarranted expense, delay or substantial injustice.

§60.155. Discovery.

(a) Discovery may commence after the Department has issued a Notice of Hearing in the case. No discovery may be sought after the commencement of the contested case hearing on the merits unless permitted by the Hearings Examiner upon a showing of good cause.

(b) Permissible forms of discovery are:

(1) oral or written depositions of a party or a nonparty;

(2) requests of a party for admission of facts or the genuineness or identity of documents or things;

(3) requests of a party for production, examination, and copying of documents or other tangible materials; and

(4) requests of a party for entry upon and examination of real or personal property, or both.

(c) The scope of discovery shall be the same as provided by the Texas Rules of Civil Procedure and shall be subject to the constraints provided therein for privileges, objections, protective orders, and duty to supplement as well as the constraints provided in the APA.

(d) Documents Produced in Discovery.

(1) Documents produced in discovery shall be served upon the requesting Parties and notice of the service shall be given to all Parties, but neither the documents produced nor the notice of service shall be filed with or served on the Hearings Examiner, except by order of the Hearings Examiner. The party responsible for service of the discovery materials shall retain a true and accurate copy of the original documents and become their custodian.

(2) Motions requesting relief in a discovery dispute shall be accompanied by only those portions of discovery materials relevant to the dispute.

(3) If documents produced in discovery are to be used at hearing or are necessary to a prehearing motion that might result in a final order on any issue, only the portions to be used shall be filed with the Hearings Examiner or offered into evidence.

§60.156. Place and Nature of Hearings.

All hearings conducted in any proceeding covered by this chapter shall be open to the public. All hearings shall be held in Austin, Texas, unless for good cause shown the Executive Director designates another place within the state.

§60.157. Order of Procedure.

(a) Opening the hearing. The Hearings Examiner shall open the hearing and make a concise statement of its scope and purposes. Appearances shall then be entered by all Parties. Thereafter, Parties may make motions or opening statements.

(b) Order of procedure. Parties shall be permitted to make opening statements, offer direct evidence, cross-examine witnesses, and present supporting arguments. The Party with the burden of proof shall be entitled to open and close. When there are multiple Parties with similar burdens of proof or several proceedings are heard on a consolidated record, the Hearings Examiner shall designate who may open and close. The Hearings Examiner will determine at what stage intervenors shall be permitted to offer evidence. The Hearings Examiner may alter the order of procedure if necessary for efficient conduct of the hearing.

(c) Voir dire. Voir dire examination to evaluate the qualifications of a witness to testify may be permitted but will not be substituted for cross-examination.

(d) Additional evidence. The Hearings Examiner may subpoena records or may call upon or subpoena any party, persons, or employees of the Department who are not assigned to render a decision or to make findings of fact and conclusions of law for additional evidence on any issue. Additional evidence shall not be admitted without an opportunity for examination, objection, and rebuttal by all Parties.

§60.158. Briefs.

(a) Briefs shall conform, where practicable, to the requirements for form of pleadings set out in these rules. The points involved shall be concisely stated, the evidence in support of each point shall be summarized, and the argument and authorities shall be organized and directed to each point in a concise and logical manner.

(b) Briefs may be requested by the Hearings Examiner at any time, on any question.

§60.159. Participation by Telephone.

(a) Upon timely motion containing the pertinent telephone number(s), a party may request to appear by telephone or to present the testimony of a witness by telephone. If the request is granted, a party may appear or a witness may testify by telephone if each participant in the hearing has an opportunity to participate in and hear the proceeding.

(b) All substantive and procedural rights apply to telephone prehearings and hearings, subject only to the limitations of the physical arrangement.

(c) Documentary evidence to be offered at a telephone prehearing conference or hearing shall be served on all Parties and filed with the Hearings Examiner at least 48 hours before the prehearing or hearing unless the Hearings Examiner, by written order, amends the filing deadline.

(d) For a telephone hearing or prehearing conference, the following may be considered a failure to appear and grounds for default if the conditions exist for more than 15 minutes after the scheduled time for hearing:

(1) failure to answer the telephone;

(2) failure to free the line for the proceeding; or

(3) failure to be ready to proceed with the hearing or prehearing conference as scheduled.

(e) Any long distance charges shall be borne by the Party requesting to appear by telephone or to present the testimony of a witness by telephone.

§60.160. Failure to Attend Hearing and Default.

(a) If, after receiving notice of a hearing, a party fails to appear or by representative on the day and time set for hearing, the Hearings Examiner may proceed in that party's absence and may enter a default judgment against the defaulting party.

(b) For purposes of this section, entry of a default judgment means the issuance of a proposal for decision in which the factual allegations against the defaulting party in the notice of hearing are deemed admitted as true without the requirement of submitting additional proof.

(c) Any default judgment entered under this section shall be issued only upon adequate proof that proper notice under Tex. Gov't Code, Chapter 2001 was provided to the defaulting party, and such notice includes disclosure, in 15-point, bold-face type, of the fact that upon failure of the party to appear at the hearing, the factual allegations in the notice will be deemed admitted as true, and the relief sought in the notice of hearing may be granted by default.

(d) If within five business days of the default order the defaulting party files a written statement with the Hearings Examiner showing good cause for the failure to appear and for the failure to notify the Hearings Examiner in advance of the hearing, the Hearings Examiner may vacate the default order and the matter will be reset for hearing.

§60.170. Reporters and Transcripts.

(a) A record of all contested case proceedings will be made. The making of a record of a prehearing conference may be waived, and the actions taken at the conference may instead be reflected in a written order issued after the conference. The Hearings Examiner is responsible for making a tape recording of the hearing or prehearing conference.

(b) The Hearings Examiner may order a different means of making a record if circumstances so require and may designate that record as the official record of the proceeding.

(c) Any party may make an unofficial record of the proceeding that is in addition to the official record, subject to the following conditions.

(1) The party shall file and serve a notice of intent to use an additional means at least two days before the proceeding.

(2) The party shall make all arrangements associated with the additional means.

(3) The Hearings Examiner may order that the additional means not be used or that it cease being used if it may cause or is causing disruption to the proceeding.

§60.171. The Record.

(a) On the written request by a party to a case or on request of the Hearings Examiner, a written transcript of all or part of the proceedings shall be prepared.

(1) The cost of the transcript is borne by the requesting party. This section does not preclude the Parties from agreeing to share the costs associated with the preparations of a transcript.

(2) The original of any transcript prepared shall be filed with the Hearings Examiner.

(3) Proposed written corrections of purported errors in a transcript shall be filed with the Hearings Examiner and served on the Parties and the court reporter within a reasonable time after discovery of the error. The Hearings Examiner may establish deadlines for the filing of proposed corrections and responses. The transcript will be corrected only upon order of the Hearings Examiner.

(4) A transcript prepared according to these procedures becomes the official record of the proceedings for purposes of all actions within the Department's jurisdiction.

(b) The Hearings Examiner shall maintain any exhibits admitted during the proceeding and the official record of the proceeding, other than a stenographic record.

(c) Any party who needs a certified language interpreter for presentation of its case shall be responsible for requesting the services of an interpreter. The department shall be responsible for making arrangements with a certified language interpreter once a request is made. The cost of the certified language interpreter shall be borne by the party requiring the interpreter's services.

§60.172. Evidence.

(a) The rules of evidence as applied in a nonjury civil case in district court of this state shall apply to a contested case except that evidence inadmissable under those rules may be admitted if admissible under the Administrative Procedure Act.

(b) A copy or excerpt of a document may be admitted as evidence if the original is not readily available and if authenticity is established by competent evidence. When numerous documents are offered, the Hearings Examiner may limit those admitted to a number of documents which are typical and representative. The Hearings Examiner may require the abstracting or summarizing of relevant data from documents and the presentation of abstracts or summaries in exhibit form. All parties shall have the right to examine the documents abstracted or summarized.

(c) Any part of the evidence may be received in written form. Affidavits may be allowed when, in the Hearings Examiner's opinion they are necessary to ascertain facts not reasonably susceptible to proof otherwise and are of a type commonly relied upon by prudent men in the conduct of their affairs. Evidence may be received by telephone or other electronic transmission.

§60.173. Offer of Proof.

When the Hearings Examiner excludes testimony, the party offering the evidence shall be permitted to make an offer of proof prior to the close of the hearing. The party may make the offer by dictating or submitting in writing the substance of the proposed testimony or by perfecting a bill of exceptions as in civil trials. The Hearings Examiner may direct the manner in which the offer is made and may ask questions if necessary to conclude that the evidence would

be as represented. The Hearings Examiner and opposing Parties shall be entitled to cross-examine any witness testifying on a bill of exceptions and to develop evidence on the bill. The Hearings Examiner may direct that bills of exception be transcribed separately and that reporter's costs be assessed against the proponent of the bill.

§60.174. Formal Exceptions Not Required.

Formal exceptions to rulings made by the Hearings Examiner during a hearing are not required. It shall be sufficient that the party shall have made known to the Hearings Examiner the desired ruling and the grounds therefor.

§60.190. Proposals for Decision.

(a) In a contested case, if a majority of the Commission members or the Executive Director, as applicable, have not heard the case or read the record, the decision, if adverse to a party other than the Department, may not be made until a proposal for decision is served on the Parties and an opportunity is afforded to each party adversely affected to file exceptions and present briefs to the Commission and/or the Executive Director. The proposal for decision must contain a statement of the reasons for the proposed decision and of each finding of fact and conclusion of law necessary to the proposed decision, prepared by the person who conducted the hearing or by one who has read the record. The Parties may waive the requirements of this subsection by written stipulation.

(b) When a proposal for decision is issued, a copy of the proposal shall be served promptly on each party or its authorized representative.

(c) The Hearings Examiner may direct a party to draft and submit proposed findings of fact and conclusions of law. The Hearings Examiner may limit the request for proposed findings to any particular issue or issues of fact. The party's proposed findings of fact shall be supported by concise and explicit statements of underlying facts developed from the record with specific record references.

(d) A proposal for decision or proposed order may be amended pursuant to exceptions, replies, or briefs submitted by the parties.

(e) Proposed decisions shall be brought before the Executive Director and/or the Commission for decision under their respective authorities.

§60.191. Filing of Exceptions and Replies.

(a) Any party of record may, within 14 days after the date of service of a proposal for decision, file exceptions to the proposal for decision with the Hearings Examiner's office. Replies to such exceptions may be filed within 10 days after the deadline for filing such exceptions. The Hearings Examiner, or the Parties by agreement with the Hearings Examiner's approval, may lengthen or shorten the time periods set out in this paragraph if good cause is shown. Copies of exceptions and replies shall be served on all Parties of record.

(b) A request for extension of time within which to file exceptions or replies shall be filed with the Hearings Examiner and a copy thereof shall be served on all other Parties of record by the party making such a request. The Hearings Examiner shall promptly notify the Parties of any action taken and shall allow additional time only if good cause is shown.

(c) The Hearings Examiner may amend the proposal for decision pursuant to the exception or reply.

§60.192. Final Orders, Motions for Rehearing, and Emergency Orders.

(a) A final order in a contested case shall be in writing and shall be signed by a quorum of the Commission, the Executive Director or both, as applicable. Final orders shall include findings of fact and conclusions of law separately stated. If a party submits proposed findings of fact as required by the Hearings Examiner, the decision shall include a ruling on each proposed finding. A party notified by mail of a final decision or order shall be presumed to have been notified on the date the notice is mailed.

(b) The filing of a Motion for rehearing is a prerequisite to appeal.

(c) In the absence of a timely filed motion for rehearing, a decision is final on the expiration of the period for filing a motion for rehearing. A decision is final and appealable on the date of rendition of an order overruling a motion for rehearing or on the date the motion is overruled by operation of law. If the Commission finds that an imminent peril to the public health, safety, or welfare requires immediate effect of a final decision or order, it shall recite that finding in the decision or order as well as the fact that the decision or order is final and effective on the date rendered, in which event the decision or order is final and appealable on the date rendered and no motion for rehearing is required as a prerequisite for appeal.

(d) A petition for judicial review must be filed in a District Court of Travis County Texas within 30 days after the order is final and appealable, as provided by Government Code, Title 10, Subtitle A, Chapter 2001.

(e) A party who appeals a final decision in a contested case must pay all costs for the preparation of the original or a certified copy of the record of the agency proceeding that is required to be transmitted to the reviewing court.

(f) If, after judicial review, the penalty is reduced or not assessed, the Executive Director shall remit to the person charged the appropriate amount, plus accrued interest if the penalty has 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 Executive Director under this subsection shall be paid at a rate equal to the rate charged on loans to depository institutions by the New York Federal Reserve Bank, and shall be paid for the period beginning on the date that the assessed penalty is paid to the Desave
partment and ending on the date the penalty is remitted.

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 August 31, 1998.

TRD-9813751
Rachelle A. Martin
Executive Director
Texas Department of Licensing and Regulation
Earliest possible date of adoption: October 11, 1998
For further information, please call: (512) 463-7357

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TITLE 22. EXAMINING BOARDS

Part I. Texas Board of Architectural Examiners

Chapter 1. Architects

Subchapter A. Scope; Definitions

22 TAC §1.10

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

The Texas Board of Architectural Examiners proposes the repeal of §1.10 Committees. The repeal of this rule will eliminate the requirement for the board to appoint a standing personnel committee and a standing rules committee. The effects are expected to eliminate duplicated coverage of material at scheduled board meetings.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five years the section as proposed is in effect, there will be no fiscal implications as a result of enforcing or administering the section.

Ms. Hendricks has also determined that for each year of the first five years the section as proposed is in effect, the public benefits anticipated as a result of enforcing the section as proposed will be the more expedient coverage of material to be addressed at board meetings. There will be no effect on small business. There is no anticipated economic cost to persons who are required to comply with the repealed rule as proposed.

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

The repeal is proposed under the Texas Civil Statutes, Article 249a which provide the Texas Board of Architectural Examiners with authority to promulgate rules.

This repeal does not affect any other statutes.

§1.10. Committees.

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 August 27, 1998.

TRD-9813628

Cathy L. Hendricks, ASID/IIDA

Executive Director

Texas Board of Architectural Examiners

Earliest possible date of adoption: October 11, 1998

For further information, please call: (512) 305-8535

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Chapter 3. Landscape Architects

Subchapter A. Scope; Definitions

22 TAC §3.10

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

The Texas Board of Architectural Examiners proposes the repeal of §3.10 Committees. The repeal of this rule will eliminate the requirement for the board to appoint a standing personnel committee and a standing rules committee. The effects are expected to eliminate duplicated coverage of material at scheduled board meetings.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five years the section as proposed is in effect, there will be no fiscal implications as a result of enforcing or administering the section.

Ms. Hendricks has also determined that for each year of the first five years the section as proposed is in effect, the public benefits anticipated as a result of enforcing the section as proposed will be the more expedient coverage of material to be addressed at board meetings. There will be no effect on small business. There is no anticipated economic cost to persons who are required to comply with the repealed rule as proposed.

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

The repeal is proposed under the Texas Civil Statutes, Article 249c which provide the Texas Board of Architectural Examiners with authority to promulgate rules.

This repeal does not affect any other statutes.

§3.10. Committees.

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 August 27, 1998.

TRD-9813626

Cathy L. Hendricks, ASID/IIDA

Executive Director

Texas Board of Architectural Examiners

Earliest possible date of adoption: October 11, 1998

For further information, please call: (512) 305-8535

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Subchapter B. Registration

22 TAC §3.28

The Texas Board of Architectural Examiners proposes an amendment to §3.28 Reciprocal Transfer. The proposed amendment is to require that applicants' records be screened by the Council of Landscape Architect Registration Boards. The effects are expected to be that applicants' records will be processed by an agency that has expertise in this field.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five years the section as proposed is in effect, the fiscal implications as a result of enforcing or administering the section will be the loss of a total of $11,000 in application fees.

Ms. Hendricks has also determined that for each year of the first five years the section as proposed is in effect, the public benefits anticipated as a result of enforcing the section as proposed will be that applications from Texas residents will provide the same information and be evaluated under the same standards as applications from other states; reciprocal registration will be easier to obtain. There will be no effect on small business. There is no anticipated economic cost to persons who are required to comply with the rule as proposed because the associated fee will remain the same.

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

The amendment is proposed under Texas Civil Statutes, Article 249c which provides the Texas Board of Architectural Examiners with authority to promulgate rules necessary to the performance of its duties.

This proposed amendment does not affect any other statutes.

§3.28. Reciprocal Transfer.

(a) Individuals holding certificates of registration in other states, nations, or territories applying for registration in Texas by reciprocal transfer shall be considered upon transmittal of their council record from the Council of Landscape Architectural Registration Boards (CLARB), effective September 1, 1999.[~~:~~]

[~~(1) their council certificate from the Council of Landscape Architectural Registration Boards (CLARB), effective September 1, 1999. (CLARB); or~~]

[~~(2) their written application on a form provided by the board. Acceptance of the information submitted will be subject to confirmation by the applicant's state from which he or she is applying.~~]

(b) Criteria for reciprocal registration [~~as outlined in subsection (a)(2) of this section~~] includes:

(1) a CLARB council certificate; or

(2) [~~(1)~~] certification by individual state boards (in which candidate holds current registration) that the applicant has qualified for the CLARB examination either as a result of approved education in landscape architecture, or having had seven years of professional experience under a registered landscape architect, supported with references and has passed the examination;

(3) [~~(2)~~] persons registered in their base state without examination through qualifications of having represented himself/herself to be a landscape architect for a period of time after September 1, 1969 (grandfather clause) are not eligible for registration by reciprocal transfer unless they have passed the CLARB examination;

(4) [~~(3)~~] those persons who have been registered by the grandfather clause in any state prior to 1970 must provide satisfactory references, examples of work accomplished, and, at the discretion of the board, must pass an oral examination; [~~examination.~~]

(5) other criteria as determined by the board.

(c) All arrangements for development of the council [~~certification~~] record will be the responsibility of the applicant.

[~~(d) Application fees for registration in Texas, as stated in Section 3.86 of this title (relating to Reciprocal Transfer Fee), must be submitted with the certification record and application.~~]

[~~(e) The processing fee for reciprocal application transfer is waived if the applicant holds a CLARB council certificate.~~]

(d) [~~(f)~~] Approval of applications for registration by reciprocal transfer will be by letter confirming the board action. The fee for registration, after approval of application, as stated in Subchapter E of this chapter (relating to Fees), must be remitted within 60 days after notification of the approval.

(e) [~~(g)~~] Rejections of applications for registration by reciprocal transfer will be by letter explaining the reasons and outlining procedures under which reconsideration may be possible.

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 August 27, 1998.

TRD-9813624
Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: October 11, 1998
For further information, please call: (512) 305-8535

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Subchapter E. Fees

22 TAC §3.86

The Texas Board of Architectural Examiners proposes an amendment to §3.86 Reciprocal Transfer Fees. The proposed amendment is to eliminate the stated fee previously included in the Rule. The effects are expected to be increased flexibility in the Board's ability to change the fee as necessary.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five years the section as proposed is in effect, there will be no fiscal implications as a result of enforcing or administering the section.

Ms. Hendricks has also determined that for each year of the first five years the section as proposed is in effect, the public benefits anticipated as a result of enforcing the section as proposed will be that the fee will not be subject to the artificial constraint imposed by a need to comply with the Rule's stated fee. There will be no effect on small business. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

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

The amendment is proposed under Texas Civil Statutes, Article 249c, which provides the Texas Board of Architectural Examiners with authority to promulgate rules necessary to the performance of its duties.

This proposed amendment does not affect any other statutes.

§3.86. Reciprocal Transfer Fees.

Initial registration fee for reciprocal license in Texas shall be as prescribed by the board and subject to change without notice. [~~Applicants requesting registration in Texas by reciprocity from other states must remit an application fee in the amount of $100. This fee is nonrefundable. If the applicant holds a Council of Landscape Architecture Registration Boards (CLARB) council certificate, the application fee is waived. If the application is approved, a certificate of registration will be issued upon receipt of an initial registration fee in the amount of $100.~~]

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 August 27, 1998.

TRD-9813625
Cathy L. Hendricks, ASID/IIDA

Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: October 11, 1998
For further information, please call: (512) 305-8535

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Chapter 5. Interior Designers

Subchapter A. Scope; Definitions

22 TAC §5.10

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

The Texas Board of Architectural Examiners proposes the repeal of §5.10 Committees. The repeal of this rule will eliminate the requirement for the board to appoint a standing personnel committee and a standing rules committee. The effects are expected to eliminate duplicated coverage of material at scheduled board meetings.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five years the section as proposed is in effect, there will be no fiscal implications as a result of enforcing or administering the section.

Ms. Hendricks has also determined that for each year of the first five years the section as proposed is in effect, the public benefits anticipated as a result of enforcing the section as proposed will be the more expedient coverage of material to be addressed at board meetings. There will be no effect on small business. There is no anticipated economic cost to persons who are required to comply with the repealed rule as proposed.

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

The repeal is proposed under the Texas Civil Statutes, Article 249e which provide the Texas Board of Architectural Examiners with authority to promulgate rules.

This repeal does not affect any other statutes.

§5.10. Committees.

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 August 27, 1998.

TRD-9813627
Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: October 11, 1998
For further information, please call: (512) 305-8535

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Part XII. Board of Vocational Nurse Examiners

Chapter 233. Education

General Provisions

22 TAC §233.1

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

The Board of Vocational Nurse Examiners proposes to repeal §233.1, relative to definitions. On September 14, 1998, the Board reviewed Chapter 233 relating to Education as outlined in the Boards Rule Review Plan and determined that rule 233.1 be repealed in order to add new definitions and to establish a numbering system for all definitions.

Marjorie A. Bronk, Executive Director, has determined that for the first five year period the rule is in effect, there will be no fiscal implication for state or local government as a result of enforcing the rule.

Mrs. Bronk has also determined that for the first five years the rule is in effect, that the public will have a better understanding of terminology used as a result of enforcement of the rule.

Comments on the proposed rule may be submitted to Marjorie A. Bronk, R.N, M.S.H.P., Executive Director, Board of Vocational Nurse Examiners, 333 Guadalupe, Suite 3-400, Austin, Texas 78701, (512) 305-8100.

This rule is proposed under Texas Civil Statutes, Article 4528c, Section 5(f), which provides the Board of Vocational Nurse Examiners with the authority to make such rules and regulations as may be necessary to carry in effect the purposes of the law.

No other statute, article or code will be affected by this proposal.

§233.1. Definitions.

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

Filed with the Office of the Secretary of State, on August 28, 1998.

TRD-9813711
Marjorie A. Bronk
Executive Director
Board of Vocational Nurse Examiners
Earliest possible date of adoption: October 11, 1998
For further information, please call: (512) 305–8100

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Subchapter A. Definitions

22 TAC §233.1

The Board of Vocational Nurse Examiners proposes new §233.1, relative to definitions. On September 14, 1998, the Board reviewed Chapter 233 relating to Education as outlined in the Boards Rule Review Plan and determined that §233.1 needed to be repealed and a new rule needed to be proposed to add definitions of Adjunct Faculty and Inactive Programs to provide definition for language and terminology used in the rules. The definition for Special Student is for consistency with §233.73 related to Special Students. The new rule is also being amended for establishing numbers for each definition.

Marjorie A. Bronk, Executive Director, has determined that for the first five year period the rule is in effect, there will be no fiscal implication for state or local government as a result of enforcing the rule.

Mrs. Bronk has also determined that for the first five years the rule is in effect, that the public will have a better understanding of terminology used as a result of enforcement of the rule.

Comments on the proposed rule may be submitted to Marjorie A. Bronk, R.N, M.S.H.P., Executive Director, Board of Vocational Nurse Examiners, 333 Guadalupe, Suite 3-400, Austin, Texas 78701, (512) 305-8100.

The new rule is proposed under Texas Civil Statutes, Article 4528c, Section 5(f), which provides the Board of Vocational Nurse Examiners with the authority to make such rules and regulations as may be necessary to carry in effect the purposes of the law.

No other statute, article or code will be affected by this proposal.

§233.1. Definitions.

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

(1) Adjunct Faculty - instructors who teach non-nursing theory or clinical courses and are exempt from meeting nursing faculty qualifications.

(2) Affiliating Agency or Clinical Facility - refers to health care facility contracted for student clinical practice by the controlling agency.

(3) Assistant Program Coordinator - a registered nurse vocational nursing program faculty member designated to assist with program management when the director assumes responsibilities other than the program.

(4) Challenge/Advanced Placement Student - a student who is allowed credit for previous nursing courses and/or comparable performance by demonstrating through writing and/or performing that he/she possesses the knowledge, skills and competencies of one or more courses in the vocational nursing program.

(5) Class Hours - shall be those hours allocated to didactic instruction in each subject and include testing.

(6) Clinical Conferences - denotes scheduled presentations and discussions of aspects of patient care experiences.

(7) Clinical Practice Hours - hours spent in actual patient care assignments, simulated laboratory, observations, clinical conferences and clinical instruction.

(8) 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.

(9) Concurrent Theory and Clinical Laboratory Experiences - coincide or operate at the same time to produce a common effect.

(10) Conditional Approval - refers to a probationary period set by the Board.

(11) Controlling Agency - institution that has ultimate authority and administrative accountability for the total program.

(12) Correlated Theory and Clinical Practice - to have reciprocal relationship or to mutually respond to each other.

(13) Course - organized subject matter and related activities, including laboratory experiences, planned to achieve specific objectives within a given time period.

(14) Curriculum - course offerings which, in aggregate, make up to the total learning activities in a program of study.

(15) Designate Supervisor - denotes a licensed nurse appointed by mutual agreement of affiliating agency and controlling agency.

(16) Director or Coordinator - denotes the nurse executive directly in charge of and responsible for the program.

(17) Director Affidavit - an official board form containing an approved nursing program's curriculum components and hours, a statement attesting to an applicant's qualifications for vocational nurse licensure in Texas, the official school seal and the signature of the nursing program director.

(18) Entry-level Competencies - describe the desirable behaviors exhibited by graduates of vocational nursing programs and are in accord with statutes governing nursing care and are based on the Essential Competencies.

(19) Essential Competencies - the expected educational outcomes to be demonstrated by nursing students at the time of graduation as published in Nursing Education Advisory Committee, Report Volume I, Essential Competencies of Texas Graduates of Education Programs in Nursing, March 1993, as amended.

(20) Full Approval - a status granted by the Board to schools complying with all requirements.

(21) Inactive Program - an approved program that has not enrolled students for a period of not more than 23 months.

(22) Initial Approval - the approval status of a program during the first year of operation.

(23) Innovative Curriculum - pertains to a curriculum which deviates from the traditional vocational nursing curriculum.

(24) Instructor - denotes all nursing education personnel employed by the controlling agency to teach in the vocational nursing department.

(25) LVN - the Licensed Vocational Nurse who has the authority to utilize the title under Texas Civil Statutes for the State of Texas.

(26) Major or Required Clinical Areas - Medical-surgical nursing, maternal-child health nursing, nursing of children and pharmacology.

(27) May - denotes optional recommendations.

(28) Nursing Process - serves as an organizational framework for the nurse-patient relationship in nursing education and practice. It encompasses all the steps taken by the nurse in a systematic approach to patient care: assessment, planning, intervention and evaluation.

(29) Objectives - Clear statements of expected behaviors that are attainable and measurable.

(A) Program Objectives - broad statements used to direct overall student learning toward the development of desirable terminal behaviors.

(B) Level Objectives - describe the student behaviors expected at the completion of major stages in the curriculum.

(C) Course Objectives - identify desired behavioral changes in the learner upon successful completion of specific curriculum content and shall serve as the mechanism for student progression and can be further divided into enroute and terminal categories.

(30) Philosophy - statement of concepts expressing fundamental beliefs, principles of reality, and of human nature and conduct as they apply to vocational nursing practice and education.

(31) Program - comprehensive system of education including development, implementation, and evaluation of policies and curriculum.

(32) Recommendations - statements of desirable standards for the development and maintenance of quality programs.

(33) Requirements - mandatory standards that a school must meet in order to gain and maintain an approved status.

(34) School - refers to a division or department offering a program in vocational nursing.

(35) Shall - denotes mandatory requirements.

(36) Should - denotes recommendations.

(37) Special Student - a student recommended by board staff for enrollment in nursing courses to meet specific curriculum deficiencies.

(38) Stipulations - specified mandatory requirements.

(39) Total Patient Care Assignment - is a manner of assignment whereby the student meets all nursing needs of the patient within the scope of his or her education.

(40) Traditional Curriculum - curriculum content which includes broad content areas for courses as specified by the Board of Vocational Nurse Examiners and meets the minimum hourly requirements for classroom and clinical instruction.

(41) Transfer Credit - is credit given for satisfactory completion of courses which are required in the vocational nurse curriculum.

(42) Transfer Student - is a student who is allowed credit for previous nursing courses.

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

Filed with the Office of the Secretary of State, on August 28, 1998.

TRD-9813712

Marjorie A. Bronk

Executive Director

Board of Vocational Nurse Examiners

Earliest possible date of adoption: October 11, 1998

For further information, please call: (512) 305–8100

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Subchapter B. Operation of a Vocational Nursing Program

22 TAC §§233.12, 233.14, 233.16, 233.18, 233.19, 233.21, 233.23, 233.24, 233.26, 233.28

On September 14, 1998, the Board reviewed Chapter 233 relating to Education as outlined in the Boards Rule Review Plan and determined that amendments to §233.12, 233.14, 233.16, 233.18, 233.19, 233.21, 233.23, 233.24, 233.26 and 233.28, relating to operation of a vocational nurse program were necessary. Section 233.12 is amended because responsibility for approval of proprietary schools was transferred to the Texas Workforce Commission. Section 233.14 is amended to clarify intent of requirement for board staff approval of student clinical practice affiliations. Section 233.16 is amended to change language to reflect Actual agency practice as the Board approves all new program regardless of the physical location. Section 233.18 is amended to differentiate between requirements for enrollment of students by a closed and an inactive program and to reflect agency practice, to remove from rule the time period of notification which is agency procedure and to clarify that reactivation of inactivation of an inactive program with full approval does not require Board approval. Section 233.19 is amended to clarify language without changing intent. Section 233.21 is amended to delete repetitious language that is repeated in §233.21 (C) (1) of this rule. Section 233.23 is amended to improve sentence structure. Section 233.24 is amended to clarify the intent of the utilization of part time faculty. Section 233.26 is amended to provide flexibility for board staff to distinguish between facilities that are small or have low patient census and major medical centers that can easily affiliate with multiple nursing programs. Section 233.28 is amended to clarify language.

Marjorie A. Bronk, Executive Director, has determined that for the first five year period the amended rules are in effect, there will be no fiscal implication for state or local government as a result of enforcing the rules.

Mrs. Bronk has also determined that for the first five years the amended rules are in effect, that the public will have a better understanding of terminology used as a result of enforcement of the rule.

Comments on the proposed rules may be submitted to Marjorie A. Bronk, R.N, M.S.H.P., Executive Director, Board of Vocational Nurse Examiners, 333 Guadalupe, Suite 3-400, Austin, Texas 78701, (512) 305-8100.

The amendments are proposed under Texas Civil Statutes, Article 4528c, Section 5(f), which provides the Board of Vocational Nurse Examiners with the authority to make such rules and regulations as may be necessary to carry in effect the purposes of the law.

No other statute, article or code will be affected by this proposal.

§233.12. Controlling Agency.

The controlling agency shall:

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

(3) select and appoint a qualified registered nurse director for the program who meets [~~will meet~~] the requirements of the Board and appropriate state education accrediting agencies (Texas Workforce Commission [~~Texas Education Agency~~] or Texas Higher Education Coordinating Board);

(4) - (7) (No change.)

§233.14. Contractual Agreement.

Before beginning new clinical affiliation, schools shall submit clinical affiliation approval forms to board office for approval. [~~Student clinical practice shall be secured through one or more health care~~

~~facilities approved by the Board of Vocational Nurse Examiners.~~] Means of cooperation between controlling and affiliating agencies shall be defined in the contract. There shall be on file a written contractual agreement between the controlling agency and each affiliating institution before the affiliation begins. The agreement shall outline the total program and the responsibilities of each agency entering the agreement. The agreement shall contain a withdrawal of participation clause indicating a minimum period of time to be given for notice of such withdrawal.

§233.16. Establishment of Extension Programs.

Any institution already operating a vocational nursing program desiring to begin an extension program [~~in another community~~] duplicating teaching facilities and a faculty shall begin the extension as a new program. Board policies governing establishing a new school are in effect.

§233.18. Reopening or Reactivating a Program [~~a School~~].

A closed program that was previously approved by the Board must be re-approved by the Board before the enrollment of students. Programs requesting to reopen shall meet the same criteria as required for the establishment of a new program. An inactive program with full approval status shall notify the agency in writing of its intent to enroll students at least three months prior to the enrollment date. An inactive program on conditional approval status must seek Board approval prior to reactivation. [~~A previously approved school shall seek advice from the Board prior to the enrollment of students. Advance notice of at least three months shall be given prior to reopening the school. Schools reactivating shall meet the same criteria as the establishment of a new program.~~]

§233.19. Closure of a School.

A school desiring to close shall make the intentions known in writing to the Board. The controlling agency shall be responsible for graduating enrolled students [~~completing enrollments in progress,~~] or ensuring [~~seeing~~] the satisfactory transfer of those students into another school. The controlling agency shall provide for permanent storage of student records. A school which has not enrolled students for a period of two years is deemed a closed school; if reopened it will be under initial approval.

§233.21. Director.

(a) Terms of Hire - The controlling agency shall ensure that:

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

[~~(3) the director is responsible to the controlling agency;~~]

(3) [~~(4)~~] the director may have responsibilities other than the program provided that an assistant program coordinator is designated to assist with the program management;

(4) [~~(5)~~] a director with responsibilities other than the program may not have major teaching responsibilities;

(5) [~~(6)~~] there are written job descriptions which clearly delineate responsibilities of the director and coordinator.

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

§233.23. Designate Supervisors.

Designate supervisors shall be nurses licensed to practice in the State of Texas. A designate supervisor shall have been actively employed in nursing for one year. A designate supervisor shall be responsible for providing clinical instruction and/or supervision when faculty is unavailable in clinical sites. The role of the designate supervisor is to augment the clinical instruction provided by the program faculty. [~~of the school and~~] While [~~while~~] acting in that capacity, the designate supervisor shall be accountable for identified clinical objectives and will participate in student evaluation. It is the responsibility of the faculty to provide written clinical objectives, evaluation criteria, and a written description of expectations to the designate supervisor. The designate supervisor is mandatory in health care facilities whose census and number of students cannot support the assignment of a faculty member.

§233.24. Minimum Teaching Personnel.

There shall be a minimum of one full-time nursing instructor for the program. A director/coordinator without major teaching or clinical responsibilities shall not be considered a full-time instructor. There shall be a minimum of one nursing instructor for every 12 students in clinical. A nursing instructor for each affiliating agency is preferred to a designate supervisor. Designate supervisors shall be excluded from the instructor/student clinical ratio. Use of part-time nursing instructors is permissible. The number of part-time instructors shall not exceed the number of full-time instructors in meeting the one to twelve ratio.

§233.26. Clinical Facility.

The Board office must be notified and approval given prior to beginning a new clinical affiliation. Board staff will determine if there are sufficient patient care experiences to support the affiliation of multiple vocational nursing programs for all major clinical areas. [~~A hospital cannot affiliate with more than one vocational nursing program for all major areas.~~] Clinical facilities that do not require approval prior to affiliations are clinics, day care centers, physicians' offices, geriatric centers, and psychiatric hospitals.

§233.28. Updating Program Design.

Schools shall apprise the board office of any program changes. [~~The Board office is to be apprised of any program changes.~~]

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 August 28, 1998.

TRD-9813713
Marjorie A. Bronk
Executive Director
Board of Vocational Nurse Examiners
Earliest possible date of adoption: October 11, 1998
For further information, please call: (512) 305–8100

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Subchapter C. Approval of Programs

22 TAC §233.41

On September 14, 1998, the Board reviewed Chapter 233 relating to Education as outlined in the Boards Rule Review Plan and determined that §233.41 relating to approval of programs needed to be amended. The rule is amended to reflect actual practice.

Marjorie A. Bronk, Executive Director, has determined that for the first five year period the amended rule is in effect, there will be no fiscal implication for state or local government as a result of enforcing the rule.

Mrs. Bronk has also determined that for the first five years the amended rule is in effect, that the public will have a better understanding of terminology used as a result of enforcement of the rule.

Comments on the proposed rule may be submitted to Marjorie A. Bronk, R.N, M.S.H.P., Executive Director, Board of Vocational Nurse Examiners, 333 Guadalupe, Suite 3-400, Austin, Texas 78701, (512) 305-8100.

The amendment is proposed under Texas Civil Statutes, Article 4528c, Section 5(f), which provides the Board of Vocational Nurse Examiners with the authority to make such rules and regulations as may be necessary to carry in effect the purposes of the law.

No other statute, article or code will be affected by this proposal.

§233.41. Types of Approval.

(a) Initial - Initial approval is extended to a new school beginning with date of first enrollment and until licensing examination results of first graduates are evaluated by the Board. An application fee and proposal for a vocational nursing program shall be submitted to the Board office [~~with the appropriate fee~~]. Upon receipt of the application and fee the Board shall cause a survey of the institution making such application to be made by a qualified representative of the Board.

(b) (No change.)

(c) Full - The Board grants full approval to programs that are in compliance with all requirements. The Board may consider granting full approval with conditions to individual programs that do not meet all requirements.[~~Full approval is granted by the Board to schools complying with all requirements.~~] Certificates of approval are issued annually based on either a survey visit or review of the annual report.

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 August 28, 1998.

TRD-9813714
Marjorie A. Bronk
Executive Director
Board of Vocational Nurse Examiners
Earliest possible date of adoption: October 11, 1998
For further information, please call: (512) 305–8100

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Subchapter D. Vocational Nursing Education Standards

22 TAC §§233.72–233.74

On September 14, 1998, the Board reviewed Chapter 233 relating to Education as outlined in the Boards Rule Review Plan and determined that §§233.72–233.74 required amendments. Section 233.72 is being amended for clarification of definition incorporating language commonly used by schools and for clarification that the requirements that must be met are the school's requirements for graduation. Section 233.73 is being amended to clarify language. Section 233.74 is being amended to simplify language and to separate into two sentences.

Marjorie A. Bronk, Executive Director, has determined that for the first five year period the amended rules are in effect, there will be no fiscal implication for state or local government as a result of enforcing the rules.

Mrs. Bronk has also determined that for the first five years the amended rules are in effect, that the public will have a better understanding of terminology used as a result of enforcement of the rule.

Comments on the proposed rules may be submitted to Marjorie A. Bronk, R.N, M.S.H.P., Executive Director, Board of Vocational Nurse Examiners, 333 Guadalupe, Suite 3-400, Austin, Texas 78701, (512) 305-8100.

The amendments are proposed under Texas Civil Statutes, Article 4528c, Section 5(f), which provides the Board of Vocational Nurse Examiners with the authority to make such rules and regulations as may be necessary to carry in effect the purposes of the law.

No other statute, article or code will be affected by this proposal.

§233.72. Transfer and Advanced Placement of [~~Students,~~] Vocational and Professional Nursing Students.
Acceptance of transfer students and evaluation of allowable credit for advanced placement remains at the discretion of the director of the program [~~school~~] and the controlling agency. All of the program's [~~curriculum~~] requirements must be met. On completion the individual is to be considered a graduate of the school.

§233.73. Special Students.
Special students may be recommended for admission by the Board staff [~~office~~]. Acceptance of special students is at [~~remains to~~] the discretion of the director of the [~~school of~~]vocational nursing program and the controlling agency. The special student would not be considered a graduate of that school.

§233.74. Clinical Practice Evaluations.
Faculty are responsible for student clinical practice evaluations. Clinical practice evaluations shall be correlated with level and/or course objectives. Students shall receive a minimum of three clinical evaluations during the program year. [~~The minimum number, not less than three, and content of clinical practice evaluations shall be correlated with level and/or course objectives.~~]

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 August 28, 1998.

TRD-9813715
Marjorie A. Bronk
Executive Director
Board of Vocational Nurse Examiners
Earliest possible date of adoption: October 11, 1998
For further information, please call: (512) 305–8100

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Subchapter E. Vocational Nurse Education Records

22 TAC §233.84, §233.85

On September 14, 1998, the Board reviewed Chapter 233 relating to Education as outlined in the Boards Rule Review Plan and determined that §233.84 and §233.85 required amendments. Section 233.84 is amended to simplify language. Section 233.85 is amended to reflect actual agency practice.

Marjorie A. Bronk, Executive Director, has determined that for the first five year period the amended rules are in effect, there

will be no fiscal implication for state or local government as a result of enforcing the rules.

Mrs. Bronk has also determined that for the first five years the amended rules are in effect, that the public will have a better understanding of terminology used as a result of enforcement of the rule.

Comments on the proposed rules may be submitted to Marjorie A. Bronk, R.N, M.S.H.P., Executive Director, Board of Vocational Nurse Examiners, 333 Guadalupe, Suite 3-400, Austin, Texas 78701, (512) 305-8100.

The amendments are proposed under Texas Civil Statutes, Article 4528c, Section 5(f), which provides the Board of Vocational Nurse Examiners with the authority to make such rules and regulations as may be necessary to carry in effect the purposes of the law.

No other statute, article or code will be affected by this proposal.

§233.84. Retention of Student Records.

All records must be maintained [~~retained~~] for two years. At minimum, [~~the Board shall require that~~] a transcript shall be retained as a permanent record on all students.

§233.85. Required and Resource Program Documents.

(a) (No change.)

(b) Changes and/or clarification of required documents, resource documents, and/or applicable fees will be communicated by board staff. [~~representatives of the Board office.~~] When applicable, original forms must be completed and submitted according to specified directions.

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 August 28, 1998.

TRD-9813716
Marjorie A. Bronk
Executive Director
Board of Vocational Nurse Examiners
Earliest possible date of adoption: October 11, 1998
For further information, please call: (512) 305–8100

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Part XXIX. Texas Board of Professional Land Surveying

Chapter 661. General Rules of Procedures and Practices

The Texas Board of Professional Land Surveying proposes amendments to §§661.42, 661.45, 661.73, 661.83 and 661.86, concerning applications, examinations, and licensing and contested case. The amendment to §661.42 clarifies the fact that examination fees will reflect the actual cost of examination. The amendment to §661.45 clarifies the types of calculators that examination candidates can use. In §661.73, §661.83 and §661.86, language has been changed for consistency with the Administrative Procedure Act.

Sandy Smith, executive director, has determined that for the first five-year period the sections are in effect, there will be no fiscal implications for state or local government.

Ms. Smith also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be all surveyors will be aware that examination fees reflect the actual cost of the examination, all applicants will be aware of the types of calculators allowed when taking examinations, and the sections will more closely reflect statutory language of the Administrative Procedure Act. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

Comments on the proposal may be submitted to Sandy Smith, Texas Board of Professional Land Surveying, 7701 North Lamar, Suite 400, Austin, Texas 78752.

Subchapter D. Applications, Examinations, and Licensing

22 TAC §661.42, §661.45

The amendments are proposed under Texas Civil Statutes, Article 5282c, §9, which provides the Texas Board of Professional Land Surveying with the authority to make and enforce all reasonable and necessary rules, regulations and bylaws not inconsistent with the Texas Constitution, the laws of this state, and this Act.

No other statute, article, or code is affected by this proposal.

§661.42. Fees.

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

(c) In addition to the application fee, an [~~the~~] examination fee not to exceed the examination cost and fees for administering the exam is required. [~~is $100 per examination~~].

(d)-(e) (No change.)

§661.45. Examinations.

(a) (No change.)

(b) Calculators will be permitted to be used during any examination. Any slide rule or silent, hand held, battery operated, nonprinting calculator will be permitted. Palmtop, laptop, notebook computers, and any other devices with text editing capabilities are not permitted.

(c)-(f) (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 August 31, 1998.

TRD-9813773
Sandy Smith
Executive Director
Texas Board of Professional Land Surveying
Earliest possible date of adoption: October 11, 1998
For further information, please call: (512) 452-9427

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Subchapter E. Contested Case

22 TAC §§661.73, 661.83, 661.86

The amendments are proposed under Texas Civil Statutes, Article 5282c, §9, which provides the Texas Board of Professional Land Surveying with the authority to make and enforce all reasonable and necessary rules, regulations and bylaws not inconsistent with the Texas Constitution, the laws of this state, and this Act.

No other statute, article, or code is affected by this proposal.

§661.73. Conduct of Hearings.

All hearings conducted in any proceeding shall be governed by the Open Meetings Act, Texas Civil Statutes, Article 6252-17, and the Administrative Procedure [~~and Texas Register~~] Act, Texas Civil Statutes, Article 6252-13a. [~~The board may recess any hearing from day to day.~~]

§661.83. Depositions.

The taking and use of depositions in any proceeding shall be governed by the Administrative Procedure [~~and Texas Register~~] Act, Texas Civil Statutes, Article 6252-13a, §14.

§661.86. Final Decisions and Orders.

All final decisions, recommendations, and orders of the board shall be in writing and shall be signed by the Board Chair [~~presiding member~~]. A final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by concise and explicit statement of the underlying facts supporting the findings. If, in accordance with agency rules, a party submits proposed findings of fact, the decision shall include a ruling on each proposed finding. Parties shall be notified either personally or by mail of any decision or order. A copy of the decision, recommendation, or order shall be delivered or mailed to the party and to his attorney of record.

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

Filed with the Office of the Secretary of State on August 31, 1998.

TRD-9813774
Sandy Smith
Executive Director
Texas Board of Professional Land Surveying
Earliest possible date of adoption: October 11, 1998
For further information, please call: (512) 452-9427

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22 TAC §661.74

(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 proposes the repeal of §661.74, concerning contested case. The section is repealed to eliminate a duplicate rule.

Sandy Smith, executive director, has determined that for the first five-year period the repeal is in effect, there will be no fiscal implications for state or local government.

Ms. Smith also has determined that for each year of the first five years the repeal is in effect the public benefit anticipated as a result of enforcing the repeal will be the elimination of redundant language. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Comments on the proposal may be submitted to Sandy Smith, Texas Board of Professional Land Surveying, 7701 North Lamar, Suite 400, Austin, Texas 78752.

The repeal is proposed under Texas Civil Statutes, Article 5282c, §9, which provides the Texas Board of Professional Land Surveying with the authority to make and enforce all reasonable and necessary rules, regulations and bylaws not inconsistent with the Texas Constitution, the laws of this state, and this Act.

No other statute, article, or code is affected by this proposal.

§661.74. Presiding Officer at Hearings.

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 August 31, 1998.

TRD-9813775
Sandy Smith
Executive Director
Texas Board of Professional Land Surveying
Earliest possible date of adoption: October 11, 1998
For further information, please call: (512) 452-9427

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TITLE 25. HEALTH SERVICES

Part VIII. Interagency Council on Early Childhood Intervention

Chapter 621. Early Childhood Intervention

The Interagency Council on Early Childhood Intervention (ECI) proposes amendments to §§621.1-621.3, 621.5, 621.61 and 621.63, concerning Early Childhood Intervention. The amendments are proposed to reflect changes in statutory revisions by the 75th Legislature. Throughout the sections the word "council" has been changed to the word "board". Elsewhere in this issue of the *Texas Register*, the ECI has proposed for review the following sections: §§621.1-621.3, 621.5 and 621.61-621.64. This review is in accordance with the Appropriations Act of 1997, HB 1, Article IX, Section 167.

Donna Samuelson, Deputy Executive Director, Interagency Council on Early Childhood Intervention, 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 enforcing or administering the amendments.

Ms. Samuelson 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 enforcing the rules will be updated terminology. There will be no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the amendments as proposed.

Comments on the proposal may be submitted to Alex Porter, General Counsel, Interagency Council on Early Childhood Intervention, 4900 North Lamar Boulevard, Austin, Texas 78751-2399.

Subchapter A. Conduct of Board [~~Council~~ Meetings

25 TAC §§621.1-621.3, 621.5

The amendments are proposed under the Human Resources Code, Chapter 73, which provides the Interagency Council on Early Childhood Intervention with the authority to promulgate rules consistent with the Code.

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

§621.1. Introduction.

These rules outline the procedures the Board [~~Council~~] will follow in the conduct of its meetings.

§621.2. Applicability of Texas Open Meetings Law.

The Board [~~council~~] in all its meetings is subject to the requirements of Government Code, Chapter 551.

§621.3. Board [~~Council~~] Procedures.

(a) Notice of meetings.

(1) (No change.)

(2) A copy of the notice will be sent to each board [~~council~~] member prior to the meeting.

(3) (No change.)

(b) Transaction of business.

(1) All meetings will be conducted according to Robert's Rules of Order except that the chairperson may vote on any action as any other member of the board [~~council~~].

(2) (No change.)

(c) Compensatory per diem.

(1) Members who are parents of children with developmental delay are entitled to reimbursement of expenses for meals, lodging and transportation as established in Article V of the current Texas State Appropriations Act. Members who were appointed as parents of children with developmental delay are entitled to reimbursement for child care necessitated by their participation in an official capacity as a board [~~council~~] member.

(2) All members are entitled to reimbursement for expenses related to attendant care necessitated by their participation in an official capacity as a board [~~council~~] member.

§621.5. Public Participation.

All requests from the public to participate in meetings shall be submitted to the board [~~council~~] chairperson who will arrange for reasonable public participation.

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 August 28, 1998.

TRD-9813720
Donna Samuelson
Deputy Executive Director
Interagency Council on Early Childhood Intervention
Earliest possible date of adoption: October 11, 1998
For further information, please call: (512) 424-6750

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Subchapter D. Early Childhood Intervention Advisory Committee

25 TAC §621.61, §621.63

The amendments are proposed under the Human Resources Code, Chapter 73, which provides the Interagency Council on Early Childhood Intervention with the authority to promulgate rules consistent with the Code.

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

§621.61. Purpose.

The purpose of these sections is to establish the size, composition, terms of office, duties, and procedures of an advisory committee to assist the Interagency Council on Early Childhood Intervention board [~~(council)~~] in its duties. The sections implement the provisions in:

(1) the Human Resources Code, §73.004, concerning an advisory committee to assist the board [~~council~~]; and

(2) the federal regulations covering an advisory committee to the board [~~council~~] in 34 Code of Federal Regulations, Part 303, Subpart G.

§621.63. Advisory Committee Duties.

(a) The advisory committee shall:

(1) advise and assist the Interagency Council on Early Childhood Intervention board [~~(council)~~] in the development and implementation of the policies that constitute the statewide system;

(2) (No change.)

(3) advise and assist the board [~~council~~] and TEA regarding the provision of appropriate services for children aged birth to five, inclusive;

(4) (No change.)

(5) assist the board [~~council~~] in the effective implementation of the statewide system, by establishing a process that includes:

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

(6) to the extent appropriate, assist the board [~~council~~] in the resolution of disputes.

(b) The advisory committee shall advise and assist the board [~~council~~] in the:

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

(c) The advisory committee shall advise and assist the board [~~council~~] in the preparation of applications under this chapter, and amendments to those applications.

(d) The advisory committee shall:

(1) with assistance from the board [~~council~~] prepare an annual report to the governor and to the secretary of the United States Department of Education (secretary) on the status of early intervention programs operated within the state for children eligible under this chapter and their families; and

(2) (No change.)

(e) (No change.)

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

Filed with the Office of the Secretary of State on August 28, 1998.

TRD-9813721
Donna Samuelson
Deputy Executive Director
Interagency Council on Early Childhood Intervention
Earliest possible date of adoption: October 11, 1998
For further information, please call: (512) 424-6750

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TITLE 28. INSURANCE

Part I. Texas Department of Insurance

Chapter 5. Property and Casualty Insurance

The Texas Department of Insurance proposes the repeal of §§5.1401 and 5.1402 relating to patient safety and risk reduction training for health care professionals, §5.1521 relating to the procedures for approval of standard and uniform professional liability rates, §5.3301 relating to forms for distribution by the property rating unit, §5.5003 relating to definition and classification of inland marine insurance, and §5.6401 relating to the agreement to participate in the Texas Workers' Compensation Assigned Risk Pool.

Article 5.15-4 was enacted by the 71st Legislature in 1989 to provide a reduction in certain professional liability insurance premiums for health care professionals who were providing charity care or services in 10% or more of their patient encounters and who completed a certain number of hours of continuing education on patient safety and risk reduction subjects related to the health care professional's practice. Sections 5.1401 and 5.1402 were adopted to implement the provisions of Article 5.15-4 and to provide for approval by the department of patient safety and risk reduction training courses for health care professionals. These sections set forth definitions and specify the procedures and requirements for approval, as qualifying education, for patient safety and risk reduction training courses or programs. Article 5.15-4 of the Insurance Code, concerning the reduction in certain medical professional liability insurance premiums, expired on September 1, 1997. Repeal of §§5.1401 and 5.1402 is necessary because the statutory authority that formed the basis for the implementation of these sections has expired thus making the sections no longer necessary.

Article 5.19 of the Insurance Code provides for rate administration by the department and for the promulgation of reasonable rules and statistical plans. Section 5.1521 was adopted under the authority of Article 5.19(d) to provide procedures for approval of standard and uniform professional liability rates subject to expiration after a two-year period or after a lesser approved period. The 73rd Legislature enacted HB 1461, effective September 1, 1993, to extend the file-and-use rate system to medical and professional liability insurance thus eliminating the approval process of standard and uniform professional liability rates and the necessity of §5.1521. Repeal of §5.1521 is necessary because statutory authority has implemented a different rate system for the area of medical and professional liability insurance.

Article 5.25, et. seq., Insurance Code, provide for rate administration by the department for fire insurance and allied lines. Section 5.3301 was adopted under the authority of Article 5.25 et. seq. to provide for forms for use by the department in property rating. The commercial property rating and inspection function was privatized effective September 1, 1994, and companies must now file and use their own commercial schedules and rating forms and certificates. Repeal of §5.3301 is necessary because the Texas Department of Insurance has implemented a different system for commercial property rating and inspection, making this section no longer needed.

Section 5.5003, which is a savings clause, was adopted under the authority of Article 5.53 along with sections specifically related to inland marine insurance. The purpose of §5.5003 was to retain the application of past procedures, orders, or interpretations and law for matters arising from events which occurred prior to the effective date of the sections adopted regarding the definition and classification of inland marine insurance. This savings clause is no longer necessary because the rules affected by this savings clause have been implemented and in effect for 14 years and the concern regarding invalidating actions which had taken place prior to the adoption of the sections no longer exists. Also, when rules affecting the definition of inland marine insurance are adopted currently, the department specifies how the amendment to the rule will apply to business written on or before the effective date of the amendment.

Section 5.6401 was adopted under the authority of Article 5.76-2, Insurance Code, to adopt by reference the agreement to participate in the Texas Workers' Compensation Assigned Risk Pool. Article 5.76-2 was repealed in 1997 eliminating the Texas Workers' Compensation Insurance Facility and incorporating it into the Assigned Risk Pool. Since the Facility has been eliminated, §5.6401 is no longer necessary. Repeal of §5.6401 is necessary because statutory authority for the creation and operation of the Texas Workers' Compensation Insurance Facility no longer exists and existence of this section is no longer necessary.

David Durden, deputy commissioner, automobile and homeowners group of regulation and safety, has determined that for the first five-year period the repeals will be in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the repeal. There will be no effect on local employment or the local economy.

Mr. Durden has also determined that for each year of the first five years the proposed repeals are in effect, the public benefit anticipated as a result of administering the repeals will be to clarify the administrative rules regulating professional liability insurance, property rating, inland marine insurance, and workers' compensation insurance by deleting sections that no longer have a statutory basis for implementation and might otherwise result in confusion to the public. There is no anticipated adverse economic effect on large or small businesses who are required to comply with the repeals as proposed.

Comments on the proposal to be considered by the department must be submitted within 30 days after publication of the proposed section in the Texas Register to Lynda H. Nesenholtz, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P. O. Box 149104, Austin Texas 78714-9104. An additional copy of the comment should be submitted to David Durden, Deputy Commissioner for the Automobile and Homeowners Group, Mail Code 104-5A, Texas

Department of Insurance, P. O. Box 149104, Austin Texas 78714-9104. A request for public hearing on the proposed repeal must be submitted separately to the Office of the Chief Clerk.

Subchapter B. Insurance Code, Chapter 5, Subchapter B

Patient Safety and Risk Reduction Training for Health Care Professionals

28 TAC §5.1401, §5.1402

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

The repeals are proposed under the Insurance Code, Articles 5.15-4, 5.98, 5.25, 5.53 and 1.03A. Article 5.15-4 provides that the commissioner shall administer this article and shall adopt necessary rules, forms, endorsements, and procedures to carry out this article. Article 5.98 provides that the Commissioner of Insurance may adopt reasonable rules that are appropriate to accomplish the purposes of Chapter 5. Article 5.25, et. seq., Insurance Code, provide for rate administration by the department for fire insurance and allied lines. Article 5.53 provides for the regulation of inland marine insurance. Article 1.03A authorizes the commissioner to adopt rules and regulations for the conduct and execution of the duties and functions of the department as authorized by statute.

The following articles of the Insurance Code are affected by this repeal: Insurance Code, Articles 5.15-4, 5.19, 5.25, et seq., and 5.53.

§5.1401. Definitions Concerning Patient Safety and Risk Reduction Training for Health Care Professionals.

§5.1402. Procedure for Approval of Patient Safety and Risk Reduction Training Courses for Health Care Professionals.

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 August 25, 1998.

TRD-9813544
Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: October 11, 1998
For further information, please call: (512) 463–6327

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Procedures for Approval of Standard and Uniform Professional Liability Rates

28 TAC §5.1521

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

The repeal is proposed under the Insurance Code, Articles 5.15-4, 5.98, 5.25, 5.53 and 1.03A. Article 5.15-4 provides that the commissioner shall administer this article and shall adopt necessary rules, forms, endorsements, and procedures to carry out this article. Article 5.98 provides that the Commissioner of Insurance may adopt reasonable rules that are appropriate to accomplish the purposes of Chapter 5. Article 5.25, et. seq., Insurance Code, provide for rate administration by the department for fire insurance and allied lines. Article 5.53 provides for the regulation of inland marine insurance. Article 1.03A authorizes the commissioner to adopt rules and regulations for the conduct and execution of the duties and functions of the department as authorized by statute.

The following articles of the Insurance Code are affected by this repeal: Insurance Code, Articles 5.15-4, 5.19, 5.25, et seq., and 5.53.

§5.1521. Procedures for Approval of Standard and Uniform Professional Liability Rates Subject to Expiration after a Two-year Period or after a Lesser Approved Period.

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 August 25, 1998.

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Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
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For further information, please call: (512) 463–6327

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Subchapter D. Fire and Allied Lines Insurance

Forms Required to be Used for the Property Rating Unit

28 TAC §5.3301

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

The repeal is proposed under the Insurance Code, Articles 5.15-4, 5.98, 5.25, 5.53 and 1.03A. Article 5.15-4 provides that the commissioner shall administer this article and shall adopt necessary rules, forms, endorsements, and procedures to carry out this article. Article 5.98 provides that the Commissioner of Insurance may adopt reasonable rules that are appropriate to accomplish the purposes of Chapter 5. Article 5.25, et. seq., Insurance Code, provide for rate administration by the department for fire insurance and allied lines. Article 5.53 provides for the regulation of inland marine insurance. Article 1.03A authorizes the commissioner to adopt rules and regulations for the conduct and execution of the duties and functions of the department as authorized by statute.

The following articles of the Insurance Code are affected by this repeal: Insurance Code, Articles 5.15-4, 5.19, 5.25, et seq., and 5.53.

§5.3301. Forms for Distribution by Property Rating Unit.

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 August 25, 1998.

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Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
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For further information, please call: (512) 463–6327

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Subchapter F. Inland Marine Insurance

Definition and Classification of Inland Marine Insurance

28 TAC §5.5003

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

The repeal is proposed under the Insurance Code, Articles 5.15-4, 5.98, 5.25, 5.53 and 1.03A. Article 5.15-4 provides that the commissioner shall administer this article and shall adopt necessary rules, forms, endorsements, and procedures to carry out this article. Article 5.98 provides that the Commissioner of Insurance may adopt reasonable rules that are appropriate to accomplish the purposes of Chapter 5. Article 5.25, et. seq., Insurance Code, provide for rate administration by the department for fire insurance and allied lines. Article 5.53 provides for the regulation of inland marine insurance. Article 1.03A authorizes the commissioner to adopt rules and regulations for the conduct and execution of the duties and functions of the department as authorized by statute.

The following articles of the Insurance Code are affected by this repeal: Insurance Code, Articles 5.15-4, 5.19, 5.25, et seq., and 5.53.

§5.5003. Savings Clause.

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 August 25, 1998.

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Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
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For further information, please call: (512) 463–6327

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Subchapter G. Workers' Compensation Insurance

Agreement to Participate in Workers' Compensation Assigned Risk Pool

28 TAC §5.6401

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

The repeal is proposed under the Insurance Code, Articles 5.15-4, 5.98, 5.25, 5.53 and 1.03A. Article 5.15-4 provides that the commissioner shall administer this article and shall adopt necessary rules, forms, endorsements, and procedures to carry out this article. Article 5.98 provides that the Commissioner of Insurance may adopt reasonable rules that are appropriate to accomplish the purposes of Chapter 5. Article 5.25, et. seq., Insurance Code, provide for rate administration by the department for fire insurance and allied lines. Article 5.53 provides for the regulation of inland marine insurance. Article 1.03A authorizes the commissioner to adopt rules and regulations for the conduct and execution of the duties and functions of the department as authorized by statute.

The following articles of the Insurance Code are affected by this repeal: Insurance Code, Articles 5.15-4, 5.19, 5.25, et seq., and 5.53.

§5.6401. Texas Workers' Compensation Assigned Risk Pool.

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 August 25, 1998.

TRD-9813543
Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
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For further information, please call: (512) 463–6327

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TITLE 30. ENVIRONMENTAL QUALITY

Part I. Texas Natural Resource Conservation Commission

Chapter 106. Exemptions from Permitting

Subchapter A. General Requirements

30 TAC §§106.1, 106.2, 106.4–106.6

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

The Texas Natural Resource Conservation Commission (commission) proposes the repeal of §§106.1, 106.2, and 106.4-106.6 and new §§106.1-106.8, concerning general requirements for an exemption from permitting.

EXPLANATION OF PROPOSED RULES

Texas Health and Safety Code, §382.057(a), prohibits an exemption from permitting for a facility defined as "major" under the Federal Clean Air Act (FCAA) or regulations adopted under it. The proposed changes conform to the limits set in the FCAA, §112(a)(1) for hazardous air pollutants (HAPs), and §302(j) for other air pollutants. The maximum emissions for a facility that may use an exemption from permitting are proposed to be

changed to conform to the federal limits for major sources. The limits for carbon monoxide and nitrogen oxides are lowered from 250 tons per year (tpy) to less than 100 tpy. Limits for HAPs are established at less than ten tpy of any individual HAP or 25 tpy of total HAPs. As a matter of policy, the commission believes that it is inappropriate to exempt facilities that are major sources of air pollution.

As part of the commission's regulatory reform initiative, §§106.1, 106.2, and 106.4 are rewritten for clarity, readability, and improved organization. These changes are for purposes of simplification and clarification only and do not involve substantive changes in the requirements of this chapter. In general, these changes involve using shorter sentences, limiting each citation to one main concept, reordering requirements into a more logical sequence, and using more commonplace terminology. Rewritten, they are proposed as §§106.1-106.6. Since *Texas Register* rules do not allow for the amendment of rule numbers, the commission proposes the repeal of existing §106.5 and §106.6, and proposes to readopt them as §106.7 and §106.8. Clarifications were made to the proposed §106.8 as discussed in this preamble. The repeals and readoptions facilitate the reorganization of Subchapter A for regulatory reform purposes.

In addition to these repeals and new sections, the commission concurrently proposes in this issue of the *Texas Register*, a change to Chapter 116, Subchapter F, §116.620(a)(4), concerning the standard permit for installation and/or modification of oil and gas facilities. The change is needed as a direct result of the commission proposing lower emission rates in §106.4. The standard permit change is limited to replacing the cross-reference to §106.4(a) with the actual emission limits designated for each pollutant that are contained in the current rule. This change will maintain the status quo for facilities authorized under the standard permit.

The new §106.1 establishes a terminology section. A definition is proposed for "site" that will apply throughout Chapter 106. Site has been defined in 30 TAC Chapter 122, concerning Federal Operating Permits, as: "The total of all stationary sources located on one or more contiguous or adjacent properties, which are under common control of the same person (or persons under common control). If a research and development operation does not produce products for commercial sale, it shall be treated as a separate site from any manufacturing facility with which it is collocated." Currently, exemptions may refer to either "site" or "account." Changes will be made, when appropriate, to those exemptions that use the word "account," if they are revised in future rulemaking.

The commission proposes to use "site" as defined in Chapter 122, because "site" represents all of the facilities and accounts under common control at a particular location and it is more appropriate to view the significance of the entire site when relating the public notice requirements in §106.4(a) and (b) to the total emission limits in §106.4(a)(1). It is also more appropriate to use the site-wide definition in viewing restrictions or prohibitions to the use of exemptions that may be contained in a particular permit.

The commission does not anticipate that defining "site" using the Chapter 122 definition will have a significant impact on the regulated community. Generally, at a site with multiple accounts, at least one facility has been through the public notice process and therefore is authorized to emit up to the maximum emission limits for each facility or a group of facilities constituting a project.

The commission proposes a new §106.2, concerning Purpose, to describe the general purpose of exemptions in Chapter 106. This language was originally in §106.1, concerning Purpose, and has been modified to meet the commission's requirements for regulatory reform.

The existing §106.2, concerning Applicability, is proposed to be deleted. The contents of this section relating to commencement of construction authorized by exemption have been moved to §106.4.

The commission proposes a new §106.3, concerning Facilities Ineligible for Exemptions from Permitting. This section sets out the restrictions that prohibit a facility from using an exemption. Most of these restrictions were originally in §106.4 and have been moved to this new section unchanged, except for wording revisions made for purposes of regulatory reform. However, the proposed §106.3(4) prohibits exemptions from permitting for facilities that would be considered construction or reconstruction that requires preconstruction approval under 40 Code of Federal Regulations (CFR) Part 63, National Emission Standards for Hazardous Air Pollutants for Source Categories (Part 63). This prohibition is added because Part 63 requires major sources of HAPs which are constructed or reconstructed to get preconstruction approval. Therefore, facilities which are major constructed or reconstructed sources of HAPs cannot be exempted from permitting under this chapter. In addition, those facilities seeking authorization for sources of HAPs that are major, are prohibited from using an exemption under this chapter. Facilities that are not major sources of HAPs, but still subject to Part 63, are not prohibited from using an exemption under this chapter.

The commission proposes to revise §106.4, concerning Emission Limits. The term "facility" has been replaced with the phrase "facility or a group of facilities constituting a project." Under the current rule, some registrants have argued, and in some cases, the staff has concurred, that multiple facilities in a project could be individually authorized to emit up to the maximum emission limits allowed under the rule. However, in most cases, the practice has been to evaluate the entire project and limit all facilities connected to the project to the maximum emission limits in §106.4. This proposed change will allow staff to ascertain that the project, when viewed as a whole, is considered insignificant and meets the intent of Texas Health and Safety Code, §382.057(a) and will ensure consistent application of the requirements of §106.4.

The commission proposes changes to the emission limitations in §106.4 to be consistent with the requirements of Texas Health and Safety Code, §382.057, Exemptions. The commission is authorized by §382.057 to exempt facilities or changes to facilities that will not make a significant contribution of air contaminants to the atmosphere. Section 382.057(a) prohibits the commission from exempting any facility or modification of an existing facility that is defined as "major" under the FCAA or regulations adopted under the FCAA. The existing §106.4(a) allows the commission to exempt facilities emitting up to 250 tons per year (tpy) of carbon monoxide (CO) or nitrogen oxides (NO_x); 25 tpy of volatile organic compounds (VOCs) or sulfur dioxide (SO_2) or inhalable particulate matter (PM_{10}); or 25 tpy of any other air contaminant except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen. This revision to

lower emission limitations is necessary due to the amendments to the FCAA in 1990 and is precipitated by the adoption of the new Chapter 116, Subchapter C on June 17, 1998, concerning Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources, commonly known as §112(g).

The 1990 amendments to the FCAA created the Title V Federal Operating Permit program. Title V requires major sources to obtain federal operating permits. FCAA, §501, Definitions, defines "major source" as any stationary source or group of such sources located within a contiguous area and under common control that is either a major source as defined in FCAA, §112 (Hazardous Air Pollutants), a major stationary source as defined in FCAA, §302 (definition of "major stationary source or major emitting facility"), or in Part D of Title I (nonattainment permits).

The major source threshold for HAPs under §112 is ten tpy or more of any HAP or 25 tpy or more of any combination of HAP. Exemptions cannot be used to authorize increases in HAPs which are considered new major sources or major reconstructions under Part 63. This includes §112(g) determinations and sources for which preconstruction approval is required under 40 CFR §63.5. A new limitation is added in subsection (a)(4) for HAPs.

The major source threshold under FCAA, §501 is 100 tpy or more of any air pollutant emitted by a major stationary source or major emitting facility as defined by FCAA, §302(j). It should be noted that authorizing a new major source or a major modification under Title I is not allowed under the current rule. However, the current rule could allow authorizing what is considered a major source under Title V since that level is 100 tpy of CO or NO_x rather than 250 tpy as currently allowed. It should also be noted that the major source level applies to the authorization of new major sources. Existing major sources can use exemptions to authorize insignificant changes to the site assuming that all other requirements in Chapter 106 are met. Section 106.4(a)(2) revises the emission limits for CO and NO_x from 250 tpy to less than 100 tpy.

As a result of the change to the CO and NO_x levels in §106.4, a change is proposed in this issue of the *Texas Register*, to §116.620, concerning Installation and/or Modification of Oil and Gas Facilities. This standard permit currently cross-references the emission limits contained in the existing §106.4(a). Since there are no specific emission limitations specified by the Texas Clean Air Act (TCAA) for standard permits, a revision is proposed to the standard permit to replace the reference to §106.4(a) with the actual limits that are currently included in §106.4(a) (i.e., 250 tpy of NO_x or CO, etc.)

In spite of the lower emission limits proposed, the commission believes that most new or modified facilities which would currently be able to be authorized under this chapter would still be able to do so under this chapter, as revised, or under an applicable standard permit under Chapter 116. However, the commission solicits comment on the need, if any, to develop additional standard permits for similar facilities under Chapter 116, because of the statutorily required changes to this chapter.

The commission is interested in receiving comments on the treatment of registrations for exemptions which are pending at the time the revisions to Subchapter A become effective. In most cases, rules become effective 20 days after they are filed with the Office of the Secretary of State, as stated in the Administrative Procedure Act, Chapter 2001, §2001.036, concerning Effective Date of Rules; Effect of Filing With Secretary of State. The commission believes that there are at least two ways to handle pending registrations. One is to require any registration that is pending approval at the time the revisions to this chapter become effective to be approved using the current emission limitations and requirements in Subchapter A. The second option is to require any registration that is pending approval at the time the revisions to this chapter become effective to be approved under the requirements that are newly adopted and effective. The commission seeks comment on these two options and any other options or scenarios that may be possible.

An additional requirement is proposed in §106.4(a)(6), which states that facilities authorized under Chapter 106 must meet any other applicable limit specified in this chapter. This addition is designed to serve as a reminder that rules and regulations listed in other sections of this chapter could impact the upper emission limits and what can be authorized under an exemption. Certain exemptions authorize emission limits that are less than the proposed emission limits in §106.4. In addition, certain exemptions have different limits that must also be met. For example, if an exemption has a 15 tpy emission limit for VOC, then a facility authorized under this chapter would have to meet both the 15 tpy total VOC limit while also meeting the ten tpy single HAP limit included in §106.4. As another example, §106.512 sets a total NO_x emission limit of 250 tpy for all emissions at a property. A facility using that exemption would have to meet the exemption specific property-wide limit and the 100 tpy NO_x emission limit in §106.4 for each new or modified facility, or group of facilities constituting a project.

Under the current §106.4, if one facility at the account has gone through the public notice process, each subsequent facility to be authorized at the account can emit up to the levels authorized by the current §106.4. If no facility at the account has been to public notice, emissions from all exempted facilities at the entire site are limited to the levels authorized by the current §106.4. The commission proposes to add language which requires at least one facility at the site to obtain a permit under Chapter 116, Subchapter B, Subchapter C, or Subchapter G (concerning New Source Review Permits; Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63); or Flexible Permits) in order for the sitewide emissions from exempted facilities to exceed the maximum levels allowed under this subchapter (i.e., each facility, or group of facilities constituting a project, can then emit up to the maximum limit, unless a specific exemption has lower emission limits).

The requirement to obtain a permit under the previously referenced subchapters of Chapter 116 is new and is intended to prevent circumvention of the public notice process, which includes opportunity for public participation. In the past, there have been cases where the sitewide limit was reached using exemptions and therefore public notice was required by the existing §106.4. To satisfy the existing rule language, a permit was applied for and once public notice was published, the permit application was withdrawn. This act did not allow an opportunity for public participation and did not satisfy the intent of the rule. By adding the requirement that a permit first be obtained, the public will be provided with notice and will have an opportunity to request a hearing. Obtaining a permit will allow for a comprehensive evaluation of the significance of the site.

The commission proposes a new §106.5, concerning Applicable Regulations and Requirements. This section contains the

requirement that exemptions must meet the intent of the TCAA, including protection of health and property of the public. The proposed language makes it clear that facilities operating under an exemption must comply with the netting requirements in Chapter 116, concerning Prevention of Significant Deterioration and Nonattainment Permitting, and the specific rules authorized under the FCAA, §111 (New Source Performance Standards) and §112 (National Emission Standards for Hazardous Air Pollutants (NESHAPS)). NESHAPS for Source Categories (commonly referred to as Maximum Achievable Control Technology Standards (MACTS)) have been promulgated by the United States Environmental Protection Agency (EPA) in Part 63. A requirement for facilities to comply with these MACTS has been added to §106.5.

New §106.6(c), concerning Other Requirements, is added to the rule to address a concern by EPA that a demonstration of compliance with the requirements of the exemption is needed to ascertain the insignificance of the authorizations under this chapter. The commission agrees that a demonstration of compliance is appropriate. Users of exemptions must be able to demonstrate that they comply with the limits and requirements of the exemption and present the appropriate records upon request.

New §106.7, concerning Public Notice, is the same as current §106.5.

New §106.8, concerning Certification of Enforceable Emission Limits, is substantively the same as current §106.6, except that it is revised to specifically include the actual name of the certification and the form number. The PI-8 form is used when an enforceable limit is needed for federal applicability requirements under New Source Review, which is lower than the maximum allowable limits listed in §106.4(a).

FISCAL NOTE

Stephen Minick, Strategic Planning and Appropriations, has determined that for the first five-year period the sections are in effect, there will be no significant fiscal implications for state or local government as a result of administration or enforcement of the sections. The commission reviewed the existing exemptions and believes that approximately 50 additional permit applications could be reviewed by the New Source Review Program as a result of the proposed revisions. Since this is likely a worst-case estimate of impacted businesses, the commission does not believe that the impact on state or local government will be significant. The commission issues approximately 1,000 new permits, permit amendments, and renewals each year.

PUBLIC BENEFIT

Mr. Minick also has determined that for each year of the first five years the sections are in effect, the anticipated public benefit will be improved opportunity for the commission to determine the potential impact on public health of facilities emitting air contaminants by lowering the emission levels above which facilities, and sites with numerous exempted facilities, will be required to obtain a permit. This change will also make the emission limits consistent with the provisions of the TCAA and will further ensure that facilities which would be considered major under the FCAA will receive permit review. The proposed changes provide a greater opportunity for public participation. The effect on businesses, including small businesses, is expected to be insignificant since most individual exemptions from permitting currently include similar or lower emission limits than the newly proposed limits of ten tpy of any single HAP or 25 tpy of any combination of HAPs. However, as a result of the lower HAP emission limits, it is possible that a limited number of businesses, estimated to be fewer than 50 per year, would need to apply for a permit before adding new or modified facilities, which would include a minimum fee of $450, public notice, and opportunity for hearing. The minimum cost of a contested case hearing is approximated at $5,000, but can be substantially higher for the more complex and controversial hearings. Commission air permit application data for 1996 indicates that less than 1.0% of permit applications result in a hearing. Similarly, as a result of the lower emission limits of NO_x and CO, other sites with new or modified internal combustion engines or gas turbines with 100 tpy or more of emissions of NO_x and CO from exempted facilities will be affected. If one of these facilities is at a site that has not previously undergone public notice, estimated to be fewer than 100 per year, it must either obtain a permit at the site, which would include public notice, or utilize any applicable standard permits, both of which currently require at least a $450 fee. The commission does not expect that there are many sites that large which have not already obtained a permit for at least one facility at the site. The commission also expects the impacts of the new NO_x and CO limits to be insignificant, since it is unusual for a single properly controlled internal combustion engine or gas turbine to emit 100 tpy or more of NO_x or CO. In addition, the proposed changes, if adopted, will not be applied retroactively. Facilities previously authorized under the existing requirements of Chapter 106, Subchapter A, concerning General Requirements, can continue to operate under those requirements as long as the facility meets those requirements.

DRAFT REGULATORY IMPACT ANALYSIS

The commission has reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code (the Code), §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it will 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. The proposal does not meet any of the four applicability requirements listed in §2001.0225(a).

This proposal does not exceed a standard set by federal law and is not specifically required by state law. The proposed rule changes do not exceed a standard set by federal law. The FCAA does not establish conditions for exempting facilities from permitting. Exemptions are authorized by TCAA, §382.057(a). Although exemptions are authorized by §382.057(a), the commission is not obligated to adopt exemptions. Therefore, the proposed changes are not specifically required by state law. However, if the commission chooses to adopt exemptions, §382.057(a) specifically prohibits the commission from exempting major sources as defined by the FCAA.

This proposal does not exceed an express requirement of state law and is not specifically required by federal law. The proposed rule changes will make the conditions of §106.4 consistent with the provisions of TCAA, §382.057(a). The FCAA does not establish conditions for exempting facilities from permitting; thus, the rule changes are not specifically required by federal law.

This proposal does not exceed the requirements of a delegation agreement or contract between the state and federal government as there is no agreement or contract between the commis-

sion and the federal government concerning exemptions from permitting.

The rules are not proposed solely under the general powers of the commission instead of under a specific state law. The proposed changes to §106.4 are not being made under the general powers of the commission. Rather, the changes are being made under the requirements of TCAA, §382.057(a), a specific state law that prohibits the commission from exempting facilities that are major as defined in the FCAA.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for these rules under Texas Government Code, §2007.043. The following is a summary of that assessment: the specific purpose of the rule amendments and repeals is to make the emission limitations allowed under Chapter 106 consistent with Texas Health and Safety Code, §382.057(a), which prohibits an exemption from permitting for a facility defined as "major" under the FCAA or regulations adopted under it. Many changes throughout the rules are intended to implement the commission's guidelines on regulatory reform, as well as provide clarifications to existing rule language. The rules revise the upper emission limits that will apply to the total of all exempted facilities at a site which has not been to public notice and obtained a permit when new authorization is being sought. The proposed changes will allow the executive director to provide a more thorough review of facilities or groups of facilities constituting a project and comprehensively evaluate the significance of the site. The proposed changes provide a greater opportunity for public participation. The proposed §106.3(4) prohibits exemptions from permitting for facilities which would be considered construction or reconstruction that requires preconstruction approval under 40 CFR Part 63, National Emission Standards for Hazardous Air Pollutants for Source Categories (Part 63). This prohibition is added because Part 63 requires major sources of HAPs which are constructed or reconstructed to get preconstruction approval. The proposed rulemaking will achieve its stated purpose by making Chapter 106 exemptions consistent with the statutory requirement in §382.057(a). The proposed rules will not make existing rules less stringent. Adoption and enforcement of the rule amendments and repeals will not create a burden on private real property.

COASTAL MANAGEMENT PLAN

The commission has determined that this proposed rulemaking action is 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.), the rules of the Coastal Coordination Council (31 TAC Chapters 501-506), and the commission's rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by 31 TAC §505.11(b)(2) and §505.22(a), and 30 TAC §281.45(a)(3) relating to actions and rules subject to the CMP, agency rules governing air pollutant emissions must be consistent with applicable CMP goals and policies. The commission has reviewed this proposed rulemaking action for consistency, and has determined that this proposed rulemaking action is consistent with the applicable CMP goals and policies, specifically §501.12(1), which is to protect, restore, and enhance the diversity, quality, functions, and values of coastal natural resource areas and §501.14(q), regarding compliance with 40 CFR, Protection of Environment.

The specific purpose of the rule amendments and repeals is to make the emission limitations allowed under §106.4 consistent with Texas Health and Safety Code, §382.057(a), which prohibits an exemption from permitting for a facility defined as "major" under the FCAA or regulations adopted under it. The upper emission limits in §106.4 are proposed to be lowered. This change may result in a reduction in emissions from new facilities authorized under exemptions.

Many changes throughout the rules are intended to implement the commission's guidelines on regulatory reform, as well as provide clarifications to existing rule language. The rules revise the upper emission limits that will apply to the total of all exempted facilities at a site which has never been to public notice and obtained a permit when new authorization is being sought. The proposed changes will allow the executive director to provide a more thorough review of facilities or groups of facilities constituting a project and comprehensively evaluate the significance of the site. The proposed changes provide a greater opportunity for public participation.

Interested persons may submit comments on the consistency of the proposed rules with the CMP goals and policies during the public comment period.

PUBLIC HEARING

A public hearing on this proposal will be held October 8, 1998, at 2:00 p.m. in Room 2210 of Texas Natural Resource Conservation Commission Building F, located at 12100 Park 35 Circle, Austin. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not occur during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to each hearing and will answer questions before and after the hearing.

SUBMITTAL OF COMMENTS

Comments may be submitted to Lisa Martin, Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 98020-106-AI. Comments must be received by 5:00 p.m., October 12, 1998. For further information, please contact Dale Beebe-Farrow, New Source Review Permits Division, (512) 239-1310, Kerry Drake, New Source Review Permits Division, (512) 239-1112, or Jim Dodds, Air Policy and Regulations Division, (512) 239-0970.

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.

STATUTORY AUTHORITY

The repeals are proposed under the Texas Health and Safety Code, the TCAA, §§382.012, 382.017, 382.056, and 382.057. Section 382.012 requires the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air. Section 382.017 authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. Section 382.056 contains the requirement for public notice. Section 382.057 authorizes the commission by rule to exempt certain facilities or changes to facilities from the requirements of §382.0518 if such facilities or changes will not make a significant contribution of air contaminants to the

atmosphere and prohibits exemptions to facilities that meet federal definitions of "major source."

The proposed repeals implement Texas Health and Safety Code, §382.057.

§106.1. Purpose.

§106.2. Applicability.

§106.4. Requirements for Exemption from Permitting.

§106.5. Public Notice.

§106.6. Registration of Emissions.

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 August 31, 1998.

TRD-9813735

Margaret Hoffman

Environmental Law Division

Texas Natural Resource Conservation Commission

Proposed date of adoption: November 13, 1998

For further information, please call: (512) 239–1966

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30 TAC §§106.1–106.8

STATUTORY AUTHORITY

The new sections are proposed under the Texas Health and Safety Code, the Texas Clean Air Act (TCAA), §§382.012, 382.017, 382.056, and 382.057. Section 382.012 requires the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air. Section 382.017 authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. Section 382.056 contains the requirements for public notice. Section 382.057 authorizes the commission by rule to exempt certain facilities or changes to facilities from the requirements of §382.0518 if such facilities or changes will not make a significant contribution of air contaminants to the atmosphere and prohibits exemptions to facilities that meet federal definitions of "major source."

The proposed new sections implement Texas Health and Safety Code, §382.057.

§106.1. Terminology.

For the purpose of this chapter, "site" shall have the same meaning as is defined in §122.10 of this title (relating to General Definitions).

§106.2. Purpose.

This chapter authorizes the construction of, or changes to, a facility or group of facilities constituting a project without obtaining a permit under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification). A facility or group of facilities constituting a project in compliance with this chapter will not make a significant contribution of air contaminants to the atmosphere and is exempt from the permit requirements of the Texas Health and Safety Code, the Texas Clean Air Act, §382.0518.

§106.3. Facilities Ineligible for Exemptions from Permitting.

An exemption from permitting may not be claimed where the facility or group of facilities constituting a project or change is:

(1) prohibited by permit. If a permit condition (or provision) at the same site prohibits or restricts the use of an exemption from permitting or standard exemption, no facility or change to a facility at that site may be exempted, except as allowed by that permit condition;

(2) considered a new major source. Major source is defined in §122.10(8) of this title (relating to General Definitions);

(3) considered a major modification as defined in:

(A) 40 Code of Federal Regulations (CFR) §52.21; or

(B) §116.12 of this title (relating to Nonattainment Review Definitions);

(4) considered to be a construction or reconstruction which requires preconstruction approval under 40 CFR Part 63.

§106.4. Emission Limits.

(a) If no facility or group of facilities constituting a project at a site has been subject to public notice and comment requirements and permitted under Chapter 116, Subchapter B, Subchapter C, or Subchapter G of this title (relating to New Source Review Permits; Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63); or Flexible Permits), the following emission limitations apply to the total emissions of all exempted facilities at that site, unless a lower limit is otherwise specified in the applicable exemption(s) from permitting:

(1) no emission limit on carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen;

(2) less than 100 tons per year (tpy) of carbon monoxide or nitrogen oxides;

(3) less than 25 tpy of volatile organic compounds, sulfur dioxide, or inhalable particulate matter (PM_{10});

(4) less than ten tpy of any individual hazardous air pollutant (HAP); or 25 tpy of total HAPs;

(5) less than 25 tpy of any other air contaminant; and

(6) any other applicable limit in this chapter.

(b) If at least one facility at a site has been subject to public notice and comment requirements and permitted under Chapter 116, Subchapter B, Subchapter C, or Subchapter G of this title, the emission limitations in subsection (a)(1)-(6) of this section apply to the facility or group of facilities constituting a project being authorized at that site, unless a lower limit is otherwise specified in the applicable exemption(s) from permitting.

§106.5. Applicable Regulations and Requirements.

(a) All facilities authorized by this chapter must be constructed and operated in compliance with:

(1) the intent of the TCAA, including protection of health and property of the public;

(2) all applicable rules and regulations of the commission, including:

(A) all applicable netting requirements of §116.150 and §116.151 of this title (relating to New Major Source or Major Modification in Ozone Nonattainment Areas; and New Major Source or Major Modification in Nonattainment Areas Other than Ozone);

(B) all applicable netting requirements of §116.160 of this title (relating to Prevention of Significant Deterioration Requirements);

(3) 40 Code of Federal Regulations (CFR) Part 60 (concerning New Source Performance Standards);

(4) 40 CFR Part 61 (concerning National Emission Standards for Hazardous Air Pollutants (NESHAPS)); and

(5) NESHAPS for source categories as listed under 40 CFR Part 63 (concerning NESHAPS for Source Categories) or as listed under Chapter 113, Subchapter C of this title (relating to National Emission Standards for Hazardous Air Pollutants for Source Categories (FCAA §112, 40 CFR 63)).

(b) Construction or modification of a facility or group of facilities constituting a project commenced on or after the effective date of a revision of this section or the effective date of a revision to a specific exemption in this chapter must meet the revised requirements to qualify for an exemption.

(c) A facility exempted by this chapter must meet any applicable permit or registration requirements of local air pollution control agencies.

§106.6. Other Requirements.

(a) Emission control equipment. All emission control equipment used for compliance with any exemption from permitting must be maintained in good condition and operated properly.

(b) Circumvention. A person claiming an exemption may not circumvent by artificial limitations the requirements of §116.110 of this title (relating to Applicability).

(c) Demonstration of compliance. A person claiming an exemption may be required to supply records or other information adequate to demonstrate that the person meets the requirements of the exemption(s) or other applicable requirements listed in this chapter.

§106.7. Public Notice.

Facilities constructed under this chapter that consist of permanently or temporarily located concrete plants that accomplish wet batching, dry batching, or central mixing, or specialty wet batch, concrete, mortar, grout mixing, or pre-cast concrete products, shall conduct public notice of the proposed construction unless exempted from public notice requirements by TCAA, §382.058(b). In all cases, public notice shall include the information specified in paragraph (1)(A) and (B) of this section.

(1) Public notification procedures.

(A) Publication in public notices section of a newspaper. At the applicant's expense, notice of intent to construct shall be published in the public notice section of two successive issues of a newspaper of general circulation in the municipality in which the facility is located or is proposed to be located or in the municipality nearest to the location or proposed location of the facility. The notice shall contain the following information:

(i) application number;

(ii) company name;

(iii) type of facility;

(iv) description of the location of facility or proposed location of the facility;

(v) contaminants to be emitted;

(vi) location and availability of copies of the completed application;

(vii) public comment period;

(viii) procedure for submission of public comments concerning the proposed construction;

(ix) notification that a person residing within 1/4-mile of the proposed plant is an affected person who is entitled to request a hearing in accordance with commission rules; and

(x) name, address, and phone number of the regional commission office to be contacted for further information.

(B) Publication elsewhere in the newspaper. Another notice with a size of at least 96.8 square centimeters (15 square inches) and whose shortest dimension is at least 7.6 centimeters (three inches) shall be published in a prominent location elsewhere in the same issues of the newspaper and shall contain the information specified in subparagraph (A)(i)-(iv) of this paragraph and note that additional information is contained in the notice published under subparagraph (A) of this paragraph in the public notice section of the same issue.

(2) Comment procedures.

(A) Comment period. Interested persons may submit written comments to the executive director, including requests for public hearings under TCAA, §382.056, on the executive director's preliminary decision to issue or not to issue the standard exemption. All such comments and hearing requests must be received in writing within 15 days of the last publication date of the notices specified in paragraph (1)(A) and (B) of this section. Any requests for a contested case hearing shall include a brief, but specific, written statement of interest and basis for challenging the application. Such statement shall convey in plain language the requestor's location relative to the proposed facility, why the requestor believes he or she will be affected by emissions from the proposed facility, what the requestor's concerns are about the emissions from the proposed facility, and how the requestor believes emissions from the facility will affect him or her if permitted. This statement shall not be used as the basis for denial of party status in any contested case hearing. Party status determinations will be made based on evidence developed at the initial prehearing conferences.

(B) Consideration of comments. All written comments received by the executive director during the period specified in subparagraph (A) of this paragraph shall be considered in determining whether to issue or not to issue the standard exemption. The executive director shall make record of all comments received together with the agency analysis of such comments available for public inspection during normal business hours at the Austin office of the commission and appropriate regional office.

§106.8. Certification of Enforceable Emission Limits.

(a) An owner or operator may certify, using a Form PI-8, Certification of Enforceable Emission Limits, and register the maximum emission rates from facilities exempted under this chapter in order to establish enforceable allowable emission rates which are below the emission limitations in §106.4 of this title (relating to Emission Limits).

(b) All representations with regard to construction plans, operating procedures, and maximum emission rates in any certification under this section become conditions upon which the exempt facility shall be constructed and operated.

(c) It shall be unlawful for any person to vary from such representation if the change will cause a change in the method of control of emissions, the character of the emissions, or will result in an increase in the discharge of the various emissions, unless the certification is first revised.

(d) The certification must include documentation of the basis of emission estimates and a written statement by the registrant

certifying that the maximum emission rates listed on the registration reflect the reasonably anticipated maximums for operation of the facility.

(e) The certification shall be maintained on-site and be provided immediately upon request by representatives of the commission or any air pollution control agency having jurisdiction. If the site is unmanned, the regional manager for the region in which the site is located may authorize an alternative site to maintain this documentation. Copies of the certification shall be included in applications for permits subject to review under the divisions in Chapter 116, Subchapter B of this title (relating to New Source Review Permits).

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 August 31, 1998.

TRD-9813736
Margaret Hoffman
Environmental Law Division
Texas Natural Resource Conservation Commission
Proposed date of adoption: November 13, 1998
For further information, please call: (512) 239–1966

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Chapter 116. Control of Air Pollution by Permits for New Construction or Modification

Subchapter F. Standard Permits

30 TAC §116.620

The Texas Natural Resource Conservation Commission (commission) proposes an amendment to §116.620, concerning Installation and/or Modification of Oil and Gas Facilities.

EXPLANATION OF PROPOSED RULE

The amendment is needed as a direct result of proposing lower emission rates in 30 TAC §106.4. The repeal and readoption of §106.4, concerning Emission Limits, is concurrently proposed in this issue of the *Texas Register*. The standard permit change is limited to replacing the cross-reference to §106.4(a) with the actual emission limits designated for each pollutant that is contained in the current rule. This change will maintain the status quo for facilities authorized under the standard permit.

FISCAL NOTE

Stephen Minick, Strategic Planning and Appropriations, has determined that for the first five-year period the section is in effect, there will be no significant fiscal implications for state or local government as a result of administration or enforcement of the section.

PUBLIC BENEFIT

Mr. Minick also has determined that for each year of the first five years the section is in effect, the anticipated public benefit will be to maintain the status quo for oil and gas facilities seeking authorization under the standard permit. There will be no effect on small businesses, since the status quo is being maintained. There is no increased economic cost to persons who are required to comply with the proposed section as compared with the current standard permit.

DRAFT REGULATORY IMPACT ANALYSIS

The commission has reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code (the Code), §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it will 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. The proposal does not meet any of the four applicability requirements listed in §2001.0225(a).

This proposal does not exceed a standard set by federal law and is not specifically required by state law. The proposed rule change does not exceed a standard set by federal law. The proposed rule replaces a cross-reference with the actual text of the rule that was previously referenced.

This proposal does not exceed an express requirement of state law and is not specifically required by federal law. The FCAA does not establish conditions for standard permits; thus, it is not specifically required by federal law.

This proposal does not exceed the requirements of a delegation agreement or contract between the state and federal government as there is no agreement or contract between the commission and the federal government concerning standard permits.

This proposal does not adopt a rule solely under the general powers of the commission instead of under a specific state law. The proposed rule simply replaces a cross-reference with the actual text of the rule that was previously referenced.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for the rule under Texas Government Code, §2007.043. The following is a summary of that assessment: the proposed change to §116.620(a)(4), concerning the Standard Permit for Installation and/or Modification of Oil and Gas Facilities, is needed as a direct result of proposing lower emission rates in §106.4 and will maintain the status quo for facilities authorized under the standard permit. The proposed rulemaking will achieve its stated purpose by replacing a cross-reference with the actual text of the rule that was previously referenced. The proposed rule will not make existing rules less stringent. Adoption and enforcement of the rule amendment will not create a burden on private real property.

COASTAL MANAGEMENT PLAN

The commission has determined that this proposed rulemaking action is 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.), the rules of the Coastal Coordination Council (31 TAC Chapters 501-506), and the commission's rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by 31 TAC §505.11(b)(2) and §505.22(a), and 30 TAC §281.45(a)(3) relating to actions and rules subject to the CMP, agency rules governing air pollutant emissions must be consistent with applicable CMP goals and policies. The commission has reviewed this proposed rulemaking action for consistency, and has determined that this proposed rulemaking action is consistent with the applicable CMP goals and policies.

The specific purpose of the rule amendment is to replace a cross-reference with the actual text of the rule that was previ-

ously referenced. The change to §116.620(a)(4), concerning Standard Permit for Installation and/or Modification of Oil and Gas Facilities, replaces the cross-reference to §106.4(a) with the actual emission limits designated for each pollutant that is contained in the current rule. This change will maintain the status quo for facilities authorized under the standard permit and does not authorize an increase in air emissions.

Interested persons may submit comments on the consistency of the proposed rule with the CMP goals and policies during the public comment period.

PUBLIC HEARING

A public hearing on this proposal will be held October 8, 1998, at 2:00 p.m. in Room 2210 of Texas Natural Resource Conservation Commission Building F, located at 12100 Park 35 Circle, Austin. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not occur during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to each hearing and will answer questions before and after the hearing.

SUBMITTAL OF COMMENTS

Comments may be submitted to Lisa Martin, Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 98020-106-AI. Comments must be received by 5:00 p.m., October 12, 1998. For further information, please contact Dale Beebe-Farrow, New Source Review Permits Division, (512) 239-1310, Kerry Drake, New Source Review Permits Division, (512) 239-1112, or Jim Dodds, Air Policy and Regulations Division, (512) 239-0970.

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.

STATUTORY AUTHORITY

The amendment is proposed under the Texas Health and Safety Code, the Texas Clean Air Act (TCAA), §§382.012, 382.017, and 382.057. Section 382.012 requires the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air. Section 382.017 authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. Section 382.057 authorizes the commission to develop standard permits for the installation of emission control equipment that constitutes a modification or a new facility.

The proposed amendment implements Texas Health and Safety Code, §382.057.

§116.620. Installation and/or Modification of Oil and Gas Facilities.

(a) Emission Specifications.

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

(4) New or modified internal combustion reciprocating engines or gas turbines permitted under this standard permit must [~~shall~~] satisfy all of the requirements of §106.512 of this title (relating to Stationary Engines and Turbines (Previously SE 6)), except that registration using the Form PI-7 or PI-8 shall not be required. Total actual emissions [~~Emissions~~] from engines or turbines must [~~shall~~] be limited to: [~~the amounts found in §106.4(a)(1) of this title (relating to Requirements for Exemption from Permitting).~~]

(A) no emission limit on carbon dioxide, water, nitrogen, methane, ethane, hydrogen, or oxygen;

(B) 250 tpy of carbon monoxide or nitrogen oxide;

(C) 25 tpy of VOCs, SO_2, or inhalable particulate matter; or

(D) 25 tpy of any other air contaminant.

(5)-(18) (No change.)

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

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

Filed with the Office of the Secretary of State, on August 31, 1998.

TRD-9813737
Margaret Hoffman
Environmental Law Division
Texas Natural Resource Conservation Commission
Proposed date of adoption: November 13, 1998
For further information, please call: (512) 239–1966

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Chapter 303. Operation of the Rio Grande

Subchapter D. Enforcement Regarding Watermaster Operation

30 TAC §303.32, §303.35

The Texas Natural Resource Conservation Commission (TNRCC or commission) proposes amendments to §303.32 and new §303.35 concerning enforcement actions and field citations by the Watermaster.

EXPLANATION OF PROPOSED RULE

Proposed amendments to §303.32 and new §303.35 represent changes made to the Watermaster program as authorized and required in the Texas Water Code §11.0843 through legislation passed by the 75th Texas Legislature in 1997. Under proposed new §303.35, upon witnessing a violation of a rule or order or a water right, the Watermaster or the Watermaster's deputy, may issue the alleged violator a field citation and provide the alleged violator the option to either pay the penalty amount or request a hearing on the alleged violation. Also, this section establishes penalty amounts corresponding to the types of violations. The rule authorizes watermasters or their deputies to issue field citations to water rights holders who may violate certain and limited regulations. A field citation is an administrative allegation of violation, which may be paid without admitting or denying the alleged violation, or contested. Historically, the violations contemplated under the proposed rules were referred to the Office of Attorney General for civil or criminal investigation and litigation. This process was costly to both the State and the alleged violator. The field citation rule proposed herein will result in a savings of much of the costs of litigation while preserving the right of the alleged violator to contest the issue of responsibility. The maximum penalty for a violation under the proposed rules is $500. The number of water rights holders

affected by this rule are limited and the maximum penalty provided is $500.

On March 19, 1998, a draft copy of the rule was mailed to the Rio Grande Watermaster Advisory Committee for review. TNRCC staff subsequently met with the Committee on March 26, 1998, to further discuss the field citation rules and address any concerns about the applicability of the rules in the Rio Grande Watermaster Program region. Based on comments from the Advisory Committee, the initial draft of proposed rules were changed to include only those violations that may occur in this Watermaster region and that would warrant a field citation.

The commission has determined that the proposed rule will not effect a local economy. The rule is limited in scope to a small number of very specific violations. The persons affected by this legislation are holders of water rights who violate the law and are a small and defined group. In addition, the rule seeks to punish illegal activity, as mandated by the legislature.

FISCAL NOTE

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for each year of the first five-year period the sections as proposed are in effect, there will be fiscal implications as a result of administration or enforcement of the sections. There will be no estimated cost to state and local governments expected as a result of enforcing or administering the rule. Local governments will not be enforcing this rule. The state previously enforced these rules but did not issue field citations. There will be no cost to issue field citations. There will be no estimated reduction in costs to local governments expected as a result of enforcing or administering the rule. Local governments will not be enforcing this rule nor have they administratively enforced these types of violations in the past. The state is expected to gain a slight reduction in operating costs associated with the enforcement of violations of the terms of water rights permits within the affected watermaster jurisdiction and subject to these sections. This reduction is due to a savings of investigation and litigation expenses. There will be no estimated loss or increase in revenue to the state or to local governments. Local governments will not be enforcing this rule and the state cannot contemplate any change to the very small amount of revenue collected. These cost savings are anticipated to be minor. There are no significant fiscal implications anticipated for local governments. The proposed rule will have no adverse economic effect on small business. The rule provides for the assessment of penalties for violations of the law. Small business are already subject to these types of violations. Therefore, there is no cost of compliance for small business as contemplated by Texas Government Code §2006.002.

PUBLIC BENEFIT

Mr. Minick has also determined that, for each year of the first five years the sections as proposed are in effect, the public benefit anticipated as a result of enforcement of and compliance with the sections will be enhancement in the level of enforcement and more cost-effective enforcement of water rights permit provisions and improved management and conservation of surface water resources. Holders of water rights permits subject to these provisions will be subject to administrative penalties as a result of the issuance of a field citation. While these costs are new costs, it is anticipated that these penalties will be significantly less than the penalty and procedural costs associated with existing formal enforcement actions. Additionally, these rules are proposed to streamline the enforcement of rules already in existence. The enforcement of the rules through the issuance of field citations should not be considered a cost to violators. It is a punishment for alleged wrongdoing. There are no other economic costs anticipated to any person, including small business, required to comply with the sections as proposed.

REGULATORY IMPACT ANALYSIS

Mr. Minick has determined that a regulatory impact analysis is not required because the rule is not a major environmental rule and will not have an adverse affect in a material way on the economy, environment or public health and safety of any sector of the state. In addition, this rule is specifically required by law, namely Texas Water Code §11.0843. (Added by Acts 1997, 75th Legislature, Ch.1010, §3.02, effective September 1, 1997.)

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these rules pursuant to Texas Government Code Annotated §2007.043. The following is a summary of that assessment. The specific purpose of this rule is to make the rules consistent with statutory authority and adopt new requirements relating to Watermaster enforcement actions as provided by Senate Bill 1, 75th Legislature, 1997. The rule also provides for issuance of field citations and to establish penalty amounts corresponding to the types of violations. Promulgation and enforcement of these rules will not burden private real property which is the subject of the rules. This newly proposed section will not involve a physical invasion, dedication, or exaction of real property, does not restrict or limit a property right that would otherwise exist, and does not eliminate any economic uses of private real property.

COASTAL MANAGEMENT PROGRAM

The executive director has reviewed the proposed rulemaking and found that the rule is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Actions and Rules Subject to the Coastal Management Program (CMP), nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the proposed rule is not subject to the CMP.

SUBMITTAL OF COMMENTS

Written comments on the proposal should refer to Rule Log No. 97147-304-WT and may be mailed to Lutrecia Oshoko, Texas Natural Resource Conservation Commission, Office of Policy and Regulatory Development, MC 205, P. O. Box 13087, Austin, Texas 78711-3087, (512) 239-4640. Comments may be faxed to (512) 239-5687, but must be followed up with the submission and receipt of the written comments within three working days of when they are faxed. Written comments must be received by 5:00 p.m. on October 12, 1998. Such comments will not receive individual responses, but will be addressed in the preamble of the adopted rules and published in the *Texas Register* . A hearing is not currently scheduled for this rule. For further information, please contact John Sadlier, Enforcement Division, (512) 239-6012.

STATUTORY AUTHORITY

The new and amendments are proposed under the Texas Water Code, §5.103 which provides the commission authority

to adopt rules necessary to carry out its powers and duties and under the provisions of the Texas Water Code and §11.0843 which provides the TNRCC with authority to issue field citations and establish penalty amounts corresponding to the types of violations.

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

§ 303.32. Enforcement Actions.

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

(c) The executive director may:

(1) seek voluntary compliance;

(2) refer a case to the attorney general for any appropriate legal remedy in a court of competent jurisdiction, which may include a penalty assessment of not more than $1,000 for each day the violator continues the taking, diversion, or appropriation as set forth in the Texas Water Code, §11.082;

(3) seek an action before the commission culminating with the issuance of an appropriate order, which if subsequently violated, may be referred to the attorney general for appropriate action in a court of competent jurisdiction; [~~or~~]

(4) issue a field citation in accordance with §303.35 (relating to Field Citation by Watermaster); or

(5) [~~(4)~~] seek any other appropriate remedies or actions which are available at law.

§303.35. Field Citation by Watermaster.

(a) Upon witnessing a violation set forth in subsection (d) of this section, the watermaster or the watermaster's deputy, may issue the alleged violator a field citation. The field citation will allege a violation has occurred and require that the alleged violator pay the administrative penalty and take remedial action as provided in the field citation.

(b) The alleged violator may either pay the administrative penalty assessed by the field citation without admitting or denying the alleged violation or request a hearing on the alleged violation.

(c) If the alleged violator fails to either pay the administrative penalty or take remedial action pursuant to a field citation issued under subsection (a) of this section, the executive director may proceed with enforcement action in accordance with Chapters 70 and 80 of this title.

(d) Violations for which the watermaster may issue a field citation are as follows.

Figure : 30 TAC §303.35(d)

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 August 26, 1998.

TRD-9813596

Margaret Hoffman

Director, Environmental Law Division

Texas Natural Resource Conservation

Proposed date of adoption: October 12, 1998

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

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Chapter 304. Watermaster Operations

Subchapter D. Enforcement Regarding Watermaster Operation

30 TAC §304.33, §304.34

The Texas Natural Resource Conservation Commission (commission) proposes amendments to §304.33 and new §304.34, concerning enforcement actions and field citations by the Watermaster.

EXPLANATION OF PROPOSED RULE

Proposed amendments to §304.33 and new §304.34 represent changes made to the Watermaster program as authorized and required in the Texas Water Code §11.0843 through legislation passed by the 75th Texas Legislature in 1997. Under proposed new §304.34, upon witnessing a violation of a rule or order or a water right, the Watermaster or the Watermaster's deputy, may issue the alleged violator a field citation and provide the alleged violator the option to either pay the penalty amount or request a hearing on the alleged violation. Also, this section establishes penalty amounts corresponding to the types of violations. The rule authorizes watermasters or their deputies to issue field citations to water rights holders who may violate certain and limited regulations. A field citation is an administrative allegation of violation, which may be paid without admitting or denying the alleged violation, or contested. Historically, the violations contemplated under the proposed rules were referred to the Office of Attorney General for civil or criminal investigation and litigation. This process was costly to both the State and the alleged violator. The field citation rule proposed herein will result in a savings of much of the costs of litigation while preserving the right of the alleged violator to contest the issue of responsibility. The maximum penalty for a violation under the proposed rules is $500. The number of water rights holders affected by this rule are limited and the maximum penalty provided is $500.

On March 25, 1998, a draft copy of the rule was mailed to the South Texas Watermaster Advisory Committee for review. TNRCC staff subsequently met with the Committee on April 22, 1998, to further discuss the field citation rules and address any concerns about the applicability of the rules in the South Texas Watermaster Program region. Based on comments from the Advisory Committee, the initial draft of proposed rules were changed to include only those violations that may occur in this Watermaster region and that would warrant a field citation.

The commission has determined that the proposed rule will not effect a local economy. The rule is limited in scope to a small number of very specific violations. The persons affected by this legislation are holders of water rights who violate the law and are a small and defined group. In addition, the rule seeks to punish illegal activity, as mandated by the legislature.

FISCAL NOTE

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for each year of the first five-year period the sections as proposed are in effect, there will be fiscal implications as a result of administration or enforcement of the sections. There will be no estimated cost to state and local governments expected as a result of enforcing or administering the rule. Local governments will not be enforcing this rule. The state previously enforced these rules but did not issue field citations. There will be no cost to issue field citations. There will be no estimated reduction in costs to local governments

expected as a result of enforcing or administering the rule. Local governments will not be enforcing this rule nor have they administratively enforced these types of violations in the past. The state is expected to gain a slight reduction in operating costs associated with the enforcement of violations of the terms of water rights permits within the affected watermaster jurisdiction and subject to these sections. This reduction is due to a savings of investigation and litigation expenses. There will be no estimated loss or increase in revenue to the state or to local governments. Local governments will not be enforcing this rule and the state cannot contemplate any change to the very small amount of revenue collected. These cost savings are anticipated to be minor. There are no significant fiscal implications anticipated for local governments. The proposed rule will have no adverse economic effect on small business. The rule provides for the assessment of penalties for violations of the law. Small business are already subject to these types of violations. Therefore, there is no cost of compliance for small business as contemplated by Texas Government Code §2006.002.

PUBLIC BENEFIT

Mr. Minick also has determined that, for each year of the first five years the sections as proposed are in effect, the public benefit anticipated as a result of enforcement of and compliance with the sections will be enhancement in the level of enforcement and more cost-effective enforcement of water rights permit provisions and improved management and conservation of surface water resources. Holders of water rights permits subject to these provisions will be subject to administrative penalties as a result of the issuance of a field citation. While these costs are new costs, it is anticipated that these penalties will be significantly less than the penalty and procedural costs associated with existing formal enforcement actions. Additionally, these rules are proposed to streamline the enforcement of rules already in existence. The enforcement of the rules through the issuance of field citations should not be considered a cost to violators. It is a punishment for alleged wrongdoing. There are no other economic costs anticipated to any person, including small business, required to comply with the sections as proposed.

REGULATORY IMPACT ANALYSIS

Mr. Minick has determined that a regulatory impact analysis is not required because the rule is not a major environmental rule and will not have an adverse affect in a material way on the economy, environment or public health and safety of any sector of the state. In addition, this rule is specifically required by law, namely Texas Water Code §11.0843. (Added by Acts 1997, 75th Legislature, Ch.1010, §3.02, effective September 1, 1997.)

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these rules pursuant to Texas Government Code Annotated §2007.043. The following is a summary of that assessment. The specific purpose of this rule is to make the rules consistent with statutory authority and adopt new requirements relating to Watermaster enforcement actions as provided by Senate Bill 1, 75th Legislature, 1997. The rule also provides for issuance field citations and establish penalty amounts corresponding to the types of violations. Promulgation and enforcement of these rules will not burden private real property which is the subject of the rules. This newly proposed section will not involve a physical invasion, dedication, or exaction of real property, does not restrict or limit a property right that would otherwise exist, and does not eliminate any economic uses of private real property.

COASTAL MANAGEMENT PROGRAM

The executive director has reviewed the proposed rulemaking and found that the rule is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Actions and Rules Subject to the Coastal Management Program (CMP), nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the proposed rule is not subject to the CMP.

SUBMITTAL OF COMMENTS

Written comments on the proposal should refer to Rule Log No. 97147-304-WT and may be mailed to Lutrecia Oshoko, Texas Natural Resource Conservation Commission, Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, (512) 239-4640. Comments may be faxed to (512) 239-5687, but must be followed up with the submission and receipt of the written comments within three working days of when they are faxed. Written comments must be received by 5:00 p.m. October 12, 1998. Such comments will not receive individual responses, but will be addressed in the preamble of the adopted rules and published in the *Texas Register* . A hearing is not currently scheduled for this rule. For further information, please contact John Sadlier, Enforcement Division, (512) 239-6012.

STATUTORY AUTHORITY

The sections are proposed under the Texas Water Code, §5.103 which provides the commission authority to adopt rules necessary to carry out its powers and duties and under the provisions of the Texas Water Code and §11.0843 which provides the commission with authority to issue field citations and establish penalty amounts corresponding to the types of violations.

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

§304.33. Enforcement Actions.

When a violation under §304.32 of this title (relating to Violations) occurs, the watermaster or the executive director may seek voluntary compliance, or may pursue appropriate enforcement action. In the absence of voluntary compliance:

(1) the watermaster may refuse to recognize a declaration of intent;

(2) the watermaster may lock headgates or pumping facilities or take other necessary actions to effectively cease diversion, impoundment or release of state water under the account associated with the violation; provided, however, that for violations of § 304.32(a)(4) or (a)(5) of this title (relating to Violations), the diverter shall be given at least 10 days notice prior to any such action by the watermaster;

(3) the executive director may seek a hearing before the commission culminating with the issuance of an appropriate order; if such an order is subsequently violated, the matter may be referred to the attorney general for appropriate action in a court of competent jurisdiction;

(4) the executive director may refer the violation to the attorney general for appropriate legal remedy in a court of competent

jurisdiction, which may include a penalty assessment to the maximum extent allowed by law; [~~and/or~~]

(5) the watermaster may issue a field citation in accordance with §304.34 (relating to Field Citation by Watermaster); and/or

(6) [~~(5)~~] the executive director may seek any other appropriate remedies or action available at law.

§304.34. Field Citation by Watermaster.

(a) Upon witnessing a violation set forth in subsection (d) of this section, the watermaster or the watermaster's deputy, may issue the alleged violator a field citation. The field citation will allege that a violation has occurred and require that the alleged violator pay the administrative penalty and take remedial action as provided in the citation.

(b) The alleged violator may either pay the administrative penalty assessed by the field citation without admitting or denying the alleged violation or request a hearing on the alleged violation.

(c) If the alleged violator fails to either pay the administrative penalty or take remedial action pursuant to a field citation issued under subsection (a) of this section, the executive director may proceed with enforcement action in accordance with Chapters 70 and 80 of this title.

(d) Violations for which the watermaster may issue a field citation are as follows.
Figure: 30 TAC §304.34(d)

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 August 26, 1998.

TRD-9813595
Margaret Hoffman
Environmental Law Division
Texas Natural Resource Conservation Commission
Proposed date of adoption: October 12, 1998
For further information, please call: (512) 239–4640

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

Part X. Texas Water Development Board

Chapter 357. Regional Water Planning Guidelines

31 TAC §357.7

The Texas Water Development Board (board) proposes amendments to 31 TAC §357.7, relating to Regional Water Plan Development. The proposed amendments clarify that the data for current and projected population and water demands, for evaluation of adequacy of current supplies, and for water supply and demand analysis are to be tabulated by cities, major providers of municipal and manufacturing water, and specified categories of use for each county or portion of a county in the regional water planning area. If a county or portion of a county is in more than one river basin, data shall be reported for each river basin. The tabulation of data in this manner has been anticipated from the initial adoption of the rule; however some conflicting interpretations of the rules have been made. The amendments are intended to clarify the board's interpretation. The tabulation of data in the manner proposed will allow a full assessment by river basins and counties of population and water demands, water supply adequacy, and supply and demand analysis. It will allow the board to determine that data is not omitted in the final state water plan and provide data to allow the Texas Natural Resource Conservation Commission and the board to make statutorily required finding of consisency of applications with approved regional water plan. The tabulations will further allow for the impacts of interbasin transfers to be studied by regions, local entities and state agencies.

Ms. Patricia Todd, Director of Accounting and Finance, has determined that for each year of the first five years that the section is in effect there will not be fiscal implications for state or local government as a result of enforcing or administering the section.

Ms. Todd also has determined that for each year of the first five years that the section is in effect the public benefit anticipated as a result of enforcing the section will be to provide clarity in the interpretation of requirements for regional water plans and to ensure that the data formulated in such plans provides information that is useful to local and state governmental entities. There will not be an effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendments as proposed.

Comments on the proposed amendments will be accepted for 30 days following publication and may be submitted to Suzanne Schwartz, 512/463-7981, Texas Water Development Board, P.O. Box 13231, Austin, Texas, 78711-3231.

The amendments are proposed under the authority granted in Texas Water Code, §6.101, which provides the board with the authority to adopt rules necessary to carry out its powers and duties under the Texas Water Code and laws of Texas, and under the authority of Texas Water Code, §16.053, which requires the board to develop rules and guidelines: to provide procedures for adoption of regional water plans by regional water planning groups and approval of regional water plans by the board; to govern procedures to be followed in carrying out the responsibilities in Texas Water Code, §16.053; and for the format in which information is to be presented in the regional water plans.

The statutory provisions affected by the amendments are Texas Water Code, §16.053.

§357.7. Regional Water Plan Development.

(a) Regional water plan development shall include the following:

(1) (No change.)

(2) presentation of current and projected population and water demands. Results shall be reported by city, major providers of municipal and manufacturing water, and categories of water use (including municipal, manufacturing, irrigation, steam electric power generation, mining, and livestock watering) for each county or portion of a county in the regional water planning area. If a county or portion of a county is in more than one river basin, data shall be reported for each river basin [~~city, county and that portion of a river basin within the regional water planing area for major providers of water for municipal and manufacturing purposes, and for categories of water use including municipal, manufacturing, irrigation, steam electric power generation, mining, and livestock watering~~];

(3) evaluation of adequacy of current water supplies available to the regional water planning area for use during drought of record. This evaluation shall consider surface water and groundwater data from the state water plan, existing water rights, contracts and option agreements, other planning and water supply studies, and analysis of water supplies currently available to the regional water planning area. Analysis of surface water available during drought of record from reservoirs shall be based on firm yield analysis of reservoirs. Firm yield is defined as the supply the reservoir can provide during a drought of record using reasonable sedimentation rates and the assumption that all senior water rights will be totally utilized. Until information is provided by the Texas Natural Resource Conservation Commission, regional water planning groups may use estimates of the projected amount of water that would be available from existing water rights during a drought of record, when flows are at 75% of normal, and when flows are at 50% of normal. Once this information is available from the Texas Natural Resource Conservation Commission, the regional water planning group shall incorporate it in its next planning cycle. The executive administrator, after coordination with staff of the Texas Natural Resource Conservation Commission and the Texas Parks and Wildlife Department, shall identify the methodology, in consultation with representatives of regional water planning groups, to be used by regional water planning groups to calculate water availability during drought of record and describe conditions when flows are at 50% and 75% of normal. The executive administrator shall provide available technical assistance to the regional water planning groups upon request to assist them in selecting appropriate methods and data to be used to determine water supply availability. Results of evaluations shall be reported by city, major providers of municipal and manufacturing water, and categories of water use (including municipal, manufacturing, irrigation, steam electric power generation, mining, and livestock watering) for each county or portion of a county in the regional water planning area. If a county or portion of a county is in more than one river basin, data shall be reported for each river basin [~~city, county, and portion of a river basin within the regional water planning area for major providers of municipal and manufacturing water and for categories of water use including municipal, manufacturing, irrigation, steam electric power generation, mining, and livestock watering~~];

(4) water supply and demand analysis comparing water demands as developed in paragraph (2) of this subsection with current water supplies available to the regional water planning area as developed in paragraph (3) of this subsection to determine if the water users in the regional water planning area will experience a surplus of supply or a need for additional supplies. The social and economic impact of not meeting these needs shall be evaluated by the regional water planning groups and reported by regional water planning area and river basin. Other results shall be reported by city, major providers of municipal and manufacturing water, and categories of water use (including municipal, manufacturing, irrigation, steam electric power generation, mining, and livestock watering) for each county or portion of a county in the regional water planning area. If a county or portion of a county is in more than one river basin, data shall be reported for each river basin [~~city, county, and portion of a river basin within the regional water planning area for major providers of municipal and manufacturing water, and for categories of water use including municipal, manufacturing, irrigation, steam electric power generation, mining, and livestock watering~~]. The executive administrator shall provide available technical assistance to the regional water planning groups, upon request, on water supply and demand analysis, including methods to evaluate the social and economic impacts of not meeting needs;

(5)-(9) (No change.)

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

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

Filed with the Office of the Secretary of State, on August 28, 1998.

TRD-9813699
Suzanne Schwartz
General Counsel
Texas Water Development Board
Proposed date of adoption: October 15, 1998
For further information, please call: (512) 463–7981

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Chapter 367. Agricultural Water Conservation Program

Subchapter A. Grants for Equipment Purchases

31 TAC §367.24, §367.29

The Texas Water Development Board (the board) proposes amendments to 31 TAC §367.24 and §367.29 concerning grants for purchase of agricultural water conservation equipment. The amendments will allow grants in excess of 75% if appropriation language provides for a greater amount. This amendment is proposed in recognition that drought or other conditions could lead the legislature to want to place funds into the agricultural soil and water conservation fund to provide grants in excess of the current limits in the rules of 75% of equipment costs. The amendments will allow such flexibility, while still providing a limit on the amount of grants under ordinary situations. The need for this flexibility has become particularly apparent when legislative committees began exploring methods to respond to the drought in Texas. The amendment to §367.29 will require reports made for equipment that measures and evaluates irrigation systems to identify the amount of water saved from use of the equipment.

Ms. Patricia Todd, Director of Accounting and Finance, has determined that for each year of the first five years that the sections are in effect there will be no be fiscal implications for local government as a result of enforcing or administering the sections. There will be no fiscal implications for state government over and above any funds that may be appropriated for grant purposes.

Ms. Todd also has determined that for each year of the first five years that the sections are in effect the public benefit anticipated as a result of enforcing the sections will be to fund cost-effective measures to promote agricultural soil and water conservation for the State. There will not be an effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendments as proposed.

Comments on the proposed sections will be accepted for 30 days following publication and may be submitted to Suzanne Schwartz, Texas Water Development Board, P.O. Box 13231, Austin, Texas, 78711-3231, 512/463-7981.

The amendments are proposed under the authority of the Texas Water Code, §6.101 which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other

laws of the State, and Chapter 15, Subchapter H, which relates to the provision of grants for equipment purchases from the agricultural soil and water conservation fund and §15.403 which directs the board to adopt rules to carry out Texas Water Code, Chapter 15.

Texas Water Code §15.471 et.seq. are the statutory provisions affected by the proposed amendments.

§367.24. Matching Grant Requirements.

The grant shall be limited to a maximum of 75% of the cost of the equipment unless appropriation language provides for a greater amount.

§367.29. Reports by Recipients.

For a period of no less than three years following receipt of grant funds, each recipient of a grant shall provide to the executive administrator reports on the number of agricultural system efficiency evaluations made (including, but not limited to, the types of systems or equipment evaluated and the affected acres and crops), uses of the equipment to demonstrate efficient irrigation systems and agricultural water conservation practices, or numbers and results of water quality evaluations and uses for demonstration of efficient or sound agricultural chemical systems. For grants made for the purpose of §367.21(1) of this title (relating to Purpose), the report shall identify the amount of water saved from use of the equipment. Individual field evaluation forms and reporting forms in a format specified by the executive administrator or in the grant agreement shall be completed and submitted. The executive administrator may approve combining reports from recipients that have received multiple grants under this program.

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

Filed with the Office of the Secretary of State, on August 28, 1998.

TRD-9813700
Suzanne Schwartz
General Counsel
Texas Water Development Board
Proposed date of adoption: October 15, 1998
For further information, please call: (512) 463–7981

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

Part I. Texas Department of Public Safety

Chapter 14. School Bus Transportation

Subchapter E. Advertising General Provisions

37 TAC §§14.61–14.68

The Texas Department of Public Safety proposes new §§14.61 - 14.68, concerning requirements for placing advertising or paid announcements on the exterior of school buses transporting public school students. These new sections set forth the allowable materials and locations of advertising or paid announcements on the exterior of public school buses and define terms commonly used in the profession. These sections are proposed to define what a person must do to place advertising or paid announcements on the exterior of school buses transporting public school students in order to comply with the safety provisions of House Bill 823, 75th Legislature, 1997, which amended Texas Transportation Code, §547.701(d).

The proposals are necessary to implement the provisions of House Bill 823, 75th Legislature, 1997, which amended Texas Transportation Code, §547.701(d). This statute prohibits a school bus from bearing advertising or another paid announcement directed at the public if the advertising or announcement distracts from the effectiveness of required safety warning equipment in order to protect the safety of students who are transported on public school buses. The statute further directs the department to adopt rules to implement the statute.

Tom Haas, Chief of Finance, has determined that for the first five-year period the sections are in effect, there will be no fiscal implications for state government as a result of enforcing or administering the sections. Mr. Haas has also determined that for the first five-year period the sections are in effect, there will be fiscal implications for local government if the school districts enter a contract to advertise; however, the fiscal implications of revenues cannot be determined due to the individuality of contract negotiated terms.

Mr. Haas also has determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing the sections will be the potential for additional revenues to the local school district generated as a result of placing advertising or paid announcements from small or large businesses on the exterior of school buses. The anticipated economic cost of expense to persons who contract to advertise and are subsequently required to comply with the sections as proposed cannot be determined due to the individuality of contract negotiated terms.

Comments on the proposal may be submitted to Mary Ann Courter, Chief of Legal Services, Texas Department of Public Safety, Box 4087, Austin, Texas 78773-0140, (512) 424-2890.

The new sections are proposed pursuant to Texas Transportation Code, §547.101, which authorizes the department to adopt rules necessary to administer this chapter.

Texas Transportation Code, §547.101 is affected by this proposal.

§14.61. Definitions.

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

(1) Advertisement - any communication brought to the attention of the public by paid announcement or in return for public recognition in connection with an event or offer or sale of a product or service, except for a single-line listing of a carrier name or manufacturer logo approved by the General Services Commission and the Texas Department of Public Safety.

(2) Safety Warning Equipment - that equipment which identifies a school bus including, but not limited to, the exterior color of the school bus painted national school bus yellow (Color No. 13432 of Federal Standard No. 595a), all lights, reflectors, "school bus" identification markings, emergency exit locations, stop signal arm, student crossing gate and reflective tape described in the General Services Commission annual manual, *Texas School Bus Specifications*.

(3) School Bus - a motor vehicle identified as a school bus by safety warning equipment, as well as a bus designed to transport more than 15 passengers, including the operator, and used

for purposes that include regularly transporting students to and from school or school-related events. The term does not include a school-chartered bus or a bus operated by a mass transit authority.

§14.62. Applicability.

These rules apply to all school buses used to transport preprimary, primary, and secondary public school students.

§14.63. Prohibitions.

Any advertisement shall not distract from or interfere with the safety warning equipment or the visibility of pedestrians involved in loading and unloading procedures.

§14.64. Material and Attachment.

Advertisements must be of a durable material that does not damage the school bus and its original paint. The advertisement shall not extend from the body intentionally or due to damage so as to allow a handhold or present a danger to pedestrians. No brackets or hardware shall be applied to the exterior of a school bus to hold advertisements.

§14.65. Location.

(a) The location of an advertisement(s) on the exterior of a school bus shall be limited to:

(1) the left rear quarter-panel of the school bus, beginning at least three inches behind the rear wheel and not closer than four inches from the lower edge of the window line; and

(2) above the windows on the right and left sides of the school bus, near the rear of the vehicle, not to extend forward of the rear axle.

(b) Advertisement(s) shall be at least three inches from any required lettering, lamp, wheel well, reflector, or emergency exit location.

(c) Advertisement(s) shall not be placed on or interfere with the operation of any door, window, lamp, reflector, or other device.

(d) Any reflective tape between the floorline and beltline of the school bus which is covered by an advertisement should be replaced above or below the advertisement.

§14.66. Permitted Space.

(a) The maximum covered area allowed for advertising on the left rear quarter panel of a school bus shall be contained within a block 30 inches in height and 90 inches in length.

(b) The maximum covered area allowed for advertising above the windows on the left and right sides of the school bus shall be contained within a block 18 inches in height and 108 inches in length, per side.

§14.67. Exemption.

(a) A school district which has entered into a contract to advertise on the exterior of their school buses at the time these rules become effective, will be exempted from required compliance until:

(1) the expiration date of the contract; or

(2) one year from the effective date of these rules; whichever event occurs earlier in time.

(b) Subsequently, the school district will be required to fully comply with these rules.

§14.68. Reporting.

(a) It shall be the responsibility of the school district to provide to the School Bus Transportation Safety Unit at the Texas Department of Public Safety written notification of any accident directly or indirectly involving a school bus operated by or for the school district which bears advertising or another paid announcement on the exterior of the vehicle.

(b) Notice shall be received by the department not more than five days from the date of the accident.

(c) Notice to the department shall include the following:

(1) the name and address of the owner of the school bus;

(2) the name and driver's license number of the school bus operator;

(3) the date of the accident;

(4) the city or county where the accident occurred; and,

(5) the name of the investigating police agency.

(d) Notice to the department shall be delivered by one of the following methods:

(1) facsimile;

(2) electronic mail; or,

(3) mailed to School Bus Transportation Safety Unit, Texas Department of Public Safety, Box 4087, Austin, Texas 78773-0252.

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 August 28, 1998.

TRD-9813727
Dudley M. Thomas
Director
Texas Department of Public Safety
Earliest possible date of adoption: October 11, 1998
For further information, please call: (512) 424–2890

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

Part I. Texas Department of Human Services

Chapter 20. Cost Determination Process

40 TAC §20.108

The Texas Department of Human Services (DHS) proposes an amendment to §20.108, concerning determination of inflation indices, in its Cost Determi- nation Process chapter. The purpose of the amendment is to remove the special provision for the Family Care (FC) program which requires the use of the Texas Workforce Commission (formerly Texas Employment Commission) tax rate notices received by contracted providers in determining an FC-specific unemployment tax adjustment factor for use in determining payment rates. By elimination of this rule, FC unemployment tax adjustment factors will be calculated using the same tax rate utilized to adjust unemployment taxes reported on the cost reports for other DHS programs.

Eric M. Bost, commissioner, has determined that for the first five-year period the section is in effect there will be no fiscal

implications for state or local government as a result of enforcing or administering the section.

Mr. Bost also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be the elimination of the need for providers to annually submit copies of their tax rate notices to DHS. There will be no adverse economic effect on small or other size businesses. This amendment eliminates the requirement of an annual submittal to DHS, and will benefit both large and small businesses. There is no anticipated economic cost to persons who are required to comply with the proposed section.

Questions about the content of this proposal may be directed to Mary Denison at (512) 438-4050 in DHS's Rate Analysis Department. Written comments on the proposal may be submitted to Supervisor, Rules and Handbooks Unit-334, Texas Department of Human Services E-205, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

The amendment is proposed under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department to administer public and medical assistance programs.

The amendment implements the Human Resources Code, §§22.001-22.030 and §§32.001-32.042.

§20.108. Determination of Inflation Indices.

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

(e) Item-specific and program-specific inflation indices. DHS may use specific indices in place of the general cost inflation index specified in subsection

(d) of this section when appropriate item-specific or program-specific cost indices are available from DHS cost reports or other surveys, other Texas state agencies or independent private sources, or nationally recognized public agencies or independent private firms, and DHS has determined that these specific indices are derived from information that adequately represents the program(s) or cost(s) to which the specific index is to be applied. For example, DHS may use specific indices pertaining to cost items such as payroll taxes, key professional and non-professional staff wages, and other costs subject to specific federal or state limits. The specific indices that DHS may use include the following.

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

[~~(4) The unemployment tax inflation index for the Primary Home Care program is based on Texas Employment Commission tax rate notices submitted by providers. To calculate this index, DHS establishes a provider factor by dividing the present tax rate shown on the TEC tax rate notice by the tax rate shown on the notice two years previously. These factors are then arrayed in a distribution from lowest to highest. The inflation index is the provider factor from the distribution array that corresponds to the median of accumulated hours of service for all contracted providers.~~]

(4) [~~(5)~~] Inflation factors for key professional and/or paraprofes- sional staff wages and salaries, e.g., nurses, nurse aides and attendants, are based on wage survey data pertaining to specific types of professional and paraprofessional staff in Texas when DHS has determined that reliable data of this kind are available for specific or comparable programs. Projections from the cost reporting period to the reimbursement period are based on discernible trends or experience as evidenced by the most recent reliable data available at the time proposed reimbursement is prepared for public dissemination and comment, and take into consideration economic conditions and regulatory changes which may be reasonably anticipated for the reimbursement period. When DHS has determined that reliable wage and salary data pertaining to specific types of staff in Texas are unavailable for specific or comparable programs, inflation factors for professional and/or paraprofessional staff are based on the lowest feasible forecast of the IPD-PCE. Professional and/or paraprofessional wage and benefit inflation rates for state employees are based on state employee wage and salary increases determined by the Texas Legislature.

(5) [~~(6)~~] For the Medicaid nursing facility program, determination of adjustments to historical costs of fixed capital assets are consistent with requirements of the federal Omnibus Budget Reconciliation Act of 1984 (OBRA 1984) and Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA 1985). For each program, one of two options is used.

(A) Reimbursement is in the form of a fixed capital asset use fee component of the overall reimbursement, based on facility appraisals, as described in program-specific reimbursement methodology rules.

(B) Reimbursement for fixed capital asset costs is calculated based on historical costs included in the reimbursement component designated in program-specific reimbursement methodology rules. The index used to inflate lease expense and to adjust the allowable depreciation base of assets which have undergone ownership changes is one-half the All-item Urban Consumer Price Index (CPI-U).

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 August 31, 1998.

TRD-9813780
Glenn Scott
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: October 11, 1998
For further information, please call: (512) 438–3765

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Chapter 50. Day Activity and Health Services

Subchapter J. Reimbursement Methodology for Day Activity and Health Services

40 TAC §50.6907

The Texas Department of Human Services (DHS) proposes an amendment to §50.6907, concerning reimbursement methodology for day activity and health services: 1997 and subsequent cost reports, in its Day Activity and Health Services chapter. The purpose of the amendment is to clarify the allowability of costs reported on cost reports which were incurred for the off-site storage of a DAHS transportation vehicle when the storage is for security or route efficiency management. The rules will also clarify that providers should continue to report United States Department of Agriculture revenues and related dietary expenses on the cost report, and not offset them prior to cost reporting.

Eric M. Bost, commissioner, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Bost also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be that providers will have a better understanding of allowable transportation costs to be reported on the cost reports and of reporting USDA revenues and related dietary expenses on the cost reports. There will be no adverse economic effect on small or other size businesses. This amendment is a clarification of existing practices; therefore, no changes in practice are required of any business, large or small. There is no anticipated economic cost to persons who are required to comply with the proposed section.

Questions about the content of this proposal may be directed to Kathy Hall at (512) 438-3702 in DHS's Rate Analysis Department. Written comments on the proposal may be submitted to Supervisor, Rules and Handbooks Unit-333, Texas Department of Human Services E-205, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register.*

The amendment is proposed under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department to administer public and medical assistance programs.

The amendment implements the Human Resources Code, §§22.001-22.030 and §§32.001-32.042.

§50.6907. Reimbursement Methodology for Day Activity and Health Services: 1997 and Subsequent Cost Reports.

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

(h) DAHS-specific allowable costs. Allowable costs specific to the DAHS program are:

(1) certain medical equipment and supplies,[. ~~These are allowable costs~~] if they are related to the services for which DHS has contracted. This may include, but is not limited to, supplies and equipment considered necessary to perform client assessments, medication administration, and nursing treatment.

(2) transportation costs if they are related to the services for which DHS has contracted. This includes the costs of garaging a vehicle that is primarily used to transport clients to and from the DAHS center. The vehicle may be garaged off-site of the center for security reasons or for route efficiency management. In these cases of off-site vehicle garaging, a mileage log is not required if the vehicle is not used for personal use and is used solely (100%) for the delivery of DAHS services.

(i) DAHS-specific unallowable costs. Unallowable costs specific to the DAHS program are:

(1) physician's fees for completion of physician orders; and

[~~(2) costs for food and food services which should have been offset by the United States Department of Agriculture (USDA) revenue as specified in §20.103(b)(15)(B) of this title (relating to Specification for Allowable and Unallowable Costs);~~ and]

(2) [~~(3)~~] costs for which the provider received federal funds which should have been offset as specified in §20.103(b)(15)(B) of this title (relating to Specification for Allowable and Unallowable Costs).

(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 August 31, 1998.

TRD-9813781
Glenn Scott
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: October 11, 1998
For further information, please call: (512) 438–3765

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TITLE 43. TRANSPORTATION

Part I. Texas Department of Transportation

Chapter 43. Employment Practices

Subchapter D. Substance Abuse Program

43 TAC §§4.30–4.37, 4.39, 4.40

The Texas Department of Transportation proposes amendments to §§4.30-4.37, 4.39, and 4.40, concerning the department's substance abuse program.

EXPLANATION OF PROPOSED AMENDMENTS

Amendments to §§4.30-4.37, 4.39, and 4.40 are proposed to reflect changes in federal and state laws and regulations as well as department policy. The Federal Highway Administration in Title 49, C.F.R., Part 382 and Part 40, requires the department to make policy and procedure revisions to reflect changes to federal regulations governing commercial drivers.

In addition to the required policy changes, the department is proposing pre-employment drug testing of all external final applicants who might potentially drive for the department and reasonable cause testing of any employee who is suspected of being under the influence of alcohol or drugs in the workplace. The department's compelling interest in conducting these tests is a concern for the safety of the traveling public. Almost all department employees are required to drive as part of their jobs, as they plan, build, maintain and inspect roads, travel to training, meetings or conferences, and conduct other department business using state vehicles or their own personal vehicles. As a result of this requirement, all job vacancy notices contain the statement that the department will conduct driving record checks with the Department of Public Safety on all final applicants for all vacant positions. Driving for the department is a safety sensitive activity which, if performed under the influence of alcohol or drugs, could pose a direct and immediate threat to the safety of the traveling public. There is a causal connection between the duty of driving for the department and the fear that the traveling public will be harmed.

Concerning the expectations of privacy, employees know that the department is highly regulated by the Federal Highway Administration, which mandates drug and alcohol testing of commercial drivers and marine crewmembers. All employees will be informed of the new testing program at least 90 days

before they are subject to testing. Applicants have a reduced expectation of privacy since they already are subjected to pre-employment physicals, reference checks, and driving record checks.

Unlike pre-employment testing, reasonable cause testing will be based on a reasonable suspicion of drug or alcohol use in the workplace including observations and information regarding a pattern of unusual physical appearance, poor work performance, excessive absences, tardiness, poor judgment, carelessness, erratic behavior, or the odor of marijuana or alcohol.

A reasonable suspicion of employees working under the influence of alcohol or drugs will be based upon the testing decision of a supervisor trained in recognizing and documenting the signs and symptoms of alcohol and drug use. Reasonable cause testing will be conducted as soon as possible after an incident and only when there are physical and/or behavioral indicators of drug and alcohol use. Furthermore, all decisions will require validation by the substance control officer, written approval by the district engineer, division director, office director, applicable member of the administration or designee and verbal approval by the substance abuse program staff of the Human Resources Division who are knowledgeable about the issues and criteria for reasonable cause testing.

The department has an obligation to the taxpayers to work safely and productively. If employees are working under the influence of alcohol or drugs, then they are unable to work in a safe, efficient and effective manner. The Human Resources Division receives an average of two calls per week regarding employees who are suspected of working under the influence of alcohol or drugs. Currently, supervisors use reasonable cause criteria to determine whether employees who are not subject to testing should be mandatorily referred to the Employee Assistance Program (EAP) for working under the influence, but they are often reluctant to take administrative or disciplinary action without the objective data that a test result provides. Testing would provide the additional objective facts needed to provide consistency throughout the department in policies and procedures for handling employees who are working under the influence. Testing procedures will require a strict chain of custody procedure and reliable drug and alcohol testing methods.

Confidentiality of all drug testing information is protected, and the ability to appeal a department action under the substance abuse program is provided in §4.39. Established policies, procedures and guidelines for reasonable cause testing will apply to all department employees. All employees will be given advance written notice and information regarding these new policies and procedures.

In support of pre-employment and reasonable cause testing, there are studies which emphasize the effectiveness of drug and alcohol testing and show it to be a major factor in the reduction of employee drug and alcohol use and the improvement of safety. Public safety is recognized as a reasonable and legitimate concern that justifies testing of prospective employees as well as current employees. The United States Coast Guard reported a reduction in employee drug and alcohol use from 10% in 1983 to three percent in 1986 after implementation of a drug and alcohol testing program. Further, two other State Departments of Transportation (DOTs) conduct pre-employment testing of all external applicants, 19 conduct reasonable cause testing for all employees, and an additional nine state DOTs conduct reasonable cause testing for safety sensitive employees who are not subject to any federal regulations.

Specific surveys conducted by the National Institute on Drug Abuse (NIDA) report that drug and alcohol use is a serious problem among the employed population. NIDA states that 70% of all illegal drug users are employed either full-time or part-time and one in 12 full-time employees report current use of illegal drugs. The United States Chamber of Commerce, in testimony presented in 1987 to the United States House of Representatives Committee on Government Operations, reported on a survey of drug users which revealed that 75% said they had used drugs on the job, 64% admitted drugs had adversely affected their job performance, 44% said they had sold drugs to other employees and 18% said they had stolen from co-workers to support their habits.

Additional studies have been well documented that show the strong correlation that exists between poor job performance and drug use including inefficiency, incompetence, mismanagement, high absenteeism, skill impairments and a decrease in productivity which results in a waste of the taxpayer's money and potential exposure of the government employer to liability for serious accidents and injuries caused by drug users on the job.

In addition to pre-employment testing of all external final applicants who might potentially drive for the department and reasonable cause testing for all employees, the department proposes that substance abuse disciplinary suspensions without pay be for a minimum of five work days due to recent court interpretations of the Fair Labor Standards Act (FLSA). For FLSA exempt employees, the suspensions must be within the same work week.

The department requires that all employees who violate substance abuse prohibitions and are mandatorily referred to the EAP provide a fitness-for-duty form completed by a medical doctor or licensed practitioner. This form ensures that employees are fit to return to any driving duties, commercial driving duties, crewmember duties, or safety sensitive duties for the department.

In an effort to deter employees from violating the substance abuse policy for a second time, the department proposes to reduce from two to one the number of times an employee can be mandatorily referred to the EAP for violating the Substance Abuse Program Rules. A mandatory referral is not counted the first time if the employee is assessed by the EAP as not needing assistance with a chemical dependency problem or if the referral is for a DUI/DWI conviction.

The department also proposes that final applicants not be hired for seasonal positions if they have a DUI/DWI conviction within the three years preceding the date of their application if driving is an essential function of the position.

The department proposes that, because employees who drive for the department and who are mandatorily referred for a DUI/DWI conviction are an increased safety risk, these employees need to be removed from safety sensitive and crewmember duties as well as driving duties until they receive a completed fitness-for-duty form.

The department incorporates into department policy a new state law for employees under 21 years of age who are convicted for Driving Under the Influence of Alcohol by a Minor (DUIABM). These employees will be subject to the same disciplinary

actions as employees who are convicted of a DUI/DWI. The department requires employees whose driver's licenses are suspended due to Administrative License Revocation because of a DUI/DWI or DUIABM arrest or conviction, to report the license suspension within one work day upon return to work rather than one work day after the suspension. This will allow employees to return to the workplace before having to report the suspension. The reporting requirement for employees to report a DUI/DWI or DUIABM conviction is being changed from three days to within one work day upon return to work in order to make all reporting requirements consistent.

The department proposes to require different disciplinary actions for employees who are authorized to drive for the department and who fail to report license suspensions. Because the department will be subjected to a greater liability, employees who continue to drive for the department with a suspended license will be terminated. Those employees who fail to report their license suspension and who do not drive for the department will be suspended for five days without pay.

The department proposes that crewmembers be subject to random testing for alcohol at an annual rate of up to 25% of all crewmembers in an effort to deter employees from performing crewmember duties while under the influence of alcohol and to provide the department with a baseline positive rate in order to evaluate the extent of alcohol use.

The department proposes to require that employees who test positive on any type of drug or alcohol test in their initial six month probation period be terminated. This will deter new employees from violating the substance abuse policy and eliminate the undue hardship imposed upon supervisors and co-workers because of an employee's absence after being referred for treatment (which may include losing their driver's or mariner's license for up to one year).

The department also proposes changes to comply with federal regulations including: conducting pre-employment inquiries to request information on positive drug and alcohol tests and refusals to test from previous employers of all final applicants for commercial driver positions who have performed commercial driving duties in the previous two years; reducing the requirement for random alcohol testing for commercial drivers from 25% to 10% annually because the positive alcohol rates for the industry and the department were less than 0.2% and 0.5%, respectively, for two consecutive years; and changing testing procedures to allow employees who are unable to produce a specimen up to three hours to do so and to allow medical review officers to verify a drug test as positive without discussing the positive test with the employee if the employer or the medical review officer has not been able to make any contact with the employee and 14 days have passed.

Sections 4.30-4.37, 4.39, and 4.40 include changes of all reporting requirements to within one work day upon the employee's return to work for employees who: are convicted on charges of criminal drug statute violations occurring in the workplace; are arrested, charged, indicted or convicted for selling, distributing, transporting and manufacturing drugs inside or outside the workplace; are convicted of a DUI/DWI; and have had their driver's license suspended. These events currently have varying time limits for reporting, which are being modified for the sake of uniformity in order to avoid confusion. Employees will no longer be required to report any of these events prior to returning to work, which makes the reporting requirements more practicable. These sections also extend suspensions for certain violations from three working days to five working days without pay for department employees who violate the substance abuse policy. For FLSA exempt employees, such suspensions must be within the same work week. These sections authorize the removal of any employee who is suspected of violating substance abuse policy from all driving duties, commercial driving duties, crewmember duties, and safety sensitive duties. A provision offering employees the option of transferring to another work location if duties are not available is not applicable or feasible and has been deleted. The term "disciplinary action" has been replaced with "administrative and disciplinary actions" for clarification. All employees who are required to take leave for substance abuse violations may use sick leave. The paragraph regarding confidentiality has been deleted from all sections because it is redundant and provided for in §4.38. These policy changes are also necessary for improved efficiency in the administration of the department's Substance Abuse Program.

Section 4.30 adds additional references to federal regulations.

Section 4.31 amends definitions for: alcohol test to include establishing an individual's breath concentration; a conviction of a DUI/DWI to include Driving Under The Influence By A Minor (DUIABM); and the form that employees sign to acknowledge their awareness of the DUI/DWI policy. The section amends the definition of "employee" to clarify that temporaries under contract to the department are not considered employees, and adds "immediate" to the definition of "family members" to clarify who can use the EAP. This section: changes the definition of "EAP counselors" to be consistent with federal language; adds the definition of "office director" to replace the deletion of "special office" in consistency with the department's new organizational structure; deletes the term "perform on a routine basis" as it is not used in the text of the rules; deletes the definition of "receive a DUI/DWI" which was replaced with "conviction of a DUI/DWI"; clarifies the definitions of "serious accident" and "serious marine accident" to explain that an employee is subject to post-accident testing if any person is injured beyond first aid; clarifies "safety sensitive position" to require the performance of an activity at least four times within a 12-month period; and rewords substance control officer to delete the unnecessary reference to appointment of those employees.

Section 4.32 specifies that employees are prohibited from consuming or possessing an alcoholic beverage, inappropriately using an inhalant, or using or possessing a dangerous drug while operating a state vehicle. Supervisors are prohibited from allowing employees to continue to perform official duties if they have knowledge that an employee has inappropriately used inhalants. This section requires pre-employment drug testing of all external final applicants and establishes guidelines to determine reasonable cause drug or alcohol testing for those employees who are observed and documented to be working under the influence in the workplace. It requires that supervisors be trained on the signs and symptoms of drug and alcohol abuse and the policies and procedures related to reasonable cause testing prior to making a determination to test. This section also establishes procedures for administering a test following a determination of reasonable suspicion. This section requires final approval for reasonable cause testing by the district engineer, division director, office director, applicable member of the administration or designee and the substance abuse program staff of the Human Resources Division. All

department employees will be notified in writing that they are subject to testing. This section provides for the removal of employees who are suspected of working under the influence from all driving duties, commercial driving duties, crewmember duties, and safety sensitive duties. The employee will either be reassigned or required to take leave, pending a decision to test, until an alcohol test is administered or 24 hours have passed.

This section establishes time limits for alcohol and drug testing and describes the type of training all supervisors will receive prior to making a determination to test any employee. It describes the administrative and disciplinary actions, including a mandatory referral to the EAP or termination from the department for an employee who violates the substance abuse prohibitions, including an employee who tests positive on a drug or alcohol test or refuses a test. This section also establishes procedures for employees who have an alcohol test result of 0.02 or greater but less than 0.04 and provides for additional requirements placed on employees who test positive on a drug or alcohol test, including return-to-duty testing, a completed fitness-for-duty form, and follow up testing. This section provides procedures for employees who are assessed by the EAP as not needing assistance with a chemical dependency problem. Those employees who refuse to test will be mandatorily referred to the EAP with the exception of those employees subject to §4.34, §4.35 and §4.36. This section provides for the termination of all employees who do not successfully complete treatment. Employees who are removed from regular duties because of impaired performance due to lawful use of drugs are required to bring in a physician's statement before returning to regular duties. New employees who test positive in their initial probation period will be terminated. This section proposes a reduction from two to one in the number of times an employee can be mandatorily referred and successfully complete treatment before being terminated. Two types of mandatory referrals that will not count toward termination are first mandatory referrals when the EAP assesses the employee as not needing assistance with a chemical dependency problem and employees who are convicted of a DUI/DWI. Employees who are referred by the EAP to outside treatment providers or counselors are responsible for any costs incurred as a result of the referral. Fitness-for-duty forms are required for all employees who are mandatorily referred to the EAP before they are allowed to return to any driving duties, commercial driving duties, crewmember duties, or safety sensitive duties. This section also requires the EAP to provide written notification for those employees who are assessed as not needing assistance with a chemical dependency problem.

Section 4.33 clarifies that the department will not offer an applicant a position when driving is an essential or marginal function of the job if the employee has been convicted of two DUI/DWIs within the previous three year period. In addition, an applicant who has been convicted of one DUI/DWI, within the previous three years from the date of application, will not be offered a position unless the applicant agrees to successfully complete EAP treatment.

The department will not hire a seasonal employee who has been convicted of a DUI/DWI within the previous three years from the date of application if driving is an essential function. All employees' driver's license records will be checked not less than once a year. All employees are required to report license suspensions to the department within one work day upon return to work. Employees who are authorized to drive for the department and who have a suspended license but do not drive for the department, will receive counseling by their supervisor and be suspended for five days without pay. Employees who are authorized to drive for the department will be terminated if they drive for the department with a suspended license. The fitness-for-duty letter referenced in §4.33 is being replaced with a standardized fitness-for-duty form. Procedures which presently exist in §4.32 have been deleted from §4.33.

Section 4.34 requires final applicants for commercial driver positions to pass a pre-employment drug test, including current employees when a job vacancy notice is posted or when an employee is transferred or promoted to a commercial driver position. The test may be waived if the employee has been previously drug tested by the department, and all drug tests were negative. A current employee who fails to pass a pre-employment drug test will not be hired for the position and will be mandatorily referred to the EAP. This section establishes a procedure for conducting pre-employment inquiries for applicants for commercial driver positions who have performed commercial driving duties during the preceding two years from the date of application. Information to be requested may pertain to any previous positive drug and alcohol tests and refusals to test.

Section 4.34 also prohibits allowing a commercial driver to perform driving duties if the supervisor receives information that the driver has had a positive drug or alcohol test or a refusal to test until the department receives information that the driver has completed the required treatment. Conditionally hired commercial drivers will be terminated if they have not completed the required treatment. Commercial drivers will be tested on a random basis at an annual rate of at least 10% of all drivers but not more than 25% for alcohol testing. Procedures for reasonable cause testing, administrative and disciplinary actions, and mandatory referral and treatment have been moved to §4.32.

Section 4.35 requires post-accident testing for crewmembers to be conducted as soon as practicable, even if it is after the specified time period. Crewmembers are subject to random testing for alcohol at an annual rate of at least 10% but not more than 25%.

Section 4.36 adds additional activities which are considered safety sensitive and, if performed by an employee, will subject him or her to drug and alcohol testing. In order to ensure consistency within the department, this section deletes the word "routinely" as it pertains to safety sensitive activities and adds the more specific requirement that performing a safety sensitive activity at least four times within a 12-month period subjects that employee to testing as a safety sensitive employee.

Section 4.37 provides guidelines for allowing an employee up to three hours to produce a specimen. It also includes the procedures for the collection of urine specimens based on the split sample method of collection. This section establishes a procedure for the medical review officer to verify a positive test result without any contact with the employee and replaces the term "retest" with the words "split specimen test." This section provides additional guidelines for split specimen testing.

Section 4.39 clarifies the procedure to appeal adverse actions taken under the proposed sections.

Section 4.40 adds administrative actions to the department's records retention procedures concerning substance abuse program records.

FISCAL NOTE

Frank J. Smith, Director, Finance Division, has determined that there will be fiscal implications as a result of enforcing or administering these sections. The effect on state government for the years 1999-2003 will be an estimated additional annual cost of $146,000 which includes $66,000 each year for pre-employment testing and $80,000 each year for reasonable cause drug and alcohol testing, random alcohol testing for crewmembers, additional training for supervisors and administrative support. This estimated cost has been offset by a decrease in cost of $27,300 to the state due to the decrease of random alcohol testing of commercial drivers. There will be no effect on local governments as a result of enforcing or administering these sections. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

Robert A. Eason, Interim Director, Human Resources Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the proposed amendments.

PUBLIC BENEFIT

Ms. Williams also has determined that for each year of the first five years the proposed amendments are in effect the public benefits anticipated as a result of implementing the proposed amendments will be a workforce that operates in an effective and efficient manner, a safe working environment for the department's employees, enhanced measures for protecting the safety of those members of the public who use the state highway system, and compliance with applicable federal and state laws and regulations concerning the use of alcohol or drugs in the workplace. There will be no effect on small businesses.

PUBLIC HEARING

Pursuant to the Administrative Procedure Act, Government Code, Chapter 2001, the Texas Department of Transportation will conduct a public hearing to receive comments concerning the proposed sections. A public hearing will be held at 9:00 a.m. on October 1, 1998, in the first floor hearing room of the Dewitt C. Greer State Highway Building, 125 E. 11th Street, Austin, Texas and will be conducted in accordance with the procedures specified in 43 TAC §1.5. Those desiring to make comments or presentations may register starting at 8:30 a.m. Any interested person may appear and offer comments, either orally or in writing; however, questioning of those making presentations will be reserved exclusively to the presiding officer as may be necessary to ensure a complete record. While any person with pertinent comments will be granted an opportunity to present them during the course of the hearing, the presiding officer reserves the right to restrict testimony in terms of time and repetitive content. Organizations, associations, or groups are encouraged to present their commonly held views and identical or similar comments through a representative member where possible. Comments on the proposed text should include appropriate citations to sections, subsections, paragraphs, etc., for proper reference. Any suggestions or request for alternative language or other revisions in the proposed text should be submitted in written form. Presentations must remain pertinent to the issues being discussed. A person may not assign a portion of his or her time to another speaker. A person who disrupts a public hearing must leave the hearing room if ordered to do so by the presiding officer. Persons with disabilities who plan to attend this meeting and who may need auxiliary aids or services such as interpreters for persons who are deaf or hearing impaired, readers, large print or braille, are requested to contact Eloise Lundgren, Director, Public Information Office, at 125 East 11th Street, Austin, Texas 78701-2483, (512) 463-8588 at least two work days prior to the hearing so that appropriate arrangements can be made.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments may be submitted to Robert A. Eason, Interim Director, Human Resources Division, Texas Department of Transportation, Dewitt C. Greer Building, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of written comments will be 5 p.m. on October 12, 1998.

STATUTORY AUTHORITY

The amended sections are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation.

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

§4.30. Purpose.

The sections under this subchapter set forth the Texas Transportation Commission's policy and procedures for [~~its~~] implementation of a substance abuse program, evidencing the department's commitment to achieving an alcohol and drug-free workplace. An alcohol and drug-free workplace helps protect the health and safety of the department's most valuable resource, its employees, as well as the health and safety of the public. In addition, these sections are intended to demonstrate the department's commitment to rehabilitating and restoring employees whose performance may be impaired by alcohol or drug abuse. These sections also [~~meet the~~] outline the policies and procedures required by 41 United States Code §§701-707, Title 33, Code of Federal Regulations, Part 95, Title 46, Code of Federal Regulations, Part 4, and Part 16, Title 49, Code of Federal Regulations, Part 382 and Part 40, and Title 28, TAC, §169.2.

§4.31. Definitions.

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

(1) Aftercare - The second phase in treatment for alcohol, inhalant, and/or drug dependency. This phase usually follows [~~intensive~~] inpatient treatment or intensive outpatient treatment, and may consist of weekly counseling sessions. The frequency and duration of these counseling sessions is designated by the treatment program's [~~center's~~] staff physician.

(2) Air blank - A reading by an evidential breath testing device (EBT) of ambient air containing no alcohol; in EBTs using gas chromatography technology, a reading of the device's internal standard.

(3) Alcohol - The intoxicating agent in beverage alcohol, ethyl alcohol, or other low molecular weight alcohols including methyl and isopropyl alcohol.

(4) Alcohol concentration - The alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath as indicated by an evidential breath test.

(5) Alcohol test - A scientifically recognized chemical test which establishes an individual's blood alcohol level or a breath test which establishes an individual's breath alcohol concentration.

(6) Alcoholic beverage - A beverage which contains alcohol.

(7) Breath alcohol technician (BAT) - An individual who instructs and assists individuals in the alcohol testing process and operates an evidential breath testing device (EBT).

(8) Chain of custody - Procedures to account for the integrity of each urine specimen by tracking its handling and storage from point of specimen collection to final disposition of the specimen, utilizing an approved department chain of custody form from time of collection to receipt by the laboratory, and upon receipt by [~~of~~] the laboratory, an appropriate laboratory chain of custody form to account for the sample or sample aliquots within the laboratory.

(9) Chain of custody form - A form which, at a minimum, includes an entry documenting date and purpose each time a specimen or aliquot is handled or transferred and identifying every individual in the chain of custody.

(10) Collection container - A container into which the employee urinates to provide the urine sample used for a drug test.

(11) Collection site - A place designated by the department where individuals present themselves for the purpose of providing a specimen of urine to be analyzed for the presence of drugs.

(12) Collection site person - A specifically trained person who instructs and assists individuals at a collection site and who receives and makes a screening examination of the urine specimen provided by those individuals.

(13) Commercial driver - An employee who operates a commercial motor vehicle on a routine, intermittent, or occasional basis for the department.

(14) Commercial motor vehicle - A motor vehicle or combination of motor vehicles used to transport passengers or property if the motor vehicle:

(A) has a gross combination weight rating of 26,001 or more pounds inclusive of a towed unit with a gross vehicle weight rating of more than 10,000 pounds;

(B) has a gross vehicle weight rating of 26,001 or more pounds;

(C) is designed to transport 16 or more passengers, including the commercial driver; or

(D) is used in the transportation of materials found to be hazardous for the purposes of the Hazardous Materials Transportation Act and which require the motor vehicle to be placarded under the Hazardous Materials Regulations (49 C.F.R. Part 172, Subpart F).

(15) Conviction of a DUI/DWI - A conviction, probated sentence, appeal, or deferred adjudication of a conviction or probated sentence while on-duty or off-duty for:

(A) driving a commercial or non-commercial vehicle while under the influence of alcohol or drugs or while intoxicated (DUI/DWI); or

(B) driving under the influence of alcohol by a minor (DUIABM).

[~~Conviction - A conviction, probated sentence, deferred adjudication, or case under appeal.~~]

(16) Crewmember - An individual who [~~is~~]:

(A) is on board a vessel acting under the authority of a license, certificate of registry, or merchant mariner's document whether or not the individual is a member of the vessel's crew;

(B) is engaged or employed on board a vessel owned in the United States that is required by law or regulation to engage, employ, or be operated by an individual holding a license, certificate of registry, or merchant mariner's document;

(C) occupies a position, or performs the duties and functions of a position, required by the vessel's Certificate of Inspection;

(D) performs the duties and functions of patrolmen or watchmen; or

(E) is specifically assigned the duties of [~~or~~] warning, mustering, or controlling the movement of passengers during emergencies.

(17) Dangerous chemical or material - A flammable, combustible, toxic, or corrosive chemical or material which has the potential to cause serious bodily harm to the traveling public and other employees if handled improperly.

(18) Dangerous drug [~~Drug~~] - A narcotic drug, controlled substance, and marijuana as defined in the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §802.

(19) Department - The Texas Department of Transportation.

(20) DHHS guidelines - Mandatory Guidelines for Federal Drug Testing Programs of the U.S. Department of Health and Human Services (53 Fed. Reg. 11970; April 11, 1988).

(21) Directly involved [~~Involved~~] - Involvement [~~Involved~~] in a serious accident or a serious marine accident on a department ferry, in which the involved employee's order, action, or failure to act is determined to be, or cannot be ruled out as, a causative factor in the events leading to or causing that accident. [~~Director - The chief administrative officer of the Human Resources Division.~~]

(22) District - One of 25 geographical areas, managed by a district engineer, in which the department conducts its primary work activities.

(23) District engineer - The chief administrative officer in charge of a district of the department.

(24) Division - An organizational unit in the department's Austin headquarters.

(25) Division director - The chief administrative officer of a division [~~or special office~~] of the department.

(26) Drive for the department - Driving a vehicle, including an employee's personal vehicle, when driven during the course and scope of employment, or operating motor-driven equipment, including but not limited to rollers, tractors, graders, ferries, and aircraft for the department, notwithstanding ownership of the vehicle or equipment and the frequency of driving or operating duties. [~~This in-~~

cludes an employee's personal vehicle when driven during the course and scope of employment.]

(27) Drug test - A scientifically recognized chemical test administered in accordance with DHHS guidelines and which analyzes an individual's urine for evidence of marijuana, cocaine, opiates, phencyclidine (PCP), and amphetamines. This test consists of laboratory testing in two parts, an initial test and a confirmatory test, respectively conducted with portions of the same original specimen.

(28) DUI/DWI Policy and Driving Requirements Policy Statement of Notification - A department form signed by employees which acknowledges their awareness of the DUI/DWI policy and Driving Requirements policy.

(29) Employee - A person employed by the department in a full-time, part-time, temporary, project, or seasonal position. This does not include a temporary employee under contract to the department.

(30) Employee Assistance Program (EAP) - A program designed to assist employees and their immediate family members in dealing with emotional and personal problems, including alcohol, inhalant, and drug abuse, affecting or potentially affecting the employee's work performance and safety.

(31) Employee Assistant Program counselors - Licensed physicians (Medical Doctors or Doctors of Osteopathy), or licensed or certified psychologists (Texas State Board of Examiners of Psychologists or other regulating board), social workers (Texas State Board of Social Worker Examiners [(National Association of Social Workers] or other regulating board), employee assistance professionals (Employee Assistance Professionals Association, Inc. or other regulating board), or addiction counselors (certified by the National Association of Alcoholism and Drug Abuse Counselors Certification Commission or by the International Certification and Reciprocity Consortium/Alcohol and Other Drug Abuse or other regulating board) with knowledge of and clinical experience in the diagnosis and treatment of alcohol and drug-related disorders.

(32) Evidential breath testing device (EBT) - A device approved by the National Highway Traffic Safety Administration (NHTSA) for the evidential testing of breath and placed on NHTSA's "Conforming Products List of Evidential Breath Measurement Devices" (CPL).

(33) Final applicant - A person who is given a conditional offer of initial employment, or a department employee who is conditionally approved for a transfer or promotion.

(34) Human Resources Division [division] - An organizational unit in the department's Austin headquarters which oversees human resource functions for the department.

(35) Impaired performance - The inability to perform assigned duties or to perform those duties in a safe and effective manner.

(36) Inappropriate use of an inhalant - The use of an inhalant in a manner other than that for which it was intended and which causes or is known to cause intoxication.

(37) Incident - An action or situation that raises a reasonable suspicion of drug or alcohol misuse.

(38) Inhalant - A breathable chemical that produces mind-altering vapors, including but not limited to volatile solvents, aerosols, nitrites, and anesthetics.

(39) Investigation - The collection and analysis of information.

(40) Laboratory - A laboratory certified to meet the standards of the DHHS guidelines.

(41) Mandatory referral - A referral to the EAP which requires an employee to report to the EAP and successfully complete treatment or be terminated from employment with the department.

(42) Medical review officer [Review Officer] (MRO) - A licensed physician (medical doctor or doctor of osteopathy) responsible for receiving laboratory results generated by the department's program who has knowledge of substance abuse disorders, and appropriate medical training to interpret and evaluate an individual's confirmed positive test result together with his or her medical history and any other relevant biomedical information.

(43) Office director - The chief administrative officer of a specialized organizational unit of the department that is headquartered in Austin.

(44) Operation of a vessel - To navigate, steer, direct, manage, or sail a vessel, or to control, monitor, or maintain the vessel's main or auxiliary equipment or systems, including determining the vessel's position, piloting, directing the vessel along a desired trackline, keeping account of the vessel's progress through the water, ordering or executing changes in course, rudder position or speed, and maintaining a lookout; controlling, operating, monitoring, maintaining, or testing the vessel's propulsion and steering systems, electric power generators, bilge, ballast, fire, and cargo pumps, deck machinery including winches, windlasses, and lifting equipment, lifesaving equipment and appliances, firefighting systems and equipment, and navigation and communication equipment; and mooring, anchoring, and line handling, loading or discharging of cargo or fuel, assembling or disassembling of tows, and maintaining the vessel's stability or watertight integrity. [Perform on a routine basis - An activity which is an essential function of a position or an activity which must be performed in order to perform an essential function and which is performed as a normal part of an employee's job duties.]

(45) Possession of alcohol or dangerous drugs - Having alcohol or dangerous drugs in an area under an employee's effective control.

(46) Program - The department's substance abuse program. [Receive a DUI/DWI - A conviction, probated sentence, appeal, or deferred adjudication of a conviction or probated sentence for driving a commercial or non-commercial vehicle while under the influence of alcohol or drugs or while intoxicated (DUI/DWI), while on-duty or off-duty.]

(47) Safety sensitive position - A full-time, part-time, temporary, project, or seasonal position which requires the performance of activities that are [regularly] assigned and [, routinely] performed at least four times within a 12-month period [activities] which if performed with inattentiveness, errors in judgement, diminished coordination, dexterity, or composure could clearly result in mistakes that could present a real and imminent threat to the personal health and safety of other employees or the public, and which are performed with such independence that it cannot be reasonably assumed that those mistakes could be prevented by a supervisor or another employee, including activities having one or more of the following characteristics: a direct, immediate relationship to safety and intimately related to the prevention of harm to the traveling public or other employees; fraught with extraordinary peril such that a single alcohol or drug-related lapse by an employee could have irreversible and calamitous consequences; and performed in an extraordinarily

hazardous setting such that careless performance carries with it the attendant risk of catastrophic consequences.

(48) Serious accident - Any accident that occurs while performing a safety sensitive function or driving a commercial motor vehicle and which results in:

(A) a death or an injury to a person, other than an employee directly involved in the accident, requiring professional medical treatment beyond first-aid;

(B) an injury to an employee directly involved in an accident requiring professional medical treatment beyond first-aid who is unable to return to work the day following the injury to perform regular duties [~~one or more deaths; an injury to an employee, passenger, or other person which requires treatment beyond first-aid that can only be provided by a medical professional and which renders the employee unfit to perform routine duties~~];

(C) damage to a vehicle which causes it to be inoperable; or

(D) receipt of a citation under state or local law for a moving traffic violation arising from the accident.

(49) Serious marine accident - Any reasonable marine accident which results in:

(A) a death [~~one~~] or [~~more deaths;~~] an injury to a person [~~an employee, passenger, or~~] other than an employee directly involved in the accident requiring [~~person which requires~~] professional medical treatment beyond first aid [~~and which renders the employee unfit to perform routine duties~~];

(B) an injury to an employee directly involved in an accident requiring professional medical treatment beyond first-aid who is unable to return to work to perform regular duties;

(C) damage to property in excess of $100,000;

(D) actual or constructive total loss of any ferry subject to Coast Guard inspection under 46 U.S.C. §3301, or not subject to Coast Guard inspection if [~~of~~] 100 gross tons or more;

(E) a discharge of oil of 10,000 gallons or more into navigable waters of the United States; [~~,~~] or

(F) a discharge of a reportable quantity of a hazardous substance into navigable waters or the environment of the United States. [~~Special office - A specialized organizational unit of the department which is headquartered in Austin.~~]

(50) Specimen bottle - A bottle, after being labeled and sealed, used to transmit a urine sample to the laboratory. [~~Statement of Notification (Form 1835) - A department form signed by employees which acknowledges their awareness of the DUI/DWI policy.~~]

(51) Substance control officer [~~Control officer~~] - An employee who administers [~~appointed by a district engineer or a division director to administer~~] the Substance Abuse Program [~~for his or her district, division, or special office~~].

(52) Successful completion of treatment - Completion of a treatment program, the composition and length of which is to be prescribed by the EAP counselor or the treatment program's staff physician, which may include aftercare. This includes compliance with all EAP treatment recommendations and requirements and passing all required drug and alcohol tests while in treatment.

(53) Treatment - Medical and/or psychological treatment for alcohol, inhalant, and/or drug dependency, which may consist of [~~intensive~~] inpatient treatment followed by aftercare, intensive outpatient treatment followed by aftercare, or educational and/or counseling sessions.

(54) United States Department of Transportation (DOT) - The cabinet level department of the United States government administering regulations requiring alcohol or drug testing (14 C.F.R. Parts 61, 63, 65, 121, and 135; 49 C.F.R. Parts 199, 219, 382, 653, and 654), in accordance with 49 C.F.R. Part 40.

(55) Use of alcohol or a dangerous drug - The consumption of a beverage, mixture, or preparation, including a medication, containing alcohol or the taking of a dangerous drug (whether orally, by inhalation, or by injection), or being under the influence of alcohol or a dangerous drug.

(56) Workplace - All department offices, construction sites, temporary laboratory sites, maintenance sites, ferries, and any other location where an employee performs [~~is performing~~] assigned duties.

§4.32. All Department Employees.

(a) Prohibited conduct. Department employees have an obligation to project a positive image at all times to other employees and the public in order to uphold the public's trust in the department.

(1) The consumption of an alcoholic beverage, the possession of an open container of an alcoholic beverage, the inappropriate use of an inhalant, and the illegal use or possession of a dangerous drug is prohibited in the workplace, [~~or~~] while on duty or while operating a state vehicle.

(2) An employee is prohibited from reporting to work, [~~or~~] performing official duties, or operating a state vehicle while under the influence of alcohol, inhalants, or illegally used drugs or, if performance is impaired, while under the influence of lawfully prescribed or over-the-counter substances. The appropriate use of prescribed or over-the-counter drugs is permitted if work performance is not impaired.

(3) The department prohibits the illegal sale, distribution, [~~dispensation,~~] transportation, [~~sale,~~] or manufacture of dangerous drugs or the possession with the intent to sell, distribute, [~~dispense,~~] transport, [~~sell,~~] or manufacture dangerous drugs in the workplace, [~~or~~] while on duty, or while operating a state vehicle. This prohibition includes any violation of state and federal controlled substances acts. Each employee must notify his or her supervisor of a conviction on charges of criminal drug statute violations occurring in the workplace[~~,~~] within one work day upon return to work [~~no later than three days~~] after such conviction. Pursuant to the Drug Free Workplace Act 1988, 41 U.S.C. §§701-707, the department will in turn notify the appropriate federal agency of such conviction within 10 days of receipt of the notice.

(4) The department prohibits the illegal sale, distribution, transportation, or manufacture of dangerous drugs or the possession with the intent to sell, distribute, transport, or manufacture dangerous drugs by any employee outside of the workplace.

[~~(A)~~] A final applicant who has been convicted of felony charges related to the illegal sale, distribution, transportation, or manufacture of dangerous drugs or the possession with the intent to sell, distribute, transport, or manufacture dangerous drugs and who is still on probation or parole for that conviction will not be hired by the department.

[~~(B) Department employees have an obligation to project a positive image at all times to other employees and the public in order to uphold the public's trust in the department.~~]

(5) A [~~No~~] supervisor having actual knowledge that an employee possesses or is using dangerous drugs, possesses an open container of an alcoholic beverage, or is consuming an alcoholic beverage or inappropriately using inhalants while performing official duties for the department may not allow the employee to continue to perform official duties.

(6) An employee who violates the policies and prohibitions of this section will be subject to consistently applied discipline, up to and including termination from the department. In addition to or in lieu of disciplinary action, an employee will be mandatorily referred to the EAP and required to successfully complete treatment, as described in subsection (d) [~~(c)~~] of this section.

(7) The department provides an employee assistance program and encourages employees to voluntarily use the services of the employee assistance program or treatment program to deal with alcohol, inhalant, or drug abuse before it affects job performance. Successful completion of such programs may mitigate the need for discipline.

(8) Each employee, as a condition of employment, must comply with this section and must signify his or her acknowledgement by signing a department form [~~prescribed by the department~~].

(b) Testing. An employee will be notified, in writing, that he or she is subject to drug or alcohol testing, prior to being required to submit to an alcohol or drug test.

(1) Pre-employment testing.

(A) The department shall not hire or employ an external final applicant when a Job Vacancy Notice (JVN)has been posted for any position in the department and the person could potentially be required to drive for the department in that position, unless that person passes a drug test.

(B) The department will notify a final applicant of the results of a pre-employment drug test, including the names of the drugs that were verified as positive, if the applicant requests the results.

(2) Reasonable cause testing. An employee who is reasonably suspected of using alcohol or dangerous drugs in the workplace or of performing official duties while under the influence of alcohol or dangerous drugs will be required to undergo an alcohol or drug test.

(A) The decision to test must be based on a reasonable belief by a supervisor, who has been trained on the signs and symptoms of alcohol and drug use, including alcohol or dangerous drugs based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech, body odors, or performance indicators of probable use. The observations of physical, behavioral, or performance indicators of probable use may include indications of the chronic and withdrawal effects of dangerous drugs. The decision to test cannot be made by a supervisor who has not been trained on the signs and symptoms of alcohol and drug use.

(B) When a supervisor reasonably suspects an employee of using alcohol or dangerous drugs in the workplace or of performing official duties while under the influence of alcohol or dangerous drugs, he or she will contact the substance control officer immediately. The supervisor or substance control officer will submit a written report of his or her observations to the program staff in the Human Resources Division within 24 hours.

(C) If there is reasonable suspicion that the employee is under the influence of alcohol or drugs, it may be reasonable to conclude that the employee may be impaired to the extent that continued performance of duties will constitute a real and present danger to personal safety or property. Pending a decision to test under this subsection or if testing is not available, the employee will be removed from:

(i) driving duties;

(ii) commercial driving duties which include:

(I) operating motorized equipment;

(II) inspecting, servicing, or conditioning any vehicle; or

(III) supervising, assisting with or loading or unloading a motor vehicle;

(iii) safety sensitive activities as described in §4.36(a) of this title (relating to Safety Sensitive Employees); or

(iv) crewmember duties.

(D) An employee will be reassigned to other duties, if appropriate, or required to take leave until:

(i) an alcohol test is administered and the employee's alcohol concentration measures less than 0.02;

(ii) twenty-four hours have elapsed following the determination that there is reasonable suspicion that the employee has violated the prohibitions concerning the use of alcohol or drugs; or

(iii) a drug test is administered and a negative result is reported by the medical review officer.

(E) The substance control officer will make an immediate inquiry into the circumstances and confer or counsel with the employee, as may be appropriate. The substance control officer will document whether testing is justified based on the supervisor's report and the substance control officer's independent analysis. Reasonable cause testing for any employee must be approved by the district engineer, division director, office director, applicable member of the administration, or a designee not below the level of assistant district engineer, deputy division director, or director of administration, and by the program staff in the Human Resources Division.

(F) An alcohol test should be administered within two hours following an incident. If an alcohol test is not administered within two hours, the department will continue to try to test up to eight hours following an incident. The substance control officer will prepare a record stating the reasons the alcohol test was not promptly administered.

(G) A drug test should be administered as soon as possible. If a drug test is not administered within 32 hours following an incident, the department will cease attempts to administer a drug test, and prepare a record stating the reasons the test was not promptly administered.

(3) Training. All supervisors and substance control officers must be trained in the signs and symptoms of drug and alcohol use and on the department's policy and procedures related to reasonable cause testing prior to any testing determinations.

(c) [~~(b)~~] Administrative and disciplinary actions [~~Disciplinary Actions~~].

(1) Consumption of an alcoholic beverage, the possession of an open container of an alcoholic beverage, dangerous drug possession or use, or the inappropriate use of an inhalant. An employee may be subject to administrative and disciplinary actions,

including termination from the department for consumption of an alcoholic beverage, the possession of an open container of an alcoholic beverage, dangerous drug possession or use, or the inappropriate use of an inhalant. [~~If an employee is directly observed possessing an open container of an alcoholic beverage or consuming an alcoholic beverage, possessing or taking a dangerous drug whether orally or by inhalation or injection, or inappropriately using an inhalant in the workplace, the following procedure shall be followed:~~]

(A) An employee in the workplace, while on duty, or while operating a state vehicle may not:

(i) possess an open container of an alcoholic beverage or consume an alcoholic beverage;

(ii) possess or take a dangerous drug whether orally or by inhalation or injection; or

(iii) inappropriately use an inhalant.

(B) If an employee is directly observed participating in any of the prohibited activities outlined in this subsection, the following procedure will be used.

(i) The supervisor or substance control officer will immediately remove an employee from performing any duties listed in subsection (b)(1)(C) of this section.

(ii) If the supervisor has a reasonable suspicion that the employee is working under the influence at this time, based on documented observed physical, behavioral, or performance indicators, the employee will be sent for a reasonable cause test under subsection (b) of this section.

(iii) [~~(A)~~] If the supervisor does not have sufficient documented observed indicators of the employee working under the influence at this time, the [~~The~~] employee will be given an opportunity to offer a reasonable explanation for the observed circumstances and behaviors. At the same time, the supervisor or substance control officer will immediately provide the employee with a letter which:

(I) [~~(i)~~] summarizes the observed circumstances and behavior;

(II) [~~(ii)~~] notifies the employee that the consumption of alcohol, the possession of an open container of an alcoholic beverage, the possession or use of dangerous drugs, or the inappropriate use of an inhalant in the workplace, while on duty or while operating a state vehicle, subjects the employee to administrative and disciplinary actions [~~termination from the department~~];

(III) [~~(iii)~~] advises the employee that he or she is being given an opportunity to offer a reasonable explanation; and

(IV) [~~(iv)~~] advises the employee of the [~~disciplinary~~] action to be taken if he or she refuses to explain his or her actions or if his or her response indicates that he or she violated the policies and prohibitions of subsection (a) of this section or is insufficient or not acceptable.

(iv) [~~(B)~~] If the employee refuses to explain his or her actions or if the employee's response indicates that he or she has violated the policies and prohibitions of subsection (a) of this section or is insufficient or not acceptable or the supervisor has sufficient documented observed indicators of the employee under the influence or the employee has an alcohol test result of .04 or greater, then the supervisor or the substance control officer will mandatorily refer the employee to the EAP and require him or her to successfully complete treatment, under [~~pursuant to~~] subsection (d) [~~(c)~~] of this section. Additional disciplinary actions may also be taken. In addition, the employee will be removed from his or her official [~~normal~~] job duties and required to take sick leave, vacation leave, compensatory time [~~leave~~] or leave without pay if the employee has exhausted his or her accrued leave, until 24 hours have passed.

(v) If the employee has an alcohol test with a result of .02 or greater but less than .04 or the employee has been sent for a drug test, the supervisor or the substance control officer will remove the employee from official duties and the employee will be required to take sick leave, vacation leave, compensatory time or leave without pay, if the employee has exhausted his or her accrued leave, until:

(I) 24 hours have passed following the alcohol test; or

(II) a negative drug test result has been reported by the medical review officer.

(vi) If the employee has a drug test with a verified positive result, then the supervisor or the substance control officer will mandatorily refer the employee to the EAP and require him or her to successfully complete treatment, under subsection (d) of this section.

(vii) In addition to actions described in this subsection, an employee who tests positive on a drug or alcohol test will complete the following requirements.

(I) The employee will undergo a return-to-duty alcohol or drug test. The alcohol test must indicate a result of less than .02 or a drug test must indicate a verified negative result. An employee who fails to pass a return-to-duty drug or alcohol test has not successfully completed treatment and will be terminated.

(II) The employee will provide a completed fitness-for-duty form as provided in subsection (d)(3) of this section prior to resuming any duties listed in subsection (b)(1)(C) of this section once he or she has completed the initial phase of treatment. An employee not required to provide a completed fitness-for-duty form as provided in subsection (d)(3) of this section will still be subject to a return-to-duty test.

(III) The employee will undergo follow-up testing for alcohol or dangerous drugs for a period of up to 60 months consisting of at least six tests in the first 12 months following the employee's return-to-duty. The number and frequency of follow-up testing shall be directed by the EAP staff. The EAP may terminate the requirement for follow-up testing at any time after the first six tests have been administered. An employee who fails to pass a follow-up drug test or alcohol test with a result of .04 or greater has not successfully completed treatment and will be terminated.

(IV) The department will terminate the employee from employment unless he or she complies with all the requirements of subsection (d) of this section.

(viii) With the exception of employees subject to §4.34, §4.35, and §4.36 of this title (relating to Commercial Drivers, Crewmembers and Safety Sensitive Employees), the department will mandatorily refer an employee to the EAP if he or she:

(I) refuses to consent to an alcohol or drug test;

(II) fails to arrive at the testing site at the assigned time;

(III) fails to cooperate with the collection site person; or

(IV) refuses to sign the certification on the Breath Alcohol Testing form.

(2) Working under the influence. If a supervisor or substance control officer suspects an employee [~~is suspected~~] of working under the influence of alcohol, dangerous drugs, or inappropriately using [~~used~~] inhalants based on [~~due to~~] a reasonable[~~, articulable~~] belief by a supervisor or substance control officer of [~~which is based on~~] specific, contemporaneous, articulable observations concerning the appearance, behavior, speech, body odors, or performance of the employee, then the procedures described in subsection (c) [~~(b)~~] (1)(B) of this section will be followed. If the employee denies the allegations [~~working under the influence of alcohol, dangerous drugs or inappropriately used inhalants~~], and the evidence is not conclusive, the supervisor or substance control officer [~~will take no further action, but~~] will advise the employee that if it is subsequently discovered that he or she is working under the influence [~~of alcohol, dangerous drugs or inappropriately used inhalants~~], then he or she will be subject to administrative and disciplinary actions [~~terminated from the department~~].

(3) Impaired performance due to lawful use of drugs. When, due to the use of lawfully prescribed or over-the-counter substances, the employee is unable to perform his or her assigned duties or perform any duty in a safe manner, the employee will be subject to temporary reassignment of duties or be required to take sick leave, vacation leave, compensatory time [~~leave~~] or leave without pay if the employee has exhausted his or her accrued leave. A physician's statement will be required before an employee will be able to return to his or her regular duties.

(4) Voluntary admission of an alcohol, inhalant, or drug problem. An employee who voluntarily admits having a problem with alcohol, inhalant, or drug use [~~abuse~~] will be mandatorily referred by his or her supervisor or substance control officer to the EAP and required to successfully complete treatment as described in subsection (d) [~~(c)~~] of this section. Disciplinary action will not be taken against an employee because he or she [~~who~~] voluntarily admits having a problem [~~with alcohol, inhalant, or drug abuse~~], provided[~~,~~] that [~~in the case of a commercial driver, crewmember or an employee in a safety sensitive position,~~] the admission occurs prior to a determination that the employee should be tested pursuant to §4.32, §4.34, §4.35 or §4.36 of this title (relating to All Department Employees, [~~Commercial Drivers, Crewmembers, and Safety Sensitive Employees~~]). The mandatorily referred employee must successfully complete treatment and provide a letter to the substance control officer from the EAP staff or the treatment program's staff physician certifying successful completion [~~to the substance control officer~~].

(5) Conviction of criminal drug statute violations in the workplace. Employees are prohibited from violating criminal drug statutes in the workplace. [~~As soon as the department becomes aware of a criminal drug statute violation occurring in the workplace, the following procedure shall be followed within 30 days.~~] If an employee fails to report his or her [~~a~~] criminal drug statute violation [~~occurring in the workplace~~] within one work day upon return to work [~~three working days~~], he or she will be suspended for five [~~three~~] working days without pay. (For FLSA exempt employees, such suspensions must be within the same work week.) This procedure will be followed within 30 days of discovery of the conviction.

(A) Employees who are convicted of criminal drug statute violations in the workplace which pertain to the sale, distribution, transportation, or manufacture of dangerous drugs or the possession with the intent to sell, distribute, transport, or manufacture dangerous drugs shall be terminated from the department.

(B) Employees who are convicted of criminal drug statute violations in the workplace which involve possession with the intent to use a dangerous drug shall be mandatorily referred by the employee's supervisor or the substance control officer to the EAP and required to successfully complete treatment, as described in subsection (d) [~~(c)~~] of this section.

(6) Sale, distribution, transportation, or manufacture of dangerous drugs inside and/or outside the workplace. The illegal sale, distribution, transportation, manufacture or possession with intent to sell, distribute, transport or manufacture dangerous drugs by any employee inside or outside of the workplace is prohibited. [~~Employees who engage in such behavior shall be terminated from the department.~~]

(A) If a final applicant for a department position has been convicted of felony charges related to the selling, distributing, transporting, or manufacturing of dangerous drugs and he or she is on probation or parole for that conviction, he or she will not be hired by the department. If an applicant is hired by the department, and it is later discovered that the employee had been convicted prior to employment with the department and is on probation or parole for one of these acts [~~selling, distributing, transporting, or manufacturing dangerous drugs~~], he or she will be immediately terminated from the department.

(B) If an employee is arrested, charged, or indicted for selling, distributing, transporting, or manufacturing dangerous drugs inside or outside the workplace, the employee or his or her designated agent shall report the arrest, charge, or indictment directly to the employee's [~~his or her~~] supervisor or substance control officer within one work day upon return to work [~~three working days~~] after its occurrence. Failure to report the arrest, charge or indictment will subject the employee to suspension for five [~~three~~] working days without pay. (For FLSA exempt employees, such suspensions must be within the same work week.)

(C) If an employee is convicted of selling, distributing, transporting, or manufacturing dangerous drugs inside or outside the workplace, he or she will be terminated from the department. The employee or his or her designated agent shall report the conviction immediately to the employee's [~~his or her~~] supervisor or substance control officer within one work day upon return to work [~~three working days~~] after its occurrence. If the conviction is not reported, the employee will be terminated when the department discovers the conviction.

(D) If an employee voluntarily admits to selling, distributing, transporting, or manufacturing dangerous drugs inside or outside the workplace, he or she will be terminated from the department. An employee must sign a statement admitting his or her actions prior to termination.

(E) If an employee is reasonably suspected of selling, distributing, transporting, or manufacturing dangerous drugs inside or [~~and/or~~] outside the workplace, due to direct observation of such acts in the workplace or by other reason such as [~~of~~] the indictment, arrest, or charge of selling, distributing, transporting, or manufacturing dangerous drugs inside or outside the workplace the following procedure shall be followed.

(i) The employee's supervisor will place the employee on immediate suspension with pay (administrative leave), pending appropriate investigation and confirmation by the department. If such acts are confirmed by the substance control officer, the employee will be terminated [~~is subject to immediate termination~~] from the department.

(ii) The employee shall immediately be provided with a letter which:

(I) summarizes the facts upon which such action is taken;

(II) notifies the employee that selling, distributing, transporting, or manufacturing dangerous drugs inside or outside the workplace subjects the employee to termination from the department;

(III) advises the employee that he or she will have a specified period of time in which to provide a reasonable explanation to his or her supervisor or substance control officer; and

(IV) advises the employee that if his or her response indicates that he or she violated the policies and prohibitions of this title or if it is insufficient or not acceptable or if an investigation by law enforcement, the department, or other authorities confirms the suspicion, the employee will be terminated from the department.

(iii) The employee shall be terminated from the department if:

(I) the employee fails to respond within the specified period or to provide an acceptable explanation; or

(II) investigation by law enforcement or other authorities confirms the suspicion that the employee was selling, distributing, transporting, or manufacturing dangerous drugs.

(iv) If the investigation reveals that the employee was using dangerous drugs inside the workplace and not selling, distributing, transporting or manufacturing dangerous drugs inside and/or outside the workplace, the employee will be mandatorily referred by his or her supervisor or substance control officer to the EAP and required to successfully complete treatment, as described in subsection (d) [~~(c)~~] of this section.

(v) If the investigation reveals that the employee was using dangerous drugs outside the workplace and not selling, distributing, transporting, or manufacturing dangerous drugs inside and/or outside the workplace, the employee will be made aware of the department's employee assistance program [~~given the opportunity to successfully complete treatment~~].

(vi) When suspicious behavior is observed in the workplace, the substance control officer shall contact the Office of [~~the~~] General Counsel or the program staff of the Human Resources Division at the earliest possible time before turning the matter over to law enforcement authorities.

(7) Suspicious substance found. If a substance which appears to be a dangerous drug is found within an area under the effective control of an employee, actions contained in subsection (c) [~~(b)~~] (6) of this section shall be followed.

(8) New employees. If an employee tests positive in his or her initial six month probation period, he or she will be terminated.

(9) [~~(8)~~] Recurrence of substance abuse [~~Substance Abuse after Successful Completion of Treatment~~]. Upon the need to mandatorily refer an employee to the EAP for the second [~~third~~] time for treatment under the department's substance abuse program, including mandatory referrals made under §4.34, §4.35, and §4.36 of this title [~~(relating to Commercial Drivers, Crewmembers, and Safety Sensitive Employees)~~], the employee will not be referred but will be terminated from the department. An employee who received and completed two mandatory referrals prior to November 1, 1998, will be terminated if mandatorily referred for a third time. An employee who received and completed one mandatory referral prior to November 1, 1998, will be mandatorily referred for the second time, if necessary, and will be terminated if mandatorily referred for a third time. The following mandatory referrals will not count as one of the mandatory referrals which would result in termination:

(A) if an employee who is assessed by the EAP as not needing assistance with a chemical dependency problem on his or her first mandatory referral; or

(B) an employee who is referred for a DUI/DWI conviction under §4.33 of this title (relating to Employees Who Drive For The Department).

(10) [~~(9)~~] Failure to successfully complete treatment. Employees who are mandatorily referred to the EAP will be terminated [~~and who are required to successfully complete treatment, as described in subsection (c) of this section, shall be subject to termination~~] from the department if they fail to report to the EAP or fail to successfully complete treatment. Successful completion of treatment must be certified by the EAP, in writing, to the employee's substance control officer.

(d) [~~(c)~~] Mandatory referral [~~Referral~~] and treatment [~~Treatment~~].

(1) Mandatory referral [~~Referral~~]. Except for policy violations which involve the sale, [~~or~~] distribution, transportation or manufacture of dangerous drugs, refusing a required alcohol or drug test under §4.34, §4.35, and §4.36 of this title, or a second [~~third~~] occurrence of substance abuse after successful completion of treatment (except as provided in subsection (c)(9) of this section), an employee who voluntarily admits to or is otherwise established to have an alcohol, inhalant or drug abuse problem shall be mandatorily referred to the EAP [~~for assessment and referral to treatment~~]. Employees who are mandatorily referred to the EAP will be removed from duties as listed in subsection (b)(1)(C) of this section and reassigned to other duties, if available, until he or she is able to provide a completed fitness-for-duty form as provided in paragraph (3) of this subsection. The employee's supervisor or substance control officer will meet with the employee to make the mandatory referral. During this meeting:

(A) the supervisor or substance control officer will contact the EAP;

(B) the supervisor or substance control officer will tell the EAP counselor that a mandatory referral is being made, the type of employee, the employee's name, the reason for the mandatory referral and any other background information requested by the counselor; and

(C) the supervisor or substance control officer will have the employee talk to the EAP counselor, in private, to make an appointment.

(2) Treatment. The department will pay for the cost of EAP counseling sessions, which includes an initial assessment. Employees who are referred by EAP to an outside treatment provider or counselor are responsible for any costs incurred as a result of the referral. Referral sources may be covered by the employee's insurance plan. An EAP counselor shall evaluate a referred employee to determine the extent of the dependence upon alcohol, inhalants, or drugs and, as may be appropriate, will refer the employee to treatment, which will include one or more of the following.

(A) Inpatient [~~Intensive inpatient~~] treatment program. Employees participating in an inpatient rehabilitation treatment program will not be able to work while enrolled in the program. [~~After~~

completing the initial phase of treatment, he or she will be conditionally reinstated contingent on the employee's willingness to follow through with the aftercare plan as prescribed by the treatment center's staff physician and successful completion of treatment.]

(B) Intensive outpatient [Outpatient] treatment program. This program provides individual counseling, group therapy, and educational services for varying lengths of time, normally up to 10 weeks, and also includes an aftercare program. Employees participating in an outpatient program will normally be able to continue to work while participating in the program. [In such cases, the employee will be conditionally reinstated, based on completion of the initial phase of the program and willingness to follow through with the aftercare treatment and successful completion of treatment.]

(C) Counseling program. This program provides education and/or counseling sessions. The EAP staff, in consultation with the counseling program staff, will prescribe the content, frequency, and duration of these sessions, as appropriate, and may include group or individual education and/or counseling sessions.

(3) Fitness-for-duty. The employee will be required to obtain a completed fitness-for-duty form prior to resuming any duties listed in subsection (b)(1)(C) of this section once he or she has completed the initial phase of treatment.

(A) The EAP counselor will refer the employee to a medical doctor or other licensed practitioner to complete a fitness-for-duty form. The supervisor or substance control officer will send a copy of the employee's job description, including a list of all driving, commercial driving, crewmember and safety sensitive duties to the EAP.

(B) The EAP counselor will provide written notification to the employee's substance control officer if the employee does not need assistance with a chemical dependency problem. In this case, a completed fitness-for-duty form will not be required.

(4) [(3)] Certification of successful treatment. After successfully completing treatment, [as described in subsection (c)(2) of this section,] completion must be certified by the EAP, in writing, to the employee's substance control officer.

[(d) Confidentiality. The department will hold all information related to policy violations and disciplinary action in strict confidence consistent with the provisions of applicable law.]

(e) Education. The department will conduct an alcohol and drug-free awareness program which will provide all employees and supervisors with [initial and ongoing periodic] training regarding the department's policy, the personnel actions that will be taken for violations of the policy, the specifics of the program, the dangers of alcohol, inhalant, and drug abuse in the workplace, and the available employee assistance and treatment programs.

§4.33. Employees Who Drive For The Department.

(a) Applicability. Employees who are authorized to drive for the department are subject to §4.32 of this title (relating to All Department Employees), as well as the requirements of this section.

(b) Final applicant.

(1) When driving is an essential or marginal function of the job, the department will only offer a position to a final applicant who has been convicted of one DUI/DWI within the last three years, from the date of application, if he or she agrees to:

(A) successfully complete treatment; and

(B) comply with the procedures described in subsection (f) of this section.

(2) The department will not hire a final applicant for a position when driving is an essential or marginal function of the job if he or she has been convicted of two DUI/DWIs within the last three years from the date of application.

(3) The department will not hire a final applicant for a seasonal position requiring driving as an essential function if he or she has been convicted of a DUI/DWI within the last three years from the date of application. [The department will not offer a position to a final applicant when driving for the department is an essential function of the job, as listed on the job vacancy notice, if the applicant has received a DUI/DWI within the three year period immediately preceding the date of application, unless he or she complies with the procedures described in subparagraph (f) of this section. The department may hire a final applicant for a position where driving is a marginal function, as listed on the job vacancy notice, but will not allow the applicant to drive for the department, if he or she has received a DUI/DWI within the last three years, from the date of application, unless the applicant complies with the procedures described in subsection (f) of this section.]

(c) Driver list. District engineers, [and] division directors, office directors, and applicable members of the administration will maintain a current list of all employees who are authorized to drive for the department. Each district engineer, [and] division director, office director, applicable member of the administration, or designee will be responsible for checking each listed employee's driving record not less than once a year [at least once every 12 months], and employees who drive for the department who are subject to this policy will be required to sign the DUI/DWI Policy and Driving Requirements Policy [Form 1835,] Statement of Notification.

(d) Driver's license suspension [License Suspension]. If an employee has his or her license suspended due to Administrative License Revocation for an arrest of a DUI/DWI or due to conviction of a DUI/DWI, the employee is required to report the suspension within one work day upon return to work to his or her supervisor.

(1) If an employee does not report the license suspension and it is subsequently discovered by the department that the employee has driven for the department with a suspended license, the employee will be terminated.

(2) If an employee does not report the license suspension and has not driven for the department with a suspended license, the employee will be taken off driving duties until the employee shows proof of a valid driver's license. The employee will also be counseled and suspended for five working days without pay. (For FLSA exempt employees, such suspensions must be within the same work week.)

(e) Occupational driver's license [Work Permits]. An employee must have a valid [Texas] driver's license to drive for the department. An occupational driver's license will be accepted if it allows the employee to perform his or her usual driving duties for the department. Otherwise, employees without a valid [Texas] driver's license will be removed from all driving duties and the supervisor [reassigned. The department] will assign non-driving duties, if available [, at his or her current work location. If unavailable, the department will offer the employee the option of transferring to another work location. If the employee refuses a transfer, he or she will be required to take all available vacation and/or compensatory time. Once this is exhausted, the employee will be required to take leave without pay until he or she is able to resume driving duties].

(f) Conviction of [Receiving] a DUI/DWI. If an employee is convicted of [receives] a DUI/DWI, the following procedures shall be followed.

(1) The employee shall notify his or her supervisor of a conviction within one work day upon return to work [three workdays] after receiving the conviction. If an employee does not report the conviction, and it is subsequently discovered by the department, the employee will be suspended for five [three] working days without pay. (For FLSA exempt employees, such suspensions must be within the same work week.)

(2) The employee will be immediately provided with a letter which summarizes the following actions to be taken.

(A) The supervisor [department] will immediately remove the employee from any duties listed in §4.32(b)(1)(C) of this title and [driving until he or she obtains a fitness-for-duty letter or a letter from the Employee Assistance Program (EAP) counselor, as provided in subparagraph (C) and (D) of this paragraph. If the employee is able to work while in treatment, the department will] assign other [non-driving] duties, if available, [at his or her current work location. If unavailable, the department will offer the employee the option of transferring to another work location. If the employee refuses a transfer, he or she will be required to take all available vacation and/or compensatory time. Once this is exhausted, the employee will be required to take leave without pay] until he or she is able to provide a completed fitness-for-duty form [letter] as provided in §4.32(d)(3) of this title [subparagraph (C) and (D) of this paragraph].

(B) The department will mandatorily refer the employee to the EAP and require successful completion of treatment, as described in §4.32(d) of this title [this subsection]. The department will terminate employees who do not report to the EAP or fail to successfully complete treatment.

[(C) The employee will be referred by the EAP counselor to a medical doctor or other licensed practitioner for a fitness-for-duty letter. In order for the employee to be reinstated to driving duties, the fitness-for-duty letter must state that the employee is able to safely drive for the department.]

[(D) If the employee is not referred for treatment beyond referral to the EAP and if the EAP counselor is unable to locate a doctor or licensed practitioner covered by the employee's health insurance to provide a fitness for duty letter, then the EAP counselor will provide a letter to the employee's substance control officer stating that the employee does not have an alcohol or drug addiction problem at this time.]

(C) [(E)] The employee must have a valid [Texas] driver's license or an occupational driver's license that allows performance of [them to perform his or her] usual driving duties before being reinstated to driving for the department.

(3) An [The] employee who receives a [the] letter[, as described in paragraph (2) of this subsection,] informing him or her of these actions must acknowledge receipt by signing the letter and returning it to the supervisor [at the bottom].

(4) An employee who is convicted of [receives] two DUIs/DWIs within a five year period beginning on or after November 1, 1995, during his or her employment with the department, will be terminated from the department. If the conviction is appealed and overturned, the employee will be reinstated. [A DUI/DWI received prior to November 1, 1995 will not count towards termination from the department.]

§4.34. Commercial Drivers.

(a) Applicability. An employee who is a commercial driver is subject to all of §4.32 and §4.33 of this title (relating to All Department Employees and Employees Who Drive for the Department), as well as the requirements of this section.

(b) Prohibitions. A [In addition to the prohibitions in §4.32 and §4.33 of this title (relating to All Department Employees and Employees Who Drive for the Department), a] commercial driver is prohibited from:

(1) reporting to work within four hours of consuming alcohol;

(2) reporting to work or remaining at work while under the influence of alcohol or dangerous drugs;

(3) consuming or possessing alcohol while on duty or while driving a commercial motor vehicle;

(4) using alcohol within eight hours following an accident or prior to undergoing a post-accident alcohol test, whichever comes first;

(5) having a positive drug test result or an alcohol test result of .04 or greater [higher]; and

(6) refusing to submit to a required alcohol or drug test.

(c) Testing. [An employee will be notified, in writing, that he or she is subject to drug and alcohol testing, prior to requiring him or her to submit to an alcohol or drug test.]

(1) Pre-employment testing.

(A) The department shall not hire or [engage,] employ [or otherwise give a commitment of employment to] a final applicant for a position as a commercial driver unless that person passes a drug test [and has an alcohol test result below 0.04, if required by the Federal Highway Administration]. A current employee, who is a final applicant for a commercial driver position, including transfers and promotions, must pass a drug test unless he or she has previously been drug tested by the department during the preceding three year period, and all drug test results were negative. A current employee [not subject to drug or alcohol testing, who is a final applicant for a commercial driver position and] who fails a drug test will not be hired for that position, and [or who has an alcohol test result of .04 or higher] will be mandatorily referred to the EAP and required to successfully complete treatment, as described in §4.32(d) [(c)] of this title [(relating to All Department Employees)].

(B) The department will notify a final applicant of the results of a pre-employment drug test if the applicant requests such results within 60 calendar days of being notified of the disposition of the employment application. The department will also inform the applicant which drugs were verified as positive.

(C) The department will request information from previous or current employers on final commercial driver applicants, pursuant to the driver's written authorization, if the final applicant (including an employee who is transferred or promoted) has performed commercial driving duties during the preceding two years from the date of application. Information to be requested will include:

(i) alcohol tests with a result of .04 alcohol concentration or greater;

(ii) verified positive controlled substances test results; and

(iii) refusals to be tested.

(D) The department shall not use a driver to perform driving or safety sensitive duties as described in §4.36(a) of this title (relating to Safety Sensitive Employees) if the department believes that the driver has violated any of the prohibitions in subparagraph (C)(i-iii) of this paragraph without receiving the required treatment, as stated on the Release Form for Evaluation/Treatment Records from Substance Abuse Professionals. If the employee has not completed the required treatment, the employee will be terminated.

(2) Post-accident testing [~~Testing~~]. A commercial driver who is directly involved in a serious accident, or in any accident in which the events and circumstances give rise to a reasonable suspicion that the employee is under the influence of alcohol or dangerous drugs at the time of the occurrence, in accordance with paragraph (3) of this subsection, is subject to post-accident alcohol and drug testing.

(A) If a commercial driver does not remain readily available for such testing, the substance control officer may record that the employee refused to submit to testing.

(B) Nothing in this section will be construed to require the delay of necessary medical attention for injured people following an accident or to prohibit an employee from leaving the scene of an accident for the period necessary to obtain assistance in responding to the accident, or to obtain necessary emergency medical care.

(C) No commercial driver required to take a post-accident alcohol test may use alcohol for eight hours following the accident or until he or she undergoes an alcohol test, whichever occurs first.

(D) An [~~If an~~] alcohol test should be [~~is not~~] administered within two hours following the accident. [~~,~~] If an alcohol test is not administered within two hours, the department will continue to try to test up to eight hours following the accident. The [~~the~~] substance control officer will prepare [~~and maintain~~] a record stating the reasons the test was not promptly administered.

[~~(E) If an alcohol test is not administered within eight hours following the accident, the substance control officer will cease attempts to administer an alcohol test and will prepare and maintain the same record.~~]

(E) [~~(F)~~] A drug test should be administered as soon as possible. If a drug test is not administered within 32 hours following the accident, the substance control officer will cease attempts to administer a drug test, and prepare [~~and maintain~~] a record stating the reasons the test was not promptly administered.

(F) [~~(G)~~] The results of a breath or blood test for the use of alcohol or a urine test for the use of dangerous drugs, conducted by federal, state, or local officials having independent authority for the test, will be considered to meet the requirements of this section, provided such tests conform to applicable federal, state or local requirements, and that the department obtains the results of the tests.

(3) Reasonable cause testing. Reasonable cause testing of all department employees will be conducted under §4.32(b) of this title. [~~A commercial driver who is reasonably suspected of using alcohol or dangerous drugs in the workplace or of performing official duties while under the influence of alcohol or dangerous drugs will be required to undergo an alcohol and/or drug test.~~

[~~(A) The decision to test must be based on a reasonable and articulable belief by a supervisor, who has been trained in the detection of alcohol and dangerous drug use, that the commercial driver has used alcohol or dangerous drugs based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech, body odors, or performance indicators of probable use of the commercial driver. The observations of physical, behavioral, or performance indicators of probable use may include indications of the chronic and withdrawal effects of dangerous drugs.~~]

[~~(B) When a supervisor reasonably suspects a commercial driver of using alcohol or dangerous drugs in the workplace or of performing official duties while under the influence of alcohol or dangerous drugs, he or she shall contact the substance control officer immediately. A written report of his or her observations shall be submitted within 24 hours, in a form prescribed by the Director.~~]

[~~(C) When there is reasonable suspicion to believe that a commercial driver is under the influence of alcohol or drugs, and it is reasonable to conclude that the commercial driver may be impaired to the extent that his or her continued performance of such duties, pending a decision to test pursuant to this subsection, will constitute a real and present danger to personal safety or property, the commercial driver will be removed from driving, and, if appropriate, reassigned or placed on administrative leave.~~]

[~~(D) The substance control officer will make an immediate inquiry into the circumstances and will confer or counsel with the employee, as may be appropriate. Based on the supervisor's report and the officer's independent analysis and the approval of the district engineer or division director or office director, the substance control officer will document , in a form prescribed by the Director, whether testing is justified.~~]

[~~(E) If an alcohol test is not administered within two hours following an incident, the substance control officer will prepare and maintain on file a record stating the reasons the alcohol test was not promptly administered.~~]

[~~(F) If an alcohol test is not administered within eight hours following an incident, the department will cease attempts to administer an alcohol test and will prepare and maintain the same record.~~]

[~~(G) If a drug test is not administered within 32 hours following an incident, the department will cease attempts to administer a drug test, and prepare and maintain a record stating the reasons the test was not promptly administered.~~]

[~~(H) Even if a reasonable cause test is not administered, no commercial driver will drive or operate motorized equipment, inspect, service or condition any vehicle, or supervise, assist with or load or unload a motor vehicle, until:~~]

[~~(i)~~ ~~an alcohol test is administered and the driver's alcohol concentration measures less than 0.02; or~~]

[~~(ii)~~ ~~twenty-four hours have elapsed following the determination that there is reasonable suspicion to believe that the driver has violated the prohibitions concerning the use of alcohol.~~]

(4) Random testing. All commercial drivers are subject to random alcohol and drug testing.

(A) A commercial driver subject to random testing for dangerous drugs and alcohol will be selected for testing on a random basis in a manner to ensure that each commercial driver has a substantially equal chance of selection on a scientifically valid basis. The testing frequency and selection process will be such that a commercial driver's chance of selection continues to exist throughout his or her employment in a commercial driver position.

(B) The Human Resources Division will ensure that commercial drivers are tested on a random basis at an annual rate of at least 10% but not more [~~less~~] than 25% for alcohol testing

and not less than 50% for drug testing. The percentage is based on [of those] respective employee categories in each payroll unit or equivalent work unit. The frequency of testing will also be at random, but will be sufficient to assure that the number of random tests conducted annually will be at least 10% but not more than [equal to] 25% for alcohol or not less than 50% for drugs[, respectively,] of the number of commercial drivers.

(C) Random selection of commercial drivers may be accomplished by periodically selecting one or more sections and testing all commercial drivers, provided each section remains equally subject to selection.

(d) Administrative and disciplinary actions [Disciplinary Action].

(1) Violations. A [In addition to being subject to disciplinary actions described in §4.32 and §4.33 of this title (relating to All Department Employees and Employees Who Drive for the Department), a] commercial driver who violates subsection (b) of this section will be subject to the administrative and disciplinary actions [procedures] described in §4.32(c)(1)(B) of this title [paragraphs (1)-(4) of this subsection].

(2) [(1)] Remove from duties. The supervisor or substance control officer will immediately remove a commercial driver from performing the duties listed in §4.32(b)(1)(C) of this title and assign other duties to the employee, if available, [subsection (c)(3)(H) of this section] until he or she meets all of the criteria listed in §4.32(d)(3) of this title [paragraph (3) of this section].

[(2) The employee's supervisor will assign duties other than those described in subsection (c)(3)(H) of this section to the employee, if available, at his or her current work location. If unavailable, the employee's supervisor will offer him or her the option of transferring to another work location. If the employee refuses the transfer, he or she will be required to take all available vacation or compensatory time. Once this is exhausted, the supervisor will require the employee to take leave without pay until he or she is able to provide a fitness-for-duty letter as provided in paragraph (3)(C) of this paragraph.]

[(3) In addition, a commercial driver will complete the following requirements:]

[(A) The supervisor or the substance control officer will mandatorily refer the commercial driver to the Employee Assistance Program (EAP) and the driver will be required to successfully complete treatment, as described in §4.32(c) of this title (relating to All Department Employee), which may include aftercare for a length of time to be specified by the treatment program's staff physician. The treatment program must be approved by the Texas Department of Mental Health and Mental Retardation or by the Texas Commission on Alcohol and Drug Abuse.]

[(B) The commercial driver will undergo a return-to-duty alcohol test prior to resuming driving duties with a result indicating an alcohol concentration below 0.02 if the conduct involved alcohol or a drug test with a verified negative result if the conduct involved a dangerous drug.]

[(C) The commercial driver will provide a fitness-for-duty letter. The EAP counselor will refer the employee to a medical doctor or other licensed practitioner for a fitness-for-duty letter once he or she has completed the initial phase of treatment.]

[(D) If the employee is not referred for any type of treatment beyond referral to the EAP and if the EAP counselor is unable to locate a doctor or licensed practitioner who is covered by the employee's health insurance, then the EAP counselor will provide a letter to the employee's substance control officer stating that the employee does not have an alcohol or drug addiction problem at this time.]

[(E) The commercial driver will undergo follow-up testing for alcohol or dangerous drugs for a period of up to 60 months and which consists of at least 6 tests in the first 12 months following the employee's return-to-duty. The number and frequency of follow-up testing shall be as directed by the EAP staff following the employee's return-to-duty. The EAP may determine that return-to-duty and follow-up testing for both alcohol and dangerous drugs is necessary for the employee. The EAP may terminate the requirement for follow-up testing at any time after the first six tests have been administered, if it determines that such testing is no longer necessary.]

[(F) The department will terminate the commercial driver from employment unless he or she complies with all the requirements of subsection (d)(3) of this section.]

[(4) A commercial driver who has an alcohol test result of .02 to .04 will be removed from official duties and required to take vacation leave, compensatory leave or leave without pay, if the employee has exhausted his or her accrued leave, until 24 hours have passed.]

(3) [(e)] Refusal to consent to testing. The department will terminate a commercial driver from employment if he or she:

(A) [(1)] refuses to consent to an alcohol or drug test;

(B) [(2)] fails to arrive at the testing site at the assigned time;

(C) [(3)] fails to cooperate with the collection site person; or

(D) [(4)] refuses to sign the certification on the Breath Alcohol Testing form.

(e) [(f)] Mandatory referral [Referral] and treatment [Treatment].

(1) Mandatory referral [Referral]. A mandatory referral to the EAP [Mandatory referrals] will be made pursuant to §4.32(d) [(c)] of this title [(relating to All Department Employees)]. [In the case of a commercial driver, the supervisor or substance control officer will send a copy of the employee's job description, including a list of all driving duties to the EAP. The EAP will coordinate with the doctor or licensed practitioner who will provide the fitness-for-duty letter and ensure that he or she is aware of the reasons the letter is required.]

(2) Treatment. The policies and procedures for EAP treatment are [Treatment is] described in §4.32(d)(2) [(c)] of this title [(relating to All Department Employees)].

[(g) Confidentiality. All information related to the alcohol and drug testing of individuals will be held in strict confidence consistent with the provisions of applicable law.]

(f) [(h)] Education. All commercial drivers and supervisors of commercial drivers will receive [yearly] training on the effects and consequences of alcohol and drug use on personal health, safety, and the work environment and the manifestations and behavioral changes that may indicate alcohol or drug use [or abuse].

§4.35. Crewmembers.

(a) Applicability. An employee who is a crewmember is subject to §4.32[(a)] and §4.33 of this title (relating to All Department Employees and Employees Who Drive for the Department) and the

prohibitions in §4.34(b) of this title (relating to Commercial Drivers), as well as the requirements of this section.

[(b) Prohibitions. The prohibitions in §4.32 (b), §4.33, and §4.34(b) of this title (relating to All Department Employees, Employees Who Drive for the Department, and Commercial Drivers) apply to a crewmember.]

(b) [(c)] Testing. [An employee will be notified, in writing, that he or she is subject to drug and alcohol testing, prior to requiring him or her to submit to an alcohol or drug test.]

(1) Pre-employment testing. Pre-employment testing for a crewmember will be conducted pursuant to §4.34(c)(1) of this title [(relating to Commercial Drivers), except that only a drug test will be administered].

(2) Post-accident testing. An alcohol test and a drug test will be administered to a crewmember who is directly involved in a serious marine accident [will be tested] pursuant to §4.34(c)(2) [(relating to Commercial Drivers)] of this title. Testing should be done as soon as practicable even if it is after the specified time period.

(3) Reasonable cause [Cause] testing. Testing will be conducted pursuant to §4.32(b) [§4.34(c)(3)] of this title [(relating to Commercial Drivers)].

(4) Random testing. All crewmembers are [only] subject to random testing for alcohol and dangerous drugs, as described in §4.34(c)(4) of this title [(relating to Commercial Drivers)]. Random selection of crewmembers may be accomplished by periodically selecting one or more shifts and testing all crewmembers, provided each shift remains equally subject to selection.

(c) [(d)] Administrative and disciplinary actions [Disciplinary Action].

(1) Violations. A [In addition to being subject to disciplinary actions described in §4.32 and §4.33 of this title (relating to All Department Employees and Employees Who Drive for the Department), a] crewmember who violates §4.34(b)(1)-(5) of this title [(relating to Commercial Drivers)] will be subject to the administrative and disciplinary actions [procedures] described in §4.32(c)(1)(B) [§4.34(d)] of this title [(relating to Commercial Drivers)].

(2) [(1)] Reporting and removal from duties. The substance control officer shall report the positive test result, in writing, to the nearest Coast Guard Officer in Charge, Marine Inspection (OCMI) and shall have the supervisor remove the individual from duties which directly affect the safe operation of the vessel as soon as practicable. The supervisor or substance control officer will immediately remove a crewmember from [crewmember] duties listed in §4.32(b)(1)(C) of this title and assign other duties, if available, until he or she meets all of the criteria listed in §4.32(d)(3) [§4.34(c)(3)] of this title [(relating to Commercial Drivers);].

[(2) the employee's supervisor will assign non-crewmember duties to the employee, if available, at his or her current work location. If unavailable, the employee's supervisor will offer him or her the option of transferring to another work location. If the employee refuses the transfer, he or she will be required to take all available vacation or compensatory time. Once this is exhausted, the supervisor will require the employee to take leave without pay until he or she is able to provide a fitness-for-duty letter as provided in §4.34(d)(3)(D) of this title (relating to Commercial Drivers); and]

(3) Medical review officer assessment. The [the] employee will be required to be assessed and found by the medical review officer to be drug-free and to pose a sufficiently low risk for subsequent illegal drug use to justify his or her return to work.

(4) [(e)] Refusal to consent to testing. A crewmember will be terminated if he or she engages in any of the behaviors described in §4.34(d)(3) [(e)] of this title [(relating to Commercial Drivers)].

(d) [(f)] Mandatory referral [Referral] and treatment [Treatment].

(1) Mandatory referral [Referral]. A mandatory referral to the EAP [Mandatory referrals] will be made pursuant to the policies and procedures of §4.32(d) [(c)] of this title [(relating to All Department Employees]. [In the case of a crewmember, the supervisor or substance control officer will send a copy of the employee's job description, including a list of all marine duties, to the EAP. The EAP will coordinate with the doctor or licensed practitioner who will provide the fitness-for-duty letter and ensure that he or she is aware of the reasons the letter is required.]

(2) Treatment. The policies and procedures for EAP treatment are [Treatment is] described in §4.32(d)(2) [(c)] of this title [(relating to All Department Employees)].

[(g) Confidentiality. All information related to the alcohol and drug testing of individuals will be held in strict confidence consistent with the provisions of applicable law.]

(e) [(h)] Education. Training shall be conducted for crewmembers and their supervisors [on a yearly basis]. The training shall be at least 60 minutes in length and shall address the effects and consequences of drug and alcohol use on personal health, safety and the work environment; and the manifestations and behavioral changes [cues] that may indicate drug and alcohol use [and abuse].

§4.36. Safety Sensitive Employees.

(a) Applicability. An employee in a safety sensitive position is subject to §4.32 and §4.33 of this title (relating to All Department Employees and Employees Who Drive for the Department) and the prohibitions in §4.34(b) of this title (relating to Commercial Drivers) as well as the requirements of this section. A position is considered safety sensitive for the purposes of this subsection if the employee holding the position performs one or more of the following activities or job functions at least four times within a 12 month period.

(1) The employee [routinely] operates a motor vehicle along a roadway in traffic in a fashion not usual to normal traffic. This includes driving slowly along the roadway or right of way, frequently pulling in and out of traffic, making frequent turns and stops, and getting in and out of a vehicle near traffic. Vehicle operation in this unusual manner in high speed traffic produces a high risk of causing immediate, catastrophic consequences. Examples of activities that fit this description include:

(A) inspecting roadways and bridges for repairs;

(B) inspecting barricades, traffic control devices, and traffic control setups;

(C) inspecting maintenance projects such as bridge/roadway repairs or sign and striping operations;

(D) assisting stranded motorists;

(E) inspecting materials and work being performed at construction sites when unusual driving is required;

(F) inspecting vegetation growing along roadways;

(G) inspecting utility placements on roadways and rights of way;

(H) inspecting driveway placements;

(I) inspecting restorations of state rights of way;

(J) supervising the installation of signals;

(K) supervising sign installation;

(L) monitoring ramp meters;

(M) inspecting barrier fences;

(N) inspecting for damaged signs; [~~or~~]

(O) inspecting draw bridges;

(P) inspecting employee safety at maintenance and construction sites; or

(Q) driving trucks that are operated in support of road crews.

(2) The employee performs job duties, other than driving, on highways or rights of way, in or around traffic [~~on a routine basis~~], such as:

(A) repairing signals;

(B) installing signals;

(C) flagging traffic and assisting with traffic control;

(D) installing reflective pavement markings;

(E) repairing roadway surfaces and bridges;

(F) performing water blasting;

(G) setting up and taking down signs and barricades;

(H) picking up litter on the right of way;

(I) removing encroachments from state rights of way;

(J) cleaning road signs;

(K) replacing signs;

(L) repairing sign illumination; [~~or~~]

(M) clearing debris from roadways and rights of way;

(N) inspecting/reviewing construction contract work;

(O) inspecting maintenance contract and operation work;

(P) drilling foundation cores; or

(Q) surveying crew operations.

(3) The employee uses dangerous chemicals/materials around other employees and/or the traveling public [~~on a routine basis~~] in the following manner:

(A) performs lab tests which require the use of materials which are combustible, flammable, toxic or corrosive;

(B) tests materials which are combustible, flammable, toxic or corrosive;

(C) operates photoprocessing equipment used in a laboratory to process film which requires the use of materials which are combustible, flammable, toxic or corrosive;

(D) silkscreens signs which requires the use of materials which are combustible, flammable, toxic or corrosive; [~~or~~]

(E) cuts or welds materials using combustible, flammable, toxic or corrosive materials; or

(F) uses or transports a nuclear density gauge.

(4) The employee operates specialized maintenance/construction or heavy equipment in and around traffic or around one or more other employees [~~on a routine basis~~]. Examples of large/heavy equipment [~~activities~~] that fit this description include, but are not limited to [~~the following:~~]

[~~(A) large/heavy equipment such as~~] hole diggers, rotary brooms, front end loaders, aerial buckets, snow plows, pony blades, epoxy machines, ladder trucks, cable lift hysters, rollers, cranes, paint machines, bulldozers, chip spreaders, rotomillers, backhoes, drilling augers, steel wheel pneumatic compacters, maintainers, wing plows, bucket trucks, drag lines, mechanical rig runners, maze meters, [~~and~~] forklifts, and right of way mowers [~~; and~~]

[~~(B) trucks and automobiles that are operated in support of road crews or that are driven along the roadway in traffic in a fashion not usual to normal traffic patterns (examples of trucks may incllude, service, litter, fuel, paint, supply, sign, and herbicide trucks)~~]

(5) The employee operates aircraft or swing bridges [~~on a routine basis~~]. The operation of aircraft or swing bridges carries with it a high risk of potential harm such that a single drug or alcohol related lapse could have immediate, irremediable, and calamitous consequences to employees, passengers, and/or the traveling public.

(6) The employee conducts or assists with underwater bridge inspections [~~on a routine basis~~]. The performance of this activity carries with it a high risk of potential harm such that a single alcohol or drug related lapse could have immediate, irremediable, and calamitous consequences to other employees or themselves.

[~~(b) An employee in a safety sensitive position is subject to §4.32(a), §4.33, and §4.34(a) of this title (relating to All Department Employees, Employees Who Drive for the Department, and Commercial Drivers) as well as the requirements of this section.~~]

[~~(c) Prohibitions. An employee in a safety sensitive position is subject to the prohibitions in subsections §4.32 (b), §4.33, and §4.34(b) of this title (relating to All Department Employees, Employees Who Drive for the Department, and Commercial Drivers).~~]

(b) [~~(d)~~] Testing. [~~An employee will be notified, in writing, that he or she is subject to drug and alcohol testing, prior to requiring him or her to submit to an alcohol or drug test.~~]

(1) Pre-employment testing. Pre-employment testing shall be conducted pursuant to §4.34(c)(1) of this title [~~(relating to Commercial Drivers)~~].

(2) Post-accident testing. An alcohol test and a drug test will be administered to a safety sensitive employee who is directly involved in a serious accident under §4.34(c)(2) of this title. [~~An employee in a safety sensitive position will only be tested if he or she is directly involved in a serious accident.~~]

(3) Reasonable cause testing. Testing will be conducted under §4.32(b) of this title.

(c) [~~(e)~~] Administrative and disciplinary actions [~~Disciplinary Action~~].

(1) Violations. Employees [~~In addition to being subject to disciplinary actions described in §4.32 and §4.33 of this title (relating to All Department Employees and Employees Who Drive for the Department), employees~~] in safety sensitive positions who violate

[~~subsection~~] §4.34(b) [~~(c)~~](1)-(5) of this title [~~(relating to Commercial Drivers)~~] will be subject to the administrative and disciplinary actions [~~procedures~~] described in §4.32(c)(1)(B) [~~§4.34(d)~~] of this title [~~(relating to Commercial Drivers)~~].

(2) Removal from duties. The supervisor or substance control officer will immediately remove a safety sensitive employee from duties listed in §4.32(b)(1)(C) of this title and assign other duties, if available, until he or she meets all of the requirements listed in §4.32(d)(3). [~~The only exception is that the employee's supervisor will assign non-safety sensitive duties to the employee, if available, at his or her current work location.~~]

(3) [~~(f)~~] Refusal to consent to testing. A safety sensitive employee will be terminated if he or she engages in any of the behaviors described in §4.34(d)(3) [~~(e)~~] of this title [~~(relating to Commercial Drivers)~~].

(d) [~~(g)~~] Mandatory referral [~~Referral~~] and treatment [~~Treatment~~].

(1) Mandatory referral [~~Referral~~]. A mandatory referral to the EAP [~~Mandatory referrals~~] will be made pursuant to the policies and procedures of §4.32(d) [~~(c)~~] of this title [~~(relating to All Department Employees)~~]. [~~In the case of an employee in a safety sensitive position, the supervisor or substance control officer will send a copy of the employee's job description, including a list of all safety sensitive duties, to the EAP. The EAP will coordinate with the doctor or licensed practitioner who will provide the fitness-for-duty letter; and ensure that he or she is aware of the reasons the letter is required.~~]

(2) Treatment. The policies and procedures for EAP treatment are [~~Treatment is~~] described in §4.32(d)(2) [~~(c)~~] of this title [~~(relating to All Department Employees)~~].

[~~(h) Confidentiality. All information related to the alcohol and drug testing of individuals will be held in strict confidence consistent with the provisions of applicable law.~~]

(e) [~~(i)~~] Education. Training shall be conducted for employees in safety sensitive positions and their supervisors [~~on a yearly basis~~]. The training requirements are described in §4.34(f) [~~(h)~~] of this title [~~(relating to Commercial Drivers)~~].

§4.37. Test Procedures.

(a) Drug and alcohol testing. An individual who is required to undergo an alcohol or drug test, will be requested to sign a consent form and to report to a collection site, or in the case of an alcohol breath test to report to a test site to be designated by the department. All alcohol and drug tests will be conducted at department [~~department's~~] expense with the exception of the split specimen [~~retest~~] test as discussed in subsection (c) of this section.

(b) Drug test administration. Collection site personnel will administer drug tests according to Department of Health and Human Services (DHHS) guidelines [~~and alcohol blood tests according to Coast Guard guidelines~~]. DHHS guidelines are summarized as follows.

(1) Specimen collection procedures.

(A) A chain of custody for each specimen to be chemically tested will be established and maintained from the time of specimen collection through the testing of the specimen.

(i) If a specimen is not immediately prepared for shipment, it will be safeguarded during temporary storage.

(ii) Every effort will be made to minimize the number of persons handling specimens.

(B) Specimen collection and shipping will be conducted as follows.

(i) Procedures for collecting urine specimens will allow individual privacy unless there is reason to believe that a particular individual may alter or substitute the specimen to be provided.

(ii) To deter the dilution of specimens at the collection site, toilet bluing agents will be placed in toilet tanks wherever possible, so the reservoir of water in the toilet bowl always remains blue. There will be no other source of water (e.g., no shower or sink) in the enclosure where urination occurs.

(iii) When an individual arrives at the collection site, the collection site person will request the individual to present photo identification. If the individual's identity cannot be established, the collection site person will not proceed with the collection. If the employee requests, the collection site person will show his or her identification to the employee.

(iv) The collection site person will ask the individual to remove any unnecessary outer garments such as a coat or jacket that might conceal items or substances that could be used to tamper with or adulterate the individual's urine specimen. The collection site person will ensure that all personal belongings such as a purse or briefcase remain with the outer garments. The individual may retain his or her wallet. If the employee requests a receipt for any personal belongings, the collection site person will provide it.

(v) The individual will be instructed to wash and dry his or her hands prior to urination.

(vi) After washing hands, the individual will remain in the presence of the collection site person and will not have access to any water fountain, faucet, soap dispenser, cleaning agent or any other materials which could be used to adulterate the specimen.

(vii) The individual may provide his or her specimen in the privacy of a stall or otherwise partitioned area that allows for individual privacy.

(viii) The collection site person shall instruct the employee to provide at least 45 ml under the split sample method of collection in which 30 ml will be used as the primary specimen and 15 ml will be used as the split specimen. [~~The individual shall urinate into a collection container or a specimen bottle capable of holding at least 60 milliliters.~~]

(ix) If the individual is unable to provide an adequate quantity of urine, the collection site person will instruct the individual to drink up to 40 [~~not more than 24~~] ounces of fluids, distributed reasonably through a period of up to three hours, or until the individual has provided a new urine specimen, whichever occurs first [~~and, after a period of up to two hours, again attempt to provide a complete sample using a fresh collection container~~]. The original insufficient specimen will be discarded. If the employee is still unable to provide an adequate specimen, the insufficient specimen will be discarded, testing discontinued, and the department so notified. The medical review officer will refer the individual for a medical evaluation to develop pertinent information concerning whether the individual's inability to provide a specimen is genuine or constitutes a refusal to test.

(x) Both the individual being tested and the collection site person shall keep the specimen in view at all times after the specimen is given, prior to the specimen being sealed and labeled. The specimen shall be sealed with a tamperproof seal over the bottle

cap and down the sides of the bottle, and labeled in the presence of the employee.

(xi) The collection site person shall place an identification label securely on the bottle which contains the date, the individual's specimen number, and any other identifying information provided or required by the department. If separate from the label, the tamperproof seal shall also be applied. The individual being tested shall be present during these procedures.

(xii) The individual shall initial the identification label on the specimen bottle to certify that it is the specimen collected from that individual.

(xiii) The individual shall be asked to read and sign a statement on the drug testing custody and control form certifying that the specimen identified as having been collected from that individual is in fact the specimen he or she provided.

(xiv) The collection site person will note any unusual employee behavior or appearance in the permanent record book.

(xv) Whenever there is reason to believe that a particular individual may alter or substitute the specimen to be provided, a second specimen will be obtained as soon as possible under the direct observation of a same gender collection site person.

(xvi) A designated collection site may be any suitable location where a specimen can be collected under conditions set forth in this subchapter, including a properly equipped mobile facility. A designated collection site will have an enclosure where private urination can occur, a toilet for completion of urination (unless a single-use collector is used with sufficient capacity to contain the void), and a suitable clean surface for writing. The site must also have a source of water for washing hands, which, if practicable, should be external to the enclosure where urination occurs.

(xvii) If a collection site facility is dedicated solely to urine collection, the department will secure it at all times. If a facility cannot be dedicated solely to drug testing, the department will secure the portion of the facility used for testing during drug testing.

(xviii) Specimens will be shipped by an expeditious means to the laboratory.

(2) Laboratory analysis procedure.

(A) Each specimen will be analyzed in accordance with DHHS guidelines which requires testing for the following substances:

(i) marijuana;

(ii) cocaine;

(iii) opiates;

(iv) phencyclidine (PCP); and

(v) amphetamines.

(B) DHHS guidelines presently specify the following confirmatory test cutoff levels.
Figure: 43 TAC 4.37(b)(2)(B).

(C) The initial test will use an immunoassay screen which meets the requirements of the Food and Drug Administration for commercial distribution.

(D) All specimens identified as positive on the initial test will be confirmed by a confirmatory test using gas chromatography/mass spectrometry (GC/MS) techniques.

(E) A specimen which indicates the presence of a dangerous drug at a level equal to or exceeding the levels established in DHHS guidelines is reported to the medical review officer as positive.

(F) Quality assurance and quality control designed, implemented, and reviewed to monitor the conduct of each step of the process of testing for drugs will be in accordance with DHHS guidelines.

(3) Reporting and reviewing of drug test results.

(A) The laboratory will report all test results as required within an average of five days after the laboratory receives the specimen.

(B) The laboratory will report as negative all specimens which are negative on the initial test or negative on the confirmatory test. Only specimens confirmed positive are reported positive to the medical review officer for a specific drug or drug metabolite.

(C) The medical review officer will review and interpret all test results before transmitting the results to the department. In carrying out this responsibility, the medical review officer will examine alternate medical explanations for any positive test result. This action could include conducting a medical interview with the individual, review of the individual's medical history, or review of any other relevant biomedical factors. The medical review officer will review all medical records made available by the tested individual when a confirmed positive test could have resulted from legally prescribed medication.

(D) Prior to making a final decision to verify a positive test result, the medical review officer will contact the individual directly, on a confidential basis, to discuss the test result with him or her.

(i) If, after making all reasonable efforts and documenting them, the medical review officer is unable to reach the individual directly, the medical review officer will contact the substance control officer who will direct the individual to contact the medical review officer as soon as possible or within 24 hours. If this becomes necessary, the requirement that the employee contact the medical review officer is held in confidence. If after making all reasonable efforts, the substance control officer is unable to contact the employee, the substance control officer will notify the medical review officer that he or she was unable to make contact with the employee. The substance control officer will continue to try and contact the employee until otherwise notified by the medical review officer.

(ii) The medical review officer may verify a test as positive without having communicated directly with the employee about the test if:

(I) the employee expressly declines the opportunity to discuss the test;

(II) neither the medical review officer or the substance control officer, after making all reasonable efforts, has been able to contact the employee within 14 days of the date on which the medical review officer receives the confirmed positive test result from the laboratory; or

(III) the substance control officer has successfully made and documented a contact with the employee and in-

structed the employee to contact the medical review officer and more than five days have passed since the date the employee was successfully contacted by the substance control officer.

(iii) If a test is verified positive as described in subparagraph (D)(ii)(II) or (III) of this paragraph [~~more than five days have passed since the verified positive test~~], the employee may present to the medical review officer information documenting that serious illness, injury, or other circumstances unavoidably prevented the employee from being contacted by the medical review officer or substance control officer or from timely contacting the medical review officer. The medical review officer, on the basis of such information, may reopen the verification, allowing the employee to present information concerning a legitimate explanation for the confirmed positive test. If the medical review officer concludes that there is a legitimate explanation, the medical review officer will declare the test to be negative.

[~~(E) If the medical review officer determines there is a legitimate medical explanation for the positive test result, he or she shall report the test result to the department as negative.~~]

(E) [~~(F)~~] In the case of an individual holding a license, certificate of registry or merchant mariners document, the department shall report the positive drug test result in writing to the nearest Coast Guard Officer in Charge, Marine Inspection (OCMI) pursuant to 46 C.F.R. §16.201, Application.

(c) Test of split specimen [~~Retesting~~]. A final applicant or employee may appeal the results of a positive drug test by following the procedures listed below.

(1) Final applicants or employees must request, in writing, that the split specimen be provided to another DHHS certified laboratory for testing [~~retesting~~].

(2) The applicant or employee must make the request, in writing, to the medical review officer within 72 hours after notification of a confirmed positive test result. The same medical review officer will be used to interpret the results of the split specimen test [~~retest~~]. All the costs related to the split specimen test [~~retest~~] are at the expense of the final applicant or employee.

(3) In the event that the result of the split specimen test [~~retest~~] is negative, indicating that the positive result of the first test was erroneous, the department will reimburse the final applicant or employee for the cost of the split specimen test [~~retest~~].

(4) If an employee has not contacted the medical review officer within 72 hours as provided under this subsection [~~more than five days have passed since the initial verified positive test~~], the employee may present to the medical review officer information documenting that serious illness, injury, inability to contact the medical review officer, lack of actual notice of the verified positive test, or other circumstances unavoidably prevented the employee from timely contacting the medical review officer [~~in a timely manner~~]. If the medical review officer concludes that there is a legitimate explanation for the employee's failure to contact the medical review officer in 72 hours, the medical review officer shall direct that the analysis of the split specimen be performed. [~~The medical review officer, on the basis of such information may reopen the verification, allowing the employee to present information concerning a legitimate explanation for the confirmed positive test.~~]

(5) The medical review officer will report and review split specimen test results as provided in subsection (b)(3)(C) of this section. [~~If the medical review officer concludes that there is a legitimate explanation, the medical review officer will declare the test to be negative.~~]

(d) Alcohol test administration. Alcohol tests may be conducted on either blood or breath specimens. A blood or breath alcohol test level of 0.04[~~%~~] or greater [~~above~~] is considered to be a positive test result for alcohol. Alcohol blood tests will be administered according to Coast Guard guidelines.

(1) Breath testing procedure. The breath alcohol technician (BAT) will administer breath alcohol tests according to Federal Highway Administration (FHWA) guidelines as follows.

(A) The BAT will complete a breath alcohol testing form for the initial breath test and for the confirmatory breath test.

(B) The BAT will conduct a breath alcohol test as follows.

(i) A BAT will administer the tests, except that a BAT qualified supervisor of the employee may not conduct the breath alcohol test.

(ii) The BAT will conduct the alcohol testing in a location that affords visual and aural privacy, sufficient to prevent unauthorized persons from seeing or hearing test results.

(iii) The BAT will require the employee to provide positive identification (through use of a photo I.D. card or identification by a department representative). If the employee requests identification, the BAT will provide it to the employee.

(iv) The BAT will explain the testing procedure to the employee.

(v) The BAT and the employee will complete Part I of the Breath Alcohol Testing Form (as prescribed by the U.S. Department of Transportation) prior to the breath test which includes the employee signing the certification. Refusal by the employee to sign this certification will be regarded as a refusal to take the test.

(vi) The BAT will open an individually sealed mouth piece in view of the employee and attach it to the Evidential Breath Testing Device (EBT) for both the initial and confirmatory [~~confirmation~~] tests.

(vii) The BAT will use a log book in conjunction with any EBT used for screening tests that does not meet the requirements of the National Highway Traffic Safety Administration's (NHTSA) Conforming Products List (CPL).

(viii) The BAT will instruct the employee to blow forcefully into the mouthpiece for at least 6 seconds or until the EBT indicates that an adequate amount of breath has been obtained.

(ix) If an adequate amount of breath is not obtained, the BAT will again instruct the employee to attempt to provide an adequate amount of breath. If the employee refuses to make the attempt, the BAT will immediately inform the substance control officer.

(x) If the employee attempts and fails to provide an adequate amount of breath, the BAT will so note in the "Remarks" section of the breath alcohol testing form and immediately inform the substance control officer.

(xi) If the result of the initial test is a breath alcohol concentration of less than 0.02, the BAT and employee will complete the form. No further testing is authorized.

(xii) If the result of the initial test is an alcohol concentration of 0.02 or greater, the BAT will conduct a confirmatory

[~~confirmation~~] test within 20 minutes of the completion of the screening test. The BAT will instruct the employee not to eat, drink, put any object or substance in his or her mouth, and, to the extent possible, not belch. The BAT will explain to the employee the reason for this requirement (to prevent any accumulation of mouth alcohol leading to an artificially high reading) and the fact that it is for the employee's benefit. The BAT will also explain that the test will be conducted at the end of the waiting period, even if the employee has disregarded the instruction. The results of the confirmatory test are final.

(xiii) If a BAT other than the one who conducted the screening test is conducting the confirmatory [~~confirmation~~] test, the new BAT will initiate a new Breath Alcohol Testing form.

(xiv) If the employee attempts and fails to provide an adequate amount of breath, the substance control officer will direct the employee to obtain, at their own expense, as soon as practical, an evaluation from a licensed physician to determine whether a medical condition could have precluded the employee from providing an adequate amount of breath. If such a medical condition exists, the employee's failure to provide an adequate amount of breath shall not be deemed a refusal to take a test.

(xv) If the licensed physician is unable to make a determination whether or not an employee has a medical condition that precluded them from providing an adequate amount of breath, the employee's failure to provide an adequate amount of breath will be regarded as a refusal to take a test.

(xvi) A mobile collection facility may be used if it meets the requirements of this item (ii) of this subparagraph. In unusual circumstances (e.g., when it is essential to conduct a test outdoors at the scene of an accident), a test may be conducted at a location that does not fully meet these requirements but the BAT will provide visual and aural privacy to the greatest extent practicable.

(xvii) No unauthorized persons will be permitted access to the testing location.

[~~(xviii)~~ ~~All EBTs will use a quality assurance plan approved by the National Highway Traffic Safety Administration (NHTSA) to ensure the accurate calibration of an EBT in accordance with FHWA guidelines.~~]

(C) A breath alcohol test will be invalid under the following circumstances:

(i) the Breath Alcohol Technician (BAT) does not observe the minimum 15-minute waiting period prior to the confirmatory [~~confirmation~~] test;

(ii) the BAT does not perform an air blank of the EBT before a confirmatory [~~confirmation~~] test, or an air blank does not result in a reading of 0.00 prior to or after the administration of the test;

(iii) the BAT does not sign the Breath Testing Alcohol form;

(iv) the BAT fails to note on the remarks section of the Breath Alcohol Testing form that the employee has failed or refused to sign the form following the recording or printing on or attachment to the form of the test result; or

(v) an EBT fails to print a confirmatory [~~confirmation~~] test result.

(2) Report and review of alcohol test results. The BAT will transmit all results of the initial and confirmatory [~~confirmation~~] tests to the substance control officer in a confidential manner.

§4.39. Appeals.

An employee who is directly affected by an adverse personnel [~~a department~~] action of involuntary demotion, suspension without pay, or termination under the substance abuse program may challenge that action through the department's employee complaints and appeals process. [~~An action challenged under this section is deemed to be adverse for purposes of granting the employee a hearing on appeal.~~]

§4.40. Records and Retention.

The substance control officer will be responsible for retaining all confidential records relating to the substance abuse program which include training, testing, administrative and disciplinary actions, documentation of post-accident and reasonable cause determinations, consent forms, treatment, appeals, and litigation. All documentation which contains information related to an employee's positive test result, such as documentation of administrative and disciplinary actions, should be maintained in a locked file separate and apart from that employee's standard personnel file. All records of individuals who pass a test will be retained for at least one year. All records of individuals who do not pass a test will be retained for at least five years.

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

Filed with the Office of the Secretary of State, on August 26, 1998.

TRD-9813616
Bob Jackson
Acting General Counsel
Texas Department of Transportation
Earliest possible date of adoption: October 11, 1998
For further information, please call: (512) 463–8630

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Subchapter E. Sick Leave Pool Program

43 TAC §§4.51, 4.54-4.56

The Texas Department of Transportation proposes amendments to §4.51 and §§4.54-4.56, concerning the department's sick leave pool program.

EXPLANATION OF PROPOSED AMENDMENTS

The number of hours in the sick leave pool has remained consistently high during the past fiscal year. The amendments will loosen the eligibility criteria so that the department may grant more pool hours. The amendments will also minimize sick leave abuse and ensure that pool hours are managed efficiently.

Section 4.51 adds definitions for "different but related condition" and "discipline" for clarification. The definition of "severe physical condition" has been revised to include a physical illness or injury that will likely result in death or cause the employee to be off work for 10 continuous weeks or more for the current episode instead of the current three months. The definition of "severe condition" has been removed because its substance is included in the definitions of "severe psychological condition" and "severe physical condition." The amendments remove "special office" terminology which is no longer being used due to reorganization of the department and unnecessary

references to the extended sick leave program which is a separate program.

Section 4.54 removes language in the procedures which limited the number of sick leave hours that could be contributed to the pool.

Section 4.55 changes the condition under which contribution hours will be returned to a contributor. Instead of exhausting all accrued leave time, a contributor must only exhaust all accrued sick leave before hours will be returned from a previous contribution. This section will alleviate potential contributors' concerns about unnecessarily losing their vacation time should they be confronted with an extended illness, and encourage contributions to the pool. The language has been changed to indicate that the amount needed for contribution returns will now be determined by the information provided by the health care provider. Since an employee will no longer be required to exhaust all accrued leave time, using the amount of unpaid leave to determine contribution returns is not applicable. To reflect these changes, references to leave balances and leave time have been changed to specify "sick leave balances" and "sick leave."

Section 4.56 adds a new restriction for withdrawal of hours in order to reduce opportunities for abuse of sick leave pool hours, and enhance the integrity of the sick leave pool program. It requires an employee formally disciplined for abuse of sick leave to provide, at his or her expense, a second health care provider certification from a different doctor chosen by the department. The pool administrator will deny the request if the second health care provider does not certify that a catastrophic condition exists. This section also removes the requirement that the human resources officer demonstrate a legitimate business necessity before having confidential information released to the officer since the human resources officers have a legitimate business necessity to this confidential information for Family and Medical Leave purposes. Also, the word "or" has been replaced with "and" to clarify that the illness or injury must still exist and it must be necessary for the employee to be off work in order to receive an extension. The words "per employee" have been added to the maximum number of hours that may be granted per catastrophic condition. This will allow employees who are related and dealing with the same catastrophic illness or injury to each be granted up to the maximum amount for one condition. In addition, if there is a different but related condition, this section makes it possible for an employee to receive a second grant of up to 720 hours (90 work days) or one third of the pool balance, whichever is less at the time the request is received. This provides additional leave for those employees faced with different but related conditions, as in the case of cancer, for example, that may spread from one part of the body to another. The requirement to have the health care provider complete the certification and mail it directly to the pool administrator has been changed to have it mailed to the employee's human resources officer. This will provide more efficient and better coordination between the employee and their human resources officer in the processing of a sick leave pool request while maintaining safeguards against potential forgery. The detail stating that the pool administrator shall stamp the date and time of receipt on each application has been removed since this is standard procedure. This section adds a provision indicating the pool administrator may require unused portions of a withdrawal to be returned to the pool if the employee fails to cooperate with a medical records review, submits false information, remains off work because the employee is not following the doctor's prescribed treatment, or is abusing sick leave pool hours.

FISCAL NOTE

Frank J. Smith, Director, Finance Division, has determined for the first five-year period the amendments are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments. There are costs anticipated for persons required to comply with §4.56 as proposed. An employee formally disciplined for abuse of sick leave will be required to produce, at his or her own expense, a second health care provider certification from a different doctor chosen by the department. The estimated out of pocket expense would be approximately $100 for those employees affected by this proposed change.

Robert A. Eason, Interim Director, Human Resources Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT

Ms. Williams has also determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing or administering the amendments will be to ensure that pool hours are managed more efficiently, opportunities for abuse of sick leave pool hours will be eliminated or reduced, opportunities to help more employees in times of need will be increased, the integrity of the program will be enhanced, and employees will be encouraged to continue making contributions to the pool. There will be no effect on small businesses.

PUBLIC HEARING

Pursuant to the Administrative Procedure Act, Government Code, Chapter 2001, the Texas Department of Transportation will conduct a public hearing to receive comments concerning the proposed amendments. The public hearing will be held at 1:30 p.m. on September 29, 1998, in the first floor hearing room of the Dewitt C. Greer State Highway Building, 125 East 11th Street, Austin, Texas and will be conducted in accordance with the procedures specified in 43 TAC §1.5. Those desiring to make comments or presentations may register starting at 1:00 p.m. Any interested persons may appear and offer comments, either orally or in writing; however, questioning of those making presentations will be reserved exclusively to the presiding officer as may be necessary to ensure a complete record. While any person with pertinent comments will be granted an opportunity to present them during the course of the hearing, the presiding officer reserves the right to restrict testimony in terms of time and repetitive content. Organizations, associations, or groups are encouraged to present their commonly held views and identical or similar comments through a representative member when possible. Comments on the proposed text should include appropriate citations to sections, subsections, paragraphs, etc. for proper reference. Any suggestions or requests for alternative language or other revisions to the proposed text should be submitted in written form. Presentations must remain pertinent to the issues being discussed. A person may not assign a portion of his or her time to another speaker. A person who disrupts a public hearing must leave the hearing room if ordered to do so by the presiding officer. Persons with disabilities who plan to attend this meeting and who may need auxiliary aids

or services such as interpreters for persons who are deaf or hearing impaired, readers, large print or braille, are requested to contact Eloise Lundgren, Director, Public Information Office, 125 East 11th Street, Austin, Texas 78701-2483, 512/463-8588 at least two working days prior to the hearing so that appropriate services can be provided.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments may be submitted to Robert A. Eason, Interim Director, Human Resources Division, Texas Department of Transportation, Dewitt C. Greer Building, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments will be 5:00 p.m. on October 12, 1998.

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation, and more specifically, Transportation Code, Chapter 661 which authorizes creation of the sick leave pool program.

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

§4.51. Definitions.

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

(1) Accrued leave time - Vacation leave, sick leave, and compensatory time.

(2) Catastrophic illness or injury - A severe condition or combination of conditions affecting the mental or physical health of an employee or an employee's immediate family member that requires the services of a health care provider for a prolonged period of time and that forces the employee to exhaust all leave time earned by that employee and to lose compensation from the state.

(3) Contribute - To give sick leave from an employee's personal sick leave account to the department sick leave pool.

(4) Different but related condition - A secondary catastrophic condition that is caused by a primary catastrophic condition which occurs at a later date, such as cancer which spreads from one part of the body to another.

(5) Discipline - Written reprimand, probation, suspension with pay, suspension without pay, involuntary demotion, or involuntary transfer.

(6) Employee - A person, other than the executive director, who is employed by the department.

(7) Health care provider - A practitioner as defined by Texas Civil Statutes, Article 4590i, who is practicing within the scope of his or her license.

(8) Human resources officer - An employee in a district, division, or [~~special~~] office who is responsible for verifying the accuracy of all employee leave time records[~~, and for the district, division, or special office extended sick leave program~~]. If more than one employee has these responsibilities, their activities will be coordinated for the purpose of this subchapter.

(9) Immediate family - Those individuals who are related by kinship, adoption, or marriage, as well as foster children certified by the Texas Department of Protective and Regulatory Services.

(10) Licensed psychiatrist - A psychiatrist licensed by a state medical licensing board.

(11) Pool administrator - The Director of the Human Resources Division or his or her designee who administers the department's sick leave pool program.

(12) Request - An initial application for withdrawal from the sick leave pool or an application for an extension of a withdrawal due to a catastrophic illness or injury.

[~~Severe condition - Any illness or injury that poses an imminent threat to the life of the patient, causes the employee to be off work for three continuous months or more for the current episode.~~]

(13) Severe physical condition - A physical illness or injury that will likely result in death [~~poses an imminent threat to the life of the patient~~] or causes the employee to be off work for 10 [~~three~~] continuous weeks [~~months~~] or more for the current episode.

(14) Severe psychological condition - A psychological illness that results in the patient being suicidal or capable of harming themselves or others and requires one week or more inpatient hospitalization.

(15) Sick leave - Leave taken when sickness, injury, or pregnancy and confinement prevent the employee's performance of duty or when the employee is needed to care and assist a member of his immediate family who is actually ill.

(16) Sick leave pool - A department-wide pool that receives voluntary contributions of sick leave from employees and which transfers approved amounts of sick leave to eligible employees.

(17) Withdrawal - An approved transfer of sick leave hours from the department sick leave pool.

§4.54. Contributions.

(a) (No change.)

(b) Procedures.

(1) The department will encourage all employees, including an employee who is planning to retire, terminate employment, or resign, to contribute sick leave hours[~~, if the employee has not already contributed the amount allowed~~].

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

§4.55. Contribution Returns.

(a) Restrictions.

(1) (No change.)

(2) Regardless of the number of requests, the [~~The~~] number of hours that may be returned to an employee shall not exceed the total number of hours he or she has contributed since the beginning of the program, June 1, 1990.

(3) All accrued sick leave [~~time~~] must be exhausted by the employee before hours will be returned from a previous contribution.

(4) The maximum number of hours that may be returned per request shall not exceed the amount needed. The amount needed is determined from the information provided by the health care provider [~~by the amount of unpaid leave incurred because of the illness or injury~~].

(5)-(6) (No change.)

(b) Procedures.

(1) (No change.)

(2) The human resources officer shall verify sick leave balances and the date and time all accrued sick leave [~~time~~] was or will be exhausted.

(3) (No change.)

§4.56. Withdrawals.

(a) Restrictions.

(1) (No change.)

(2) A written certification from a health care provider must be submitted with all requests for withdrawals. Requests related to severe psychological conditions must be certified by a licensed psychiatrist. The certification:

(A) shall [~~should~~] include:

(i) the diagnosis and prognosis of the condition or combination of conditions;

(ii) [~~and~~] the date the employee or employee's immediate family member will be able to return to normal activities; and

(iii) [~~. If the certification is for the employee's immediate family member, it should also include~~] the amount of time the employee will be needed to provide primary care if the certification is for the employee's immediate family member; [~~. The health care provider certification~~]

(B) shall be in a form prescribed by the pool administrator; and[~~. This information~~]

(C) is confidential, unless otherwise required by law, and may only be released to the human resources officer [~~if he or she can demonstrate a legitimate business necessity for this information~~].

(3) With the request for withdrawal, an employee who has been formally disciplined for abuse of sick leave must provide, at his or her expense, a second health care provider certification from a different doctor chosen by the department. The pool administrator will deny the request if the second health care provider does not certify that a catastrophic condition exists.

(4) [~~(3)~~] The employee must submit an updated health care provider's certification that certifies that the catastrophic illness or injury still exists, and [~~or~~] that it is necessary for the employee to be off work to recover or assist in the recovery from [~~the treatment of~~] the catastrophic illness or injury before an extension may be approved.

(5) [~~(4)~~] An employee's use of a transfer from the sick leave pool for family members not residing in that employee's household is strictly limited to the time necessary to provide assistance to a spouse, child, or parent of the employee who needs such care and assistance as a direct result of a documented medical condition.

(6) [~~(5)~~] The maximum number of hours that may be granted per catastrophic condition per employee is 720 hours (90 work days) or one third of the pool balance, whichever is less at the time a request is received. If there is a different but related catastrophic condition, an employee may receive a second grant of up to 720 hours (90 work days) or one-third of the pool balance, whichever is less at the time the request is received.

(7) [~~(6)~~] When the pool balance is below 7200 hours, an employee may not be transferred more than 340 hours (approximately two months) per request, unless unpaid leave is incurred before the request is approved. If unpaid leave is incurred, the employee may not be transferred more than the sum of the unpaid leave and 340 hours. Additionally, the pool administrator will approve or deny all requests in the order in which they are received.

(8) [~~(7)~~] The time transferred will begin on the date and time the employee exhausted all accrued leave or, in cases which are eligible for workers' compensation payments, after the period covered by the last workers' compensation check distributed.

(9) [~~(8)~~]employee who uses pool sick leave in accordance with this subchapter is not required to pay back that leave.

(10) [~~(9)~~] An employee must exhaust all accrued leave time before using hours approved from the sick leave pool.

(11) [~~(10)~~] All withdrawals from the pool must be used solely for the catastrophic illness or injury for which they were granted.

(12) [~~(11)~~] An employee who is in need of additional sick leave after exhausting all accrued leave time shall exhaust all available extended sick leave before using time granted from the sick leave pool.

(13) [~~(12)~~] An employee who is injured on the job, who is entitled to receive worker compensation payments, and who chooses to integrate his or her sick leave, and vacation leave, or compensatory time is also eligible to receive a withdrawal in accordance with this subchapter.

(14) [~~(13)~~] Hours from the sick leave pool may be granted in a block of time and used on an as needed basis. The pool administrator may require the unused hours to be returned to the pool after such time has expired unless an immediate need for such leave still exists.

(15) [~~(14)~~] The pool administrator may require the patient's condition to be recertified by a health care provider on a monthly basis when the necessary information to make a definite determination of the employee's need for pool hours is changed, uncertain, or not available. If the employee is determined to be able to return to work sooner than a previous certification, the pool administrator may require the unused portion of a withdrawal to be returned to the pool. If the employee fails to cooperate with recertification requirements and reevaluation procedures, the pool administrator may deny the request or require the unused portion of a withdrawal be returned to the sick leave pool.

(16) [~~(15)~~] Unused sick leave from the pool shall be returned to the pool when the need for such leave ceases to exist or the pool administrator requires it in accordance with this subchapter.

(17) [~~(16)~~] The estate of a deceased employee is not entitled to payment for unused sick leave from the pool.

(b) Procedures.

(1) (No change.)

(2) The employee shall submit the application and the health care provider's certification form and a copy of the employee's functional job description to his or her health care provider no earlier than 15 workdays before the need for the withdrawal. The health care provider will complete the certification form and mail it, with the completed application, directly to the employee's human resources officer [~~pool administrator~~].

(3) The pool administrator will consider applications for withdrawal in the order in which they are received[~~. The pool~~

~~administrator~~ ~~shall~~ ~~stamp~~ ~~the~~ ~~date~~ ~~and~~ ~~time~~ ~~of~~ ~~receipt~~ ~~on~~ ~~each application,~~] and shall approve or deny the request within five working days of that date.

(4) If the pool administrator questions the validity of the certification completed by the employee's health care provider, based on the average expected duration or severity of the condition, the administrator may request a health care provider, contracted by the department, to review the patient's medical records. The contracted health care provider may consult with the patient's health care provider if more information is needed. If the determination of the contracted health care provider differs from the patient's health care provider, the pool administrator may request that the patient's medical records be reviewed by a third health care provider who is not under contract with the department. The pool administrator and the employee must agree on the third health care provider. The determination of the third health care provider is binding. The department will pay for both reviews. If the employee fails to cooperate with the medical records review, the pool administrator may deny the request.

(5) The pool administrator may [~~or~~] require that the unused portion of the withdrawal [~~to~~] be returned to the sick leave pool if the employee:

(A) fails to cooperate with a medical records review;

(B) submits false information;

(C) remains off work because the employee is not following the doctor's prescribed treatment; or

(D) is abusing sick leave pool hours.

(6) [~~(5)~~] The pool administrator will determine the amount of sick leave transferred for each request based on:

(A) the number of hours requested by the employee;

(B) the health care provider's certification which indicates the approximate date the patient will be able to return to light and normal duties or the amount of time that the employee is needed to provide primary care for the immediate family member;

(C) the date and time all accrued leave time was or will be exhausted; and

(D) the balance of the pool.

(7) [~~(6)~~] The pool administrator shall approve or deny the transfer of hours from the sick leave pool to the employee's personal sick leave account.

(8) [~~(7)~~] The human resources officer shall inform the pool administrator of the amount of leave the employee used for the illness or injury at the end of each month, and, if the employee [~~he or she~~] has returned to work, the total number of hours used and how many hours are being returned.

(9) [~~(8)~~] The pool administrator shall return all unused hours to the pool.

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 August 26, 1998.

TRD-9813607
Bob Jackson
Acting General Counsel
Texas Department of Transportation
Earliest possible date of adoption: October 11, 1998
For further information, please call: (512) 463-8630

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Chapter 17. Vehicles Titles and Registration

Subchapter A. Motor Vehicle Certificates of Title

43 TAC §17.10

The Texas Department of Transportation proposes new §17.10, concerning the recording of restitution liens on motor vehicles.

EXPLANATION OF PROPOSED NEW SECTION

House Bill 2830, 75th Legislature, 1997, amended Texas Code of Criminal Procedure, Article 42.21, to provide that a victim or attorney for the state may file a restitution lien against any interest in a motor vehicle owned by a criminal defendant in order to secure payment of restitution, fines, or costs ordered by the court.

New §17.10 establishes that the purpose of the section is to provide procedures for a person to file a restitution lien on a motor vehicle in accordance with Transportation Code Chapter 501, defines words and terms, and identifies persons who may file a restitution lien. The section also requires that certain documents and fees be filed with the county tax assessor-collector's office to perfect a restitution lien. The documents include evidence of motor vehicle ownership, a copy of the court order, and an affidavit containing information about the defendant, the court action, and the vehicle description.

FISCAL NOTE

Frank J. Smith, Director, Finance Division, has determined that for the first five-year period the new section is in effect, there will be no significant fiscal implications to the state as a result of administering the new section. There are no anticipated fiscal implications to local governments as a result of administering this section. There will be at least an $18.00 cost per lien for the title cost to persons recording restitution liens on motor vehicle certificates of title. The cost may be higher if other title or registration fees apply.

Jerry L. Dike, Director, Vehicle Titles and Registration Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the new section.

PUBLIC BENEFIT

Mr. Dike has also determined that for each year of the first five years the section is in effect, the anticipated public benefit will be the establishment of procedures to assist in the collection of court ordered restitution, fines, or costs against a criminal defendant. There will be no effect on small businesses.

PUBLIC COMMENT

Written comments on the proposal may be submitted to Jerry L. Dike, Director, Vehicle Titles and Registration Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments will be 5:00 p.m. on October 12, 1998.

STATUTORY AUTHORITY

The new section is proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation, and more specifically, Transportation Code, Chapter 501, which authorizes the department to carry out the provisions of those laws governing the titling of motor vehicles, and Texas Code of Criminal Procedure, Article 42.21, which provides for the filing of restitution liens on motor vehicles.

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

§17.10. Restitution Liens.

(a) Purpose. Pursuant to the Code of Criminal Procedure, Article 42.21, a victim or an attorney for the state may file a lien on any interest in a motor vehicle of a person convicted of a criminal offense to secure payment of restitution or fines or costs. This section establishes the procedures to perfect the filing and the removal of the lien on any interest of the defendant in a motor vehicle whether then owned or after-acquired.

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

(1) Department - The Texas Department of Transportation.

(2) Restitution lien - A lien placed against a defendant's motor vehicle in order to recoup a judgment or fines or costs.

(3) State - The State of Texas and all its political subdivisions.

(4) Victim - A close relative of a deceased victim, guardian of a victim, or victim, as those terms are defined by the Code of Criminal Procedure, Article 56.01.

(c) Persons who may file a restitution lien. The following persons may file a restitution lien:

(1) a victim of a criminal offense to secure the amount of restitution to which the victim is entitled under the order of a court in a criminal case; and

(2) an attorney of the state to secure the amount of fines or costs entered against a defendant in a judgment in a felony criminal case.

(d) Perfection of a restitution lien. A restitution lien against any interest in a motor vehicle must be perfected in accordance with Transportation Code, Chapter 501. The victim or the attorney representing the state must file an application for certificate of title with a county tax-assessor collector to perfect the restitution lien. The application must be on a form prescribed by the department as described in §17.3(b)(2) of this title (relating to Motor Vehicle Certificates of Title), and shall be supported by, at a minimum, the following documents:

(1) evidence of motor vehicle ownership, as described in §17.3(c) of this title, which is properly assigned to or issued in the name of the defendant;

(2) an original or certified copy of the court order or judgment establishing the restitution lien and requiring the defendant to pay restitution, fines, or costs; and

(3) an affidavit to perfect a restitution lien which must include, at a minimum:

(A) the name and birth date of the defendant whose interest in the motor vehicle is subject to the lien;

(B) the residence or principal place of business of the person named in the lien, if known;

(C) the criminal proceeding giving rise to the lien, including the name of the court, the name of the case, and the court's file number for the case;

(D) the name and address of the attorney representing the state and the name and address of the person entitled to restitution;

(E) a statement that the notice is being filed pursuant to Code of Criminal Procedure, Article 42.21;

(F) the amount of restitution, fines, and costs the defendant has been ordered to pay by the court;

(G) a statement that the amount of restitution owed at any one time may be less than the original balance and that the outstanding balance is reflected in the records of the clerk of the court hearing the criminal proceeding giving rise to the lien;

(H) the vehicle description (year, make, and vehicle identification number) of the motor vehicle for which the restitution lien is to be perfected; and

(I) the signature of the attorney representing the state or a magistrate.

(e) Fees. The applicant will be required to pay a $5.00 restitution lien filing fee, in addition to a $13.00 title application fee and any other applicable fees required by Transportation Code, Chapters 501, 502, and 520.

(f) Recording a restitution lien. Upon receiving a completed application for certificate of title, the required supporting documents and any applicable fees, the department or its designated agent will process and issue a certificate of title recording the restitution lien.

(g) Release of perfected restitution liens. The clerk of the court recorded as the lienholder will receive payments from the defendant and maintain a record of the outstanding balance of restitution, fines, or costs owed by the defendant. Upon satisfaction of the lien, the clerk of the court shall execute the release of lien as described in §17.3(h) of this title. The release of lien must be provided to the owner or owner's designee. A photocopy of the release of lien shall be forwarded to the department for filing.

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 August 26, 1998.

TRD-9813608
Bob Jackson
Acting General Counsel
Texas Department of Transportation
Earliest possible date of adoption: October 11, 1998
For further information, please call: (512) 463-8630

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Chapter 21. Right of Way

Subchapter C. Utility Accommodation

43 TAC §21.56

The Texas Department of Transportation proposes an amendment to §21.56, concerning metric equivalents.

EXPLANATION OF PROPOSED AMENDMENTS

The Omnibus Trade and Competitiveness Act of 1988 designated the metric system of measurement as the preferred system of weights and measures. In accordance with that Act, the Federal Highway Administration (FHWA) instituted guidelines which encouraged the use of metric equivalents by state highway agencies by October 1, 1996. Based on those guidelines the Texas Transportation Commission adopted 43 TAC §21.56, which states that prior to October 1, 1996, utility plans that were in English measures could be converted to metric equivalents, and after October 1, 1996, those plans must be submitted using the metric system of measurement.

Recently, the FHWA reaffirmed its position, and stated that the use of metric units of measurements is not mandatory, but is at the option of the individual states. As a result, some of the department's design plans are in English measure and some in metric units. Section 21.56 still requires all utility plans to be in metric units. To require the utility industry to use metric units on plans that are otherwise submitted in English units would impose an onerous burden. The proposed amendment to §21.56 would eliminate the mandatory provision regarding metric units and state that plans may be converted to metric units, but does not mandate that this be done.

FISCAL NOTE

Frank J. Smith, Director, Finance Division, has determined that for the first five-year period the amendment is in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendment. There are no anticipated economic costs for persons required to comply with the section as proposed.

Jim Henry, Interim Director, Right of Way Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendment.

PUBLIC BENEFIT

Mr. Henry has also determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing or administering the amendment will be to allow more flexibility in the manner in which the department accepts utility plans. There will be no effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendment may be submitted to Jim Henry, Interim Director, Right of Way Division, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments will be 5:00 p.m. on October 12, 1998.

STATUTORY AUTHORITY

The amendment is proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation.

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

§21.56. Metric Equivalents.

All [~~Prior to October 1, 1996, all~~] English units of measurement referenced in §§21.31-21.55 of this title (relating to Utility Accommodations) may be converted to metric equivalents as shown in Appendix A.[~~On or after October 1, 1996, a utility company must submit its request for accommodation using the metric system of measurement.~~] Figure: 43 TAC §21.56

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 August 26, 1998.

TRD-9813615
Bob Jackson
Acting General Counsel
Texas Department of Transportation
Earliest possible date of adoption: October 11, 1998
For further information, please call: (512) 463-8630

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WITHDRAWN RULES

An agency may withdraw a proposed action or the remaining effectiveness of an emergency action by filing a notice of withdrawal with the ***Texas Register***. The notice is effective immediately upon filling or 20 days after filing as specified by the agency withdrawing the action. If a proposal is not adopted or withdrawn within six months of the date of publication in the ***Texas Register***, it will automatically be withdrawn by the office of the Texas Register and a notice of the withdrawal will appear in the ***Texas Register.***

TITLE 16. ECONOMIC REGULATION

Part II. Public Utility Commission of Texas

Chapter 25. Substantive Rules Applicable to Electric Service Providers

Subchapter B. Customer Service

16 TAC §25.41

The Public Utility Commission of Texas has withdrawn from consideration for permanent adoption the new section to §25.41, which appeared in the March 13, 1998, issue of the *Texas Register* (23 TexReg 2652).

Filed with the Office of the Secretary of State on August 27, 1998.

TRD-9813676
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Effective date: August 27, 1998
For further information, please call: (512) 936–7308

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TITLE 22. EXAMINING BOARDS

Part XXIX. Texas Board of Professional Land Surveying

Chapter 661. General Rules of Procedures and Practices

Subchapter F. Firms Furnishing Surveying Crews

22 TAC §661.121

The Texas Board of Professional Land Surveying has withdrawn from consideration for permanent adoption the proposed amendment to §661.121, which appeared in the August 14, 1998, issue of the *Texas Register* (23 TexReg 8338).

Filed with the Office of the Secretary of State on August 31, 1998.

TRD-9813767
Sandy Smith
Executive Director
Texas Board of Professional Land Surveying
Effective date: August 31, 1998
For further information, please call: (512) 452-9427

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22 TAC §661.123

The Texas Board of Professional Land Surveying has withdrawn from consideration for permanent adoption the proposed new §661.123, which appeared in the July 17, 1998 issue of the *Texas Register* (23 TexReg 7326).

Filed with the Office of the Secretary of State on August 31, 1998.

TRD-9813768
Sandy Smith
Executive Director
Texas Board of Professional Land Surveying
Effective date: August 31, 1998
For further information, please call: (512) 452-9427

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ADOPTED RULES

An agency may take final action on a section 30 days after a proposal has been published in the ***Texas Register***. The section becomes effective 20 days after the agency files the correct document with the ***Texas Register***, unless a later date is specified or unless a federal statute or regulation requires implementation of the action on shorter notice.

If an agency adopts the section without any changes to the proposed text, only the preamble of the notice and statement of legal authority will be published. If an agency adopts the section with changes to the proposed text, the proposal will be republished with the changes.

TITLE 1. ADMINISTRATION

Part III. Office of the Attorney General

Chapter 55. Child Support Enforcement

Subchapter F. Collections and Distributions

1 TAC §55.140

The Office of the Attorney General adopts the repeal of 1 TAC §55.140 concerning disputing the distribution of child support collections, without changes to the proposed text as published in the July 31, 1998, issue of the *Texas Register* (24 TexReg 7677). The text will not be republished.

The repeal of the section is adopted because the section is being replaced by a new 1 TAC §55.140 and §55141, which will include additional provisions relating to disputing the distribution of child support collections.

The repeal of the section deletes a rule to be replaced. It affects the Family Code, Chapter 231.

No comments were received.

The repeal of the section is adopted under the Family Code §231.002 and the Government Code §2107.002.

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 August 31, 1998.

TRD-9813789
Sarah Shirley
Assistant Attorney General
Office of the Attorney General
Effective date: September 20, 1998
Proposal publication date: July 31, 1998
For further information, please call: (512) 460–6000

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1 TAC §55.140

The Office of the Attorney General adopts new §55.140 relating to the collection of money distributed by the Child Support Division from the custodial parent or other person entitled to receive the support when the collection is reversed after it has been distributed, and new §55.141 providing custodial parents and others affected by §55.140 the opportunity for a hearing to contest the action by the agency, without changes to the proposed text as published in the July 31, 1998, issue of the *Texas Register* (24 TexReg 7677-78, 7858-60). The text will not be republished.

These rules are adopted for the efficient collection of sums owed to the State.

These rules provide an effective process for collecting money owed to the State as the result of a child support collection being reversed after it has been distributed to the payee as well as provide a process for contesting the agency's action. These rules affect the Family Code, Chapter 231.

No comments were received in writing or at the public hearing.

The new sections are adopted under the Family Code §231.002 and the Government Code §2107.002.

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 August 31, 1998.

TRD-9813791
Sarah Shirley
Assistant Attorney General
Office of the Attorney General
Effective date: September 20, 1998
Proposal publication date: July 31, 1998
For further information, please call: (512) 460–6000

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Subchapter I. State Directory of New Hires

1 TAC §§55.301–55.308

The Office of the Attorney General adopts new Subchapter I, §§55.301-55.308, concerning Employer New Hire Reporting to the State Directory of new Hires, without changes to the proposed text as published in the July 31, 1998, issue of the *Texas Register* (24 TexReg 7678-81, 7861-63). The text will not be republished.

This new subchapter is being adopted to establish the procedures for reporting employee information to the State Directory of New Hires meeting the requirements of federal law at §313(b) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 and 42 U.S.C. §653A (codified from §453A of the Social Security Act).

This new subchapter details when, where, what information, and how, employers must report information concerning newly

hired employees to the State Directory of New Hires. This subchapter affects the Family Code, Chapters 231 and 234.

Comments received are summarized as follows:

The rule authorizing a $500.00 civil penalty for intentional conspiracy in failing to report should be omitted because the Office of the Attorney General lacks authority to promulgate the penalty rule.

The Office of the Attorney General has not made the suggested change because its authority to promulgate the penalty rule derives from Texas Family Code § 234.104, which authorizes the promulgation of rules for reporting employee information and for operating a state directory of new hires meeting the requirements of federal law, and then from 42 U.S.C. § 653A(d) (§ 453A(d) of the Social Security Act) which authorizes the State to set a State civil money penalty for failure to report as a result of a conspiracy between the employer and the employee to not supply the required report or to supply a false or incomplete report. The Office of the Attorney General has not proposed a penalty for just any failure to report as would also be authorized under 42 U.S.C. § 653A(d) (§ 453A(d) of the Social Security Act).

The new sections are adopted under the Family Code §234.104 which provides the Office of the Attorney General with the authority to establish by rule procedures for reporting employee information and for operating a state directory of new hires meeting the requirements of federal law at §313(b) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 and 42 U.S.C. §653A (§453A of the Social Security 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 August 31, 1998.

TRD-9813790
Sarah Shirley
Assistant Attorney General
Office of the Attorney General
Effective date: October 1, 1998
Proposal publication date: July 31, 1998
For further information, please call: (512) 460–6000

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Part X. Department of Information Resources

Chapter 201. Planning and Management of Information Resources Technologies

1 TAC §201.13

The Department of Information Resources adopts an amendment to §201.13, concerning information security, without changes to the proposed text as published in the May 22,1998 issue of the *Texas Register* (23 TexReg 5283).

The effect of the section is to clarify, refine and update the current information security standards and to remove obsolete provisions.

The department received no comments regarding the proposed rule.

The amendments are adopted pursuant to the provisions of Texas Government Code §2054.051(b), which requires the department to develop and publish standards relating to information resource management by state agencies, and Texas Government Code §2054.052(a), which permits the department to adopt rules as necessary to implement its responsibilities.

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 August 24, 1998.

TRD-9813485
C.J. Brandt, Jr.
General Counsel
Department of Information Resources
Effective date: September 13, 1998
Proposal publication date: May 22, 1998
For further information, please call: (512) 475–2153

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TITLE 16. ECONOMIC REGULATION

Part I. Railroad Commission of Texas

Chapter 3. Oil and Gas Division

16 TAC §3.14

The Railroad Commission of Texas adopts amendments to §3.14, concerning plugging, with changes to the proposed text as published in the April 17, 1998, issue of the *Texas Register* (23 TexReg 3785). The amendments conform §3.14 to Texas Natural Resources Code, §§89.002 and 89.011, as amended, to codify existing Commission procedures regarding plugging of inactive wells, to clarify certain provisions, and to delete obsolete provisions from the section. In conformity with statutory changes, the adopted amendments provide that an entity that designates itself to the Commission as operator of a well by having a designation form approved on or after September 1, 1997, retains responsibility for properly plugging that well until a subsequent operator files, and the Commission approves, an operator designation form for the well in question. For wells on which the most recent operator designation form was filed prior to September 1, 1997, Commission rules regarding plugging responsibility remain unchanged - the designated operator is presumed to be responsible for plugging but that presumption may be rebutted upon a showing at a hearing that some other entity has assumed responsibility for the physical operation and control of the well.

The amendments clarify the procedures for obtaining extensions of plugging deadlines and delineate when extensions may be cancelled. A new provision concerning applications to transfer inactive wellbores into the Texas Experimental Research and Recovery Activity (TERRA) program is added in subsection (b)(3). The amendments also add provisions setting out the circumstances in which the Commission may plug wells and seek reimbursement from the operator and the procedures for obtaining designation as an approved cementer.

Comments were received from four individuals and three associations - North Texas Oil & Gas Association ("NTOGA"), Texas Independent Producers & Royalty Owners Association ("TIPRO"), and Texas Oil & Gas Association ("TxOGA"). The comments primarily focused on concerns regarding specific proposed provisions. None of the commenters expressed general opposition to the proposed amendments.

NTOGA commented on three specific areas. NTOGA asserted that the presumption that the P-4 operator is responsible for plugging should be irrebuttable regardless of the date the P-4 filing. Under the proposed rule, any P-4 operator designated on or after September 1, 1997 is responsible for plugging the well; as to designations filed prior to that date, there is a rebuttable presumption of responsibility. The Commission declines to make any change to this aspect of the rule. The statutory change was effective September 1, 1997 and the effect of operator designations filed prior to that date cannot be altered retroactively. NTOGA comments that the provision of subsection (d)(1) stating that both the cementer and operator are responsible for complying with Commission plugging rules and that both may be fined for failing to do so should be removed or amended to limit the liability of cementing companies. The Commission declines to change this paragraph. For the Commission's regulation of plugging operations to be effective and fair it is vital that cementing companies, as the entities that are on site and that conduct the actual plugging operation, comply with these rules and that they be subject to penalties for failure to do so. Finally, NTOGA asserts that the rule is vague concerning obtaining certification as an approved plugger and that plugging ability should not have to be demonstrated in multiple districts. The Commission agrees with NTOGA that approval of a cementer in one district is valid for all districts and believes that the rule clearly states this. Subsection (d)(5)(A) states that an entity requesting designation as an approved cementer should file its request in "the district in which it proposes to conduct its initial plugging operations." Subsection (d)(5) provides that, "An approved cementer is authorized to conduct plugging operations in accordance with Commission rules in each commission district." Accordingly, the Commission declines to make any change based on this comment.

TIPRO and TxOGA both filed comments indicating that the language of subsection (c)(1) should be amended to more closely track the statutory change and that the Commission's Form P-4 should be revised so that it conforms to the new language of the rule. The Commission agrees and the phrase "specifically identified" has been added to the paragraph to satisfy this concern. TxOGA also commented that the definition of "active operation" for a delinquent inactive production well in subsection (a)(1)(A) should be broadened to include all "commission-approved operations." The Commission agrees that certain other operations directly related to a bona fide attempt to re-establish production constitute active operation. However, operations on a well that has been inactive for twelve months, such as closing a pit or conducting a well test, do not constitute active operation and do not preclude the necessity of obtaining an exception to the plugging requirements of subsection (b)(2). Accordingly, based on this comment, the phrase, "or other commission-approved operations, such as recompletion attempts, conducted downhole in a bona fide attempt to re- establish production" has been added to this definition. This definition does not require an exception for wells that were approved as monitoring wells prior to becoming delinquent inactive wells because these wells are involved in regular and continuing activities related to the production of oil or gas.

TxOGA also recommended various amendments to the definition of a "delinquent inactive well." As this definition is taken verbatim from the statute (Texas Natural Resources Code §89.002(a)(7)), the Commission declines to make any changes to this provision.

TxOGA comments that the definitions in subsection (a)(1)(E) should be eliminated and all forms referred to by their designation (e.g., P-4 and W-1) throughout the rule. The forms are described rather than identified by form name because form names are changed from time to time and if the current form name is used in the rule and the name is subsequently changed, a rule amendment would be required even though the change was purely ministerial. The definition was used to abbreviate references to the forms within the rule and make the substantive portions of the rule easier to read. The Commission declines to make any change based on this comment.

TxOGA and Felderhoff Production Company commented regarding the requirement in subsection (a)(5) that notice of plugging be given to the surface owner. This rule is intended to assure that surface owners whose activities may be directly affected by a plugging operation have reasonable advance notice of what can, depending on the surface use and type of plugging, be a highly disruptive operation. Three days advance notice (or mailing seven days in advance) is a reasonable compromise time-frame for this purpose. TxOGA asserts that it is impractical to identify the specific date the well will be plugged. Ordinarily, plugging is scheduled in advance and identifying the date plugging will actually occur should not present a problem. To address the situation in which weather or other circumstances force a change in the plugging date, the requirement has been amended based on this comment to require giving notice of the "projected date the well will be plugged" rather than "the day the well will be plugged." Felderhoff comments that the advance notice requirement cannot be met where a drilling or workover rig is involved. The Commission agrees with this comment and has added a provision stating that, "The district director may grant exceptions to the requirements of this paragraph concerning the timing of notices when a workover or drilling rig is already at work on location, ready to commence plugging operations."

TxOGA objects to the provision in both subsection (a)(2) and (a)(3) that the "operator shall deliver the [notice] to the district office" on the grounds that "it is the U.S. postal service, another mail carrier, or a facsimile machine that *delivers' the notice." The provision merely indicates that it is the operator's duty to assure that the notices are delivered to the district office and is not intended to require personal delivery or dictate the method of delivery chosen by the operator. To clarify this intent, these sections have been re- worded based on this comment.*

TxOGA comments that the provision allowing the district director to grant exceptions to the requirements regarding the timing of notice of plugging to the district office should be expanded to allow verbal approval of exceptions to plugging procedures. The Commission disagrees. Use of an appropriate plugging procedure is vital to protection of freshwater and oil and gas reserves. Oral authorization of plugging procedures would introduce a substantial risk of miscommunication, misunderstanding and improper plugging. Written approval greatly limits the potential for miscommunication and, given the wide use of fax machines, written approval can be obtained as quickly or nearly

as quickly as oral approval. The Commission declines to make any change to this provision.

With regard to subsection (b)(2)(A), TxOGA comments that the Commission should not require that both the well and associated facilities are not a pollution hazard as a condition to granting a plugging extension. It is important that all related facilities, including tank batteries and pits, and not just the wellbore itself, be maintained in a manner that does not threaten fresh water. If the wellbore or related facilities pose a pollution hazard, extensions of the one-year time frame for plugging inactive wells is not appropriate. Accordingly, the Commission declines to make any change based on this comment.

TxOGA comments with regard to both subsection (b)(2)(A) and subsection (b)(2)(D) that operators should be required to provide evidence of a good faith claim only upon request and not as a matter of course. The Commission agrees and has clarified this by amending these two provisions to emphasize that, although each operator is required to possess a good faith claim to operate any well for which it seeks an extension, providing evidence of this good faith claim is required only upon request.

TxOGA asserts that, under subsection (b)(2)(C), operators should be given 90 days rather than 30 days after a request for an extension is denied or revoked to plug the well or return it to active operation. The Commission disagrees with this comment. Any well that is subject to this provision has already been inactive for a minimum of one year. Currently, Commission orders requiring compliance with §3.14(b)(2) typically give an operator 30 days to achieve compliance after the order becomes final. This 30-day benchmark is a reasonable time-frame under the circumstances in most cases. If extraordinary circumstances exist, the operator has the option of requesting a hearing. The Commission declines to make any change based on this comment.

TxOGA comments that it is not clear whether 48 hours notice must be given prior to hydraulic pressure tests. The Commission agrees and, in response to this comment, has clarified this by expressly re-stating the notice requirement in subsection (b)(2)(E)(iii). TxOGA comments that subsection (b)(2)(E)(iv) is confusing and should be amended. The Commission agrees with this comment and has deleted the phrase "within a year after the well becomes inactive," as suggested by TxOGA.

TxOGA comments that subsection (b)(3) should be deleted as it believes that the TERRA program will be discontinued in the future. The TERRA program is currently in effect and the rule therefor should address the program. Accordingly, the Commission disagrees with this comment and declines to make any change to this provision.

Felderhoff Production Company commented regarding subsection (d)(9) that the requirement that the mud-laden fluid used for plugging be 9 1/2 pounds per gallon, "is one of those 'one size fits all' regulations that needs to be changed, not added to," since mud is used as spacer and not as a permanent barrier to fluid migration and the proper weight and viscosity varies with conditions. The proposed paragraph states the mud weight and viscosity as minimums and does not preclude the use of heavier or more viscous fluids if conditions warrant. There are few, if any, circumstances in which lighter or less viscous mud would be necessary to properly plug a well. However, in response to this comment a clause has been added authorizing the district director to grant exceptions to the weight and viscosity minimums if necessary to properly plug the well.

TxOGA, Ronald D. Stephens, Stephens Energy Corp., and Tidemark Petroleum, Inc. all commented regarding subsection (d)(12). TxOGA and Tidemark specifically objected to the requirement that underground piping be removed as being unduly onerous. Based on these comments, the Commission has amended this provision to allow an operator to leave underground piping in place if it is emptied and is at least three feet below the surface. TxOGA, Ronald D. Stephens, and Stephens Energy Corp. all objected to the requirement that tanks, vessels and related piping be removed within 120 days. Removal of these items is necessary because as they deteriorate they may pollute fresh water. Further, unused tanks, vessels and piping create an unnecessary regulatory burden because it is impossible to tell without continuing and repeated inspections whether these receptacles remain empty or have become a pollution threat due to unauthorized use. In addition, unused tanks in remote locations may be used by unauthorized persons for the temporary, illegal storage of "hot" oil. Based on the comments, the Commission has amended this provision to provide the district director with authority to extend the time period for removing these facilities up to an additional 120 days in appropriate circumstances.

Finally, TxOGA commented that the requirement in subsection (d)(12) that the location be contoured to discourage pooling of surface water should be specific to the well or facility site. Based on this comment, this provision has been amended to specify that contouring is required to discourage pooling of water on or around the facility site.

The Commission adopts the amendments pursuant to Texas Natural Resources Code, §§81.052, 85.042, 85.046, 85.201, 86.042, 89.001, 89.121, and 91.101, which authorize the Commission to prevent waste of oil and gas, to protect correlative rights and to prevent the pollution of surface and subsurface water within the state.

Texas Natural Resources Code §§81.052, 85.042, 85.046, 85.201, 86.042, 89.001, 89.121, and 91.101 are affected by the adopted amendments to this section.

§3.14. Plugging.

(a) Definitions and application to plug.

(1) As used in this section:

(A) "Active operation" means regular and continuing activities related to the production of oil and gas for which the operator has all necessary permits. In the case of a delinquent inactive well that is not permitted as a disposal or injection well, active operation requires reported production or other commission-approved operations, such as recompletion attempts, conducted downhole in a bona fide attempt to re-establish production.

(B) "Delinquent inactive well" means an unplugged well that has had no reported production, disposal, injection, or other permitted activity for a period of greater than 12 months and for which, after notice and opportunity for hearing, the commission has not extended the plugging deadline.

(C) "Funnel viscosity" means viscosity as measured by the Marsh funnel, based on the number of seconds required for 1,000 cubic centimeters of fluid to flow through the funnel.

(D) "Good faith claim" means a factually supported claim based on a recognized legal theory to a continuing possessory

right in a mineral estate, such as evidence of a currently valid oil and gas lease or a recorded deed conveying a fee interest in the mineral estate.

(E) "Operator designation form" means a certificate of transportation authority and compliance or an application to drill, deepen, recomplete, plug back, or reenter which has been completed, signed and filed with the commission.

(F) "Productive horizon" means any stratum known to contain oil, gas, or geothermal resources in producible quantities in the vicinity of an unplugged well.

(G) "Reported production" means production of oil or gas, excluding production attributable to well tests, accurately reported to the commission on a monthly producer's report.

(H) To "serve surface notice" means to hand deliver a written notice identifying the well to be plugged and the projected date the well will be plugged to the intended recipient at least three days prior to the day of plugging or to mail the notice by first class mail, postage pre-paid, to the last known address of the intended recipient at least seven days prior to the day of plugging.

(I) "Usable quality water strata" means all strata determined by the Texas Natural Resources Conservation Commission to contain usable quality water.

(2) The operator shall give the commission notice of its intention to plug any well or wells drilled for oil, gas, or geothermal resources or for any other purpose over which the commission has jurisdiction, except those specifically addressed in §3.100(f)(1) of this title (relating to Seismic Holes and Core Holes) (Statewide Rule 100), prior to plugging. The operator shall deliver or transmit the written notice to the district office on the appropriate form.

(3) The operator shall cause the notice of its intention to plug to be delivered to the district office at least five days prior to the beginning of plugging operations. The notice shall set out the proposed plugging procedure as well as the complete casing record. The operator shall not commence the work of plugging the well or wells until the proposed procedure has been approved by the district office. The operator shall not initiate approved plugging operations before the date set out in the notification for the beginning of plugging operations unless authorized by the district director. The operator shall notify the district office at least four hours before commencing plugging operations and proceed with the work as approved. The district director may grant exceptions to the requirements of this paragraph concerning the timing of notices when a workover or drilling rig is already at work on location, ready to commence plugging operations. Operations shall not be suspended prior to plugging the well unless the hole is cased and casing is cemented in place in compliance with commission rules.

(4) The landowner and the operator may file an application to condition an abandoned well located on the landowner's tract for usable quality water production operations, provided the landowner assumes responsibility for plugging the well and obligates himself, his heirs, successors, and assignees as a condition to the commission's approval of such application to complete the plugging operations. The application shall be made on the form prescribed by the commission. In all cases, the operator responsible for plugging the well shall place all cement plugs required by this rule up to the base of the usable quality water strata.

(5) The operator of a well shall serve surface notice on the surface owner of the well site tract, or the resident if the owner is absent, before the scheduled date for beginning the plugging operations. A representative of the surface owner may be present to witness the plugging of the well. Plugging shall not be delayed because of the lack of actual notice to the surface owner or resident if the operator has served surface notice as required by this paragraph. The district director may grant exceptions to the requirements of this paragraph concerning the timing of notices when a workover or drilling rig is already at work on location ready to commence plugging operations.

(b) Commencement of plugging operations and extensions.

(1) The operator shall complete and file in the district office a duly verified plugging record, in duplicate, on the appropriate form within 30 days after plugging operations are completed. A cementing report made by the party cementing the well shall be attached to, or made a part of, the plugging report. If the well the operator is plugging is a dry hole, an electric log status report shall be filed with the plugging record.

(2) Plugging operations on each dry or inactive well shall be commenced within a period of one year after drilling or operations cease and shall proceed with due diligence until completed. Plugging operations on delinquent inactive wells shall be commenced immediately unless the well is restored to active operation. For good cause, a reasonable extension of time in which to start the plugging operations may be granted pursuant to the following procedures.

(A) The commission or its delegate may administratively grant an extension of time of one year if the well is in compliance with all other laws and commission rules; the well and associated facilities are not a pollution hazard; the operator's organization report is current and active, the operator has, and upon request provides evidence of, a good faith claim to operate the well; and

(i) the operator pays the proper fee as provided in §3.76 of this title (relating to Fees, Performance Bonds, and Alternate Forms of Financial Security Required To Be Filed) (Statewide Rule 78), obtains a permit for this extension, and no more than three extensions have been granted after June 1, 1992, for the well under the provisions of this clause; or

(ii) the operator files an individual or blanket performance bond as provided in §3.76 of this title (relating to Fees, Performance Bonds, and Alternate Forms of Financial Security Required To Be Filed) (Statewide Rule 78), or a letter of credit.

(B) The commission or its delegate may revoke an administratively granted extension of time if an operator fails to maintain the well in compliance with commission rules, fails to maintain a current and accurate organization report on file with the commission, or fails to provide the commission, upon request, with evidence of a continuing good faith claim to operate the well.

(C) If the commission or its delegate declines administratively to grant or continue an extension of time, or revokes an extension, the operator shall, within 30 days, return the well to active operation, plug the well or request a hearing on the matter.

(D) The commission or its delegate may allow a well to be the subject of more than four extensions granted after June 1, 1992, under the provisions of subparagraph (A)(i) of this paragraph, upon written application, if the operator's organization report is current and active, the operator has, and upon request provides evidence of, a good faith claim to operate the well, and the operator demonstrates that no pollution of surface or subsurface water could occur as a result of granting the extension. If such application is administratively denied, the commission may subsequently grant the extension.

(E) The operator of any well more than 25 years old that becomes inactive and subject to the provisions of this paragraph shall plug or annually test such well to determine whether the well poses a potential threat of harm to natural resources, including surface and subsurface water, oil and gas.

(i) In general, a fluid level test is a sufficient test for purposes of this subparagraph. However, the commission or its delegate may require alternate methods of testing, and more frequent tests, if the commission deems it necessary to ensure the well does not pose a potential threat of harm to natural resources. Alternate methods of testing may be approved by the commission or its delegate by written application and upon a showing that such a test will provide information sufficient to determine that the well does not pose a threat to natural resources.

(ii) No test other than a fluid level test shall be acceptable without prior approval from the district office. The district office shall be notified at least 48 hours before any test other than a fluid level test is conducted. Mechanical integrity test results shall be filed with the district office and fluid level test results shall be filed with the commission in Austin. Test results shall be filed on a commission-approved form, within 30 days of the completion of the test.

(iii) Notwithstanding the provisions of clause (ii) of this subparagraph, a hydraulic pressure test may be conducted without prior approval from the district office, provided that the operator gives the district office at least 48 hours advance notice of the test, the production casing is tested to a depth of at least 250 feet below the base of usable quality water strata, or 100 feet below the top of cement behind the production casing, whichever is deeper, and the minimum test pressure is greater than or equal to 250 psig for a period of at least 30 minutes. A hydraulic pressure test, so conducted, will exempt the well from further testing for five years from the date of the test unless the commission or its delegate determines that more frequent testing is necessary to ensure that the well does not pose a potential threat of harm to natural resources.

(iv) Wells that are returned to continuous production, as evidenced by three consecutive months of reported production, need not be tested.

(3) An operator may apply to have an inactive, mechanically sound and non-polluting wellbore accepted into the Texas Experimental Research and Recovery Activity (TERRA) program. If the well is accepted into the TERRA program, the operator is no longer responsible for plugging the well. An operator is not entitled to a hearing to contest the administrative denial of an application to accept a well into the TERRA program.

(4) The commission may plug or replug any dry or inactive well as follows:

(A) After notice and hearing, if the well is causing or is likely to cause the pollution of surface or subsurface water or if oil or gas is leaking from the well, and:

(i) Neither the operator nor any other entity responsible for plugging the well can be found; or,

(ii) Neither the operator nor any other entity responsible for plugging the well has assets with which to plug the well.

(B) Without a hearing if the well is a delinquent inactive well and:

(i) the commission has sent notice of its intention to plug the well as required by §89.043(c) of the Texas Natural Resources Code; and,

(ii) the operator did not request a hearing within the period (not less than 10 days after receipt) specified in the notice.

(C) Without notice or hearing, if:

(i) The commission has issued a final order requiring that the operator plug the well and the order has not been complied with; or,

(ii) The well poses an immediate threat of pollution of surface or subsurface waters or of injury to the public health and the operator has failed to timely remediate the problem.

(5) The commission may seek reimbursement from the operator and any other entity responsible for plugging the well for state funds expended pursuant to paragraph (4) of this subsection.

(c) Designated operator responsible for proper plugging.

(1) The entity designated as the operator of a well specifically identified on the most recent commission-approved operator designation form filed on or after September 1, 1997 is responsible for properly plugging the well in accordance with this section and all other applicable commission rules and regulations concerning plugging of wells.

(2) As to any well for which the most recent commission-approved operator designation form was filed prior to September 1, 1997, the entity designated as operator on that form is presumed to be the entity responsible for the physical operation and control of the well and to be the entity responsible for properly plugging the well in accordance with this section and all other applicable commission rules and regulations concerning plugging of wells. The presumption of responsibility may only be rebutted at a hearing called for the purpose of determining plugging responsibility.

(d) General plugging requirements.

(1) Wells shall be plugged to insure that all formations bearing usable quality water, oil, gas, or geothermal resources are protected. All cementing operations during plugging shall be performed under the direct supervision of the operator or his authorized representative, who shall not be an employee of the service or cementing company hired to plug the well. Direct supervision means supervision at the well site during the plugging operations. The operator and the cementer are both responsible for complying with the general plugging requirements of this subsection and for plugging the well in conformity with the procedure set forth in the approved notice of intention to plug and abandon for the well being plugged. The operator and cementer may each be assessed administrative penalties for failure to comply with the general plugging requirements of this subsection or for failure to plug the well in conformity with the approved notice of intention to plug and abandon the well.

(2) Cement plugs shall be set to isolate each productive horizon and usable quality water strata.

(3) Cement plugs shall be placed by the circulation or squeeze method through tubing or drill pipe. Cement plugs shall be placed by other methods only upon written request with the written approval of the district director or the director's delegate.

(4) All cement for plugging shall be an approved API oil well cement without volume extenders and shall be mixed in accordance with API standards. Slurry weights shall be reported on the cementing report. The district director or the director's delegate

may require that specific cement compositions be used in special situations; for example, when high temperature, salt section, or highly corrosive sections are present.

(5) Operators shall use only cementers approved by the assistant director of well plugging or the assistant director's delegate, except when plugging is conducted in accordance with subparagraph (B)(ii) of this paragraph or paragraph (6) of this subsection. Cementing companies, service companies, or operators may apply for designation as approved cementers. Approval will be granted on a showing by the applicant of the ability to mix and pump cement in compliance with this rule. An approved cementer is authorized to conduct plugging operations in accordance with commission rules in each commission district.

(A) A cementing company, service company, or operator seeking designation as an approved cementer shall file a request in writing with the district director of the district in which it proposes to conduct its initial plugging operations. The request shall contain the following information:

(i) the name of the organization as shown on its most recent approved organizational report;

(ii) a list of qualifications including personnel who will supervise mixing and pumping operations;

(iii) length of time the organization has been in the business of cementing oil and gas wells;

(iv) an inventory of the type of equipment to be used to mix and pump cement; and

(v) a statement certifying that the organization will comply with all commission rules.

(B) No request for designation as an approved cementer will be approved until after the district director or the director's delegate has:

(i) inspected all equipment to be used for mixing and pumping cement; and

(ii) witnessed at least one plugging operation to determine if the cementing company, service company, or operator can properly mix and pump cement to the specifications required by this rule.

(C) The district director or the director's delegate shall file a letter with the assistant director of well plugging recommending that the application to be designated as an approved cementer be approved or denied. If the district director or the director's delegate does not recommend approval, or the assistant director of well plugging or the assistant director's delegate denies the application, the applicant may request a hearing on its application.

(D) Designation as an approved cementer may be suspended or revoked for violations of commission rules. The designation may be revoked or suspended administratively by the assistant director of well plugging for violations of commission rules if:

(i) the cementer has been given written notice by personal service or by registered or certified mail informing the cementer of the proposed action, the facts or conduct alleged to warrant the proposed action, and of its right to request a hearing within 10 days to demonstrate compliance with commission rules and all requirements for retention of designation as an approved cementer; and

(ii) the cementer did not file a written request for a hearing within 10 days of receipt of the notice.

(6) An operator may request administrative authority to plug its own wells without being an approved cementer. An operator seeking such authority shall file a written request with the district director and demonstrate its ability to mix and pump cement in compliance with this subsection. The district director or the director's delegate will determine whether such a request warrants approval. If the district director or the director's delegate refuses to administratively approve this request, the operator may request a hearing on its request.

(7) The district director may require additional cement plugs to cover and contain any productive horizon or to separate any water stratum from any other water stratum if the water qualities or hydrostatic pressures differ sufficiently to justify separation. The tagging and/or pressure testing of any such plugs, or any other plugs, and respotting may be required if necessary to insure that the well does not pose a potential threat of harm to natural resources.

(8) For onshore or inland wells, a 10-foot cement plug shall be placed in the top of the well, and casing shall be cut off three feet below the ground surface.

(9) Mud-laden fluid of at least 9 1/2 pounds per gallon with a minimum funnel viscosity of 40 seconds shall be placed in all portions of the well not filled with cement. The hole shall be in static condition at the time the cement plugs are placed. The district director may grant exceptions to the requirements of this paragraph if a deviation from the prescribed minimums for fluid weight or viscosity is necessary to insure that the well does not pose a potential threat of harm to natural resources.

(10) Non-drillable material that would hamper or prevent reentry of a well shall not be placed in any wellbore during plugging operations, except in the case of a well plugged and abandoned under the provisions of §3.35 or §3.94(e) of this title (relating to Procedures for Identification and Control of Wellbores in Which Certain Logging Tools Have Been Abandoned (Statewide Rule 35); and Disposal of Oil and Gas NORM Waste (Statewide Rule 94), respectively). Pipe and unretrievable junk shall not be cemented in the hole during plugging operations without prior approval by the district director.

(11) All cement plugs, except the top plug, shall have sufficient slurry volume to fill 100 feet of hole, plus 10% for each 1,000 feet of depth from the ground surface to the bottom of the plug.

(12) The operator shall fill the rathole, mouse hole, and cellar, and shall empty all tanks, vessels, related piping and flowlines that will not be actively used in the continuing operation of the lease within 120 days after plugging work is completed. Within the same 120 day period, the operator shall remove all such tanks, vessels, related surface piping, and all subsurface piping that is less than three feet beneath the ground surface, remove all loose junk and trash from the location, and contour the location to discourage pooling of surface water at or around the facility site. The operator shall close all pits in accordance with the provisions of §3.8 of this title (relating to Water Protection (Statewide Rule 8)). The district director may grant a reasonable extension of time of not more than an additional 120 days for the removal of tanks, vessels and related piping.

(e) Plugging requirements for wells with surface casing.

(1) When insufficient surface casing is set to protect all usable quality water strata and such usable quality water strata are exposed to the wellbore when production or intermediate casing is pulled from the well or as a result of such casing not being run,

a cement plug shall be placed from 50 feet below the base of the deepest usable quality water stratum to 50 feet above the top of the stratum. This plug shall be evidenced by tagging with tubing or drill pipe. The plug must be respotted if it has not been properly placed. In addition, a cement plug must be set across the shoe of the surface casing. This plug must be a minimum of 100 feet in length and shall extend at least 50 feet above and below the shoe.

(2) When sufficient surface casing has been set to protect all usable quality water strata, a cement plug shall be placed across the shoe of the surface casing. This plug shall be a minimum of 100 feet in length and shall extend at least 50 feet above the shoe and at least 50 feet below the shoe.

(3) If surface casing has been set deeper than 200 feet below the base of the deepest usable quality water stratum, an additional cement plug shall be placed inside the surface casing across the base of the deepest usable quality water stratum. This plug shall be a minimum of 100 feet in length and shall extend from 50 feet below the base of the deepest usable quality water stratum to 50 feet above the top of the stratum.

(f) Plugging requirements for wells with intermediate casing.

(1) For wells in which the intermediate casing has been cemented through all usable quality water strata and all productive horizons, a cement plug meeting the requirements of subsection (d)(11) of this section shall be placed inside the casing and centered opposite the base of the deepest usable quality water stratum, but extend no less than 50 feet above and below the stratum.

(2) For wells in which intermediate casing is not cemented through all usable quality water strata and all productive horizons, and if the casing will not be pulled, the intermediate casing shall be perforated at the required depths to place cement outside of the casing by squeeze cementing through casing perforations.

(g) Plugging requirements for wells with production casing.

(1) For wells in which the production casing has been cemented through all usable quality water strata and all productive horizons, a cement plug meeting the requirements of subsection (d)(11) of this section shall be placed inside the casing and centered opposite the base of the deepest usable quality water stratum and across any multi-stage cementing tool.

(2) For wells in which the production casing has not been cemented through all usable quality water strata and all productive horizons and if the casing will not be pulled, the production casing shall be perforated at the required depths to place cement outside of the casing by squeeze cementing through casing perforations.

(3) The district director may approve a cast iron bridge plug to be placed immediately above each perforated interval, provided at least 20 feet of cement is placed on top of each bridge plug. A bridge plug shall not be set in any well at a depth where the pressure or temperature exceeds the ratings recommended by the bridge plug manufacturer.

(h) Plugging requirements for well with screen or liner.

(1) If practical, the screen or liner shall be removed from the well.

(2) If the screen or liner is not removed, a cement plug in accordance with subsection (d)(11) of this section shall be placed at the top of the liner.

(i) Plugging requirements for wells without production casing and open-hole completions.

(1) Any productive horizon or any formation in which a pressure or formation water problem is known to exist shall be isolated by cement plugs centered at the top and bottom of the formation. Each cement plug shall have sufficient slurry volume to fill a calculated height as specified in subsection (d)(11) of this section.

(2) If the gross thickness of any such formation is less than 100 feet, the tubing or drill pipe shall be suspended 50 feet below the base of the formation. Sufficient slurry volume shall be pumped to fill the calculated height from the bottom of the tubing or drill pipe up to a point at least 50 feet above the top of the formation, plus 10% for each 1,000 feet of depth from the ground surface to the bottom of the plug.

(j) The district director shall review and approve the notification of intention to plug in a manner so as to accomplish the purposes of this section. The district director may approve, modify, or reject the operator's notification of intention to plug. If the proposal is modified or rejected, the operator may request a review by the director of field operations. If the proposal is not administratively approved, the operator may request a hearing on the matter. After hearing, the examiner shall recommend final action by the commission.

(k) Plugging horizontal drainhole wells. All plugs in horizontal drainhole wells shall be set in accordance with subsection (d)(11) of this section. The productive horizon isolation plug shall be set from a depth 50 feet below the top of the productive horizon to a depth either 50 feet above the top of the productive horizon, or 50 feet above the production casing shoe if the production casing is set above the top of the productive horizon. If the production casing shoe is set below the top of the productive horizon, then the productive horizon isolation plug shall be set from a depth 50 feet below the production casing shoe to a depth that is 50 feet above the top of the productive horizon. In accordance with subsection (d)(7) of this section, the commission or its delegate may require additional plugs.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on August 25, 1998.

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TRD-9813522
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Deputy General Counsel
Railroad Commission of Texas
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Part II. Public Utility Commission of Texas

Chapter 23. Substantive Rules

Subchapter A. General Rules

16 TAC §23.3

The Public Utility Commission of Texas adopts the repeal of §23.3 relating to Definitions with no changes to the proposed

text as published in the May 15, 1998 *Texas Register* (23 TexReg 4721). The repeal is necessary to avoid duplicative rule sections. The commission has adopted §25.5 of this title (relating to Definitions) for electric service providers, and §26.5 of this title (relating to Definitions) for telecommunications service providers to replace §23.3. This repeal is adopted under Project Number 19120.

The commission received no comments on the proposed repeal.

This repeal is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998) (PURA) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction.

Cross Index to Statutes: Public Utility Regulatory Act §14.002.

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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Rhonda Dempsey
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For further information, please call: (512) 936–7308

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Subchapter D. Certification

16 TAC §23.32

The Public Utility Commission of Texas adopts the repeal of §23.32 relating to Automatic Dial Announcing Devices with no changes to the proposed text as published in the July 24, 1998 *Texas Register* (23 TexReg 7480). The repeal is necessary to avoid duplicative rule sections. The commission has adopted §26.125 of this title (relating to Automatic Dial Announcing Devices) to replace §23.32. This repeal is adopted under Project Number 19466.

The commission received no comments on the proposed repeal.

This repeal is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998) (PURA) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction.

Cross Index to Statutes: Public Utility Regulatory Act §14.002.

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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Rhonda Dempsey
Rules Coordinator
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For further information, please call: (512) 936–7308

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16 TAC §23.33

The Public Utility Commission of Texas adopts the repeal of §23.33 relating to Telephone Solicitation with no changes to the proposed text as published in the July 24, 1998 *Texas Register* (23 TexReg 7481). The repeal is necessary to avoid duplicative rule sections. The commission has adopted §26.126 of this title (relating to Telephone Solicitation) to replace §23.33. This repeal is adopted under Project Number 19467.

The commission received no comments on the proposed repeal.

This repeal is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998) (PURA) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction.

Cross Index to Statutes: Public Utility Regulatory Act §14.002.

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 I. Universal Service Fund

16 TAC §23.134

The Public Utility Commission of Texas (commission) adopts an amendment to §23.134, relating to the Small and Rural Incumbent Local Exchange Carrier (ILEC) Universal Service Plan with changes as published in the June 5, 1998 *Texas Register* (23 TexReg 5882). This amendment is adopted under Project Number 19293.

The commission initiated this rulemaking to investigate severing the link between Substantive Rule §23.133 of this title (relating to Texas High Cost Universal Service Plan (THCUSP)), and Substantive Rule §23.134. Docket Number 18515 is the compliance proceeding to implement §23.133. Docket Number 18516 is the compliance proceeding to implement §23.134. As currently written, §23.134(e)(1)(B) cannot be implemented until after the proceeding in Docket Number 18515 is completed. During the Open Meeting held on May 6, 1998, the commission voted to delay implementation of the Texas Universal Service Fund (TUSF) until January 1, 1999. The commission also instructed commission staff to initiate a rulemaking proceeding to investigate severing the link between §23.133 and §23.134.

Interested parties filed written comments on June 25, 1998, and reply comments on July 5, 1998. The commission received timely written comments on the proposed rule from AT&T Communications of the Southwest, Inc. (AT&T), the Texas Telephone Association (TTA), and Texas Statewide Telephone

Cooperative Incorporated (TSTCI). The commission received reply comments from AT&T and TSTCI. A public hearing was held on July 10, 1998. Representatives from AT&T, TTA, and TSTCI attended the hearing and provided comments. To the extent that these comments differ from the submitted written comments, they are summarized herein. At the public hearing, commission staff requested additional information regarding interstate and intrastate access rates and rate elements. TTA filed the requested information on July 16, 1998.

Parties commenting generally supported the amendment of §23.134(e); however, as summarized herein, they offered modifications to the proposal.

AT&T noted a difference in the caption for subparagraph (B) and the text in subparagraph (B). AT&T commented that the proposed amendment should reflect that the small and rural incumbent local exchange carriers (SLECs) are being granted flexibility to "reduce" their access and toll rates rather than "set new" access and toll rates as published. AT&T indicated that based on the rules of statutory construction, which apply to the commissions substantive rules, the proposed subparagraph (B) is captioned "Access/toll reduction"; the caption has no legal force. AT&T recommended that the text of the rule should be amended to clarify that the SLECs may only reduce their access and toll rates.

TSTCI countered that it is not necessary to include language to the effect that SLECs may only reduce their access and toll rates, since it was TSTCI's opinion that subsection (e) of the rule clearly indicates that SLECs may only reduce access and toll.

The commission concurs with AT&T and modifies subparagraph (B) to clarify that the SLECs may only reduce their existing carrier common line (CCL), residual interconnection charge (RIC), and/or intraLATA toll rates.

TTA proposed modifications to the rule that would allow a company to mirror its interstate access rate structure, not just the CCL and RIC rate elements. TTA opined that while a reduction in CCL could be used to achieve a closer per minute composite rate between the intrastate and interstate tariffs, the difference in transport and local switching structure between state and federal tariffs could continue to create incentives to tariff shop (the situation where an interexchange carrier might have the incentive, because of differences in rates and structure, to improperly report usage as interstate rather than intrastate), and SLECs and their customers would have to administer two separate tariffs, thereby lessening efficiencies. TTA's proposed modification would allow a company two options regarding access rate reductions: (1) a company could choose to mirror its interstate rates and be assured of commission approval; or (2) a company could propose an alternate structure subject to commission approval. TTA stated that allowing companies this flexibility is a benefit and permits a SLEC to propose a different tariff that may be better suited to its situation than its interstate tariff.

TSTCI stated that since 1991 it has advocated for SLECs to be permitted to mirror the National Exchange Carrier Association (NECA) access rates and rate structure for their intrastate access rates and rate structure. TSTCI argued that many of the reasons and benefits to be gained by mirroring NECA tariff in 1991 are still significant and valid today. Like TTA, TSTCI advocated a single set of access rates for the SLECs for three reasons: (1) removal of incentives for access customers to tariff shop and eliminate the basis for percentage interstate usage (PIU) reporting disputes; (2) increase in the efficiency of tariff administration and reduce the administrative costs associated with administering two access tariffs; and (3) furthering the Chairman's goal of "a nonlocal minute is a nonlocal minute." TSTCI proposed replacing "CCL and RIC" in the proposed rule revision with "intrastate access rates."

AT&T stated that adoption of the proposed amendment as published would grant the SLECs the flexibility in rate reduction that both TTA and TSTCI sought in their proposed rule comments. In its reply comments, AT&T stated that TTA's and TSTCI's suggested changes were a significant modification that it had not had sufficient time to analyze and quantify. AT&T stated that the original rule only considered CCL and RIC and there was previously no suggestion in formal comments by any party that all access rate elements be considered. AT&T stated that it is clear that CCL and RIC are subsidy elements, it is less clear whether other access rate elements should be replaced by universal service funding. AT&T stated that its brief review of some SLEC intrastate tariffs, revealed that in some cases the intrastate transport rate appears higher than the interstate rate. AT&T continued that it was unclear to AT&T that if a SLEC mirrors its interstate access tariff the result would be a net access reduction for that SLEC. For that reason alone, AT&T opposed TTA's proposed revision, since it would not require any commission approval. AT&T stated that it believes that all access rates should be driven down, and it would not oppose a restructuring of intrastate switched access tariffs to mirror interstate switched access tariffs if the effect was a net switched access reduction, but it was not apparent to AT&T that this rulemaking is the place to do it. AT&T concluded that the benefits of a consistent jurisdictional rate structure cited by TTA and TSTCI are not necessarily tied to TUSF relief and urged caution. In its reply comments, AT&T suggested that the commission republish the rule with the commission's preferred language and allow additional written comments, if the commission supports the changes proposed by TTA and TSTCI.

AT&T was also concerned that TTA's proposal contains no provision for intraLATA toll reductions to be subject to commission approval.

At the public hearing TTA noted that its current proposal would not continue a perpetual parity of intrastate access rates with interstate access rates.

The commission notes that this rulemaking contemplates making explicit the known implicit subsidies contained in the SLECs' intrastate access rate elements. The commission recognizes that CCL and RIC are subsidy elements of the SLECs' intrastate access tariffs. The commission acknowledges that the differences that exist between the SLECs' interstate and intrastate tariffs may continue even though RIC and CCL revenues are replaced by TUSF support. However, the commission does not, at this time, revise the rule to adopt TTA's and TSTCI's proposal to allow the SLECs to match their interstate access rate elements. If the SLECs desire to mirror their interstate access rates and rate elements, the commission encourages them to provide their proposals in Docket Number 18516 and support those proposals with appropriate testimony.

TSTCI asked if the commission allowed the SLECs to mirror their interstate rates, that they be allowed to adjust their intrastate tariffs each time the interstate rates were revised. TSTCI requested that the commission establish a new project to investigate a mechanism for maintaining one set of access

rates for SLECs that chose to mirror their interstate access rates because interstate access rates change at least annually.

The commission declines to establish a new project in conjunction with this rulemaking, as requested by TSTCI. If the SLECs are allowed in the future to mirror their interstate access rates and rate elements, then the commission will address the need for such a project at that time.

AT&T stated that it understood the commission's goal of separating the access and toll reduction amounts for SLECs from the reductions of large incumbent local exchange carriers (ILECs), but AT&T took issue with the "voluntary" nature of the reduction amounts, which would have the effect of diminishing the importance of any consistency in SLEC and large ILEC access and toll rates.

TSTCI countered that the "voluntary" aspect of rate reductions for small ILECs has not changed from the initially approved rule, and is therefore not a new issue in this proceeding.

The commission agrees with TSTCI that the voluntary aspect of intraLATA access rate reductions is not a new issue in this proceeding and takes no action as a result of AT&T's comments.

TSTCI expressed concern about the issue of revenue neutrality, particularly as it pertained to the phrase "recover reasonable amount" in the proposed amendment. TSTCI indicated that this wording creates a great deal of uncertainty and anxiety on the part of the SLECs as to their assurance of revenue recovery for access and/or toll rate reductions. TSTCI requested concrete assurance about the issue of how the phrase will be interpreted and proposed adding language to the amendment to define the phrase. TSTCI's proposed language defines a reasonable amount as the amount equal to the difference between the SLECs' previous rates and its current approved interstate access rates, or the amount equal to the difference between the SLECs' previous rates and the rate reductions of one of the ILECs receiving support under §23.133, or the amount equal to the difference between the SLEC's previous rates and the revised rate level of one of the ILECs receiving support under §23.133. TSTCI posed several questions to illustrate its concern: what parameters would be used to apply "reasonable" on a consistent basis? Would the commission go as far as to require additional proceedings to establish what is a reasonable amount of revenue recovery? Would potential proceedings entail a revenue requirement showing? Would the small and rural companies have the burden of proof? Would support amounts be based on earnings and rate of return?

AT&T did not offer amended language but indicated that delinking will only export the rate reduction issue from Docket Number 18515 to Docket Number 18516, where parties may be forced to argue the "reasonable amount of the difference between the previous rates and the new rates." In its reply comments, AT&T stated that it understood the SLEC's desire to have certainty in this process, but TSTCI's proposed language was not sufficiently certain for AT&T. AT&T argued that TSTCI's proposed language when defining "reasonable amount," fails to take into account toll reductions in the first instance, and in the second instance matches "previous rates" to "rate reductions," which AT&T does not believe will work from a rule construction standpoint. AT&T indicated that it can accept the commission's original rule, which TSTCI appears to want to retain as an option, but then the original language ought to be retained and the "reasonable amount" language could be eliminated.

It is the commission's intent to sever the connection between §23.133 and §23.134. The commission declines to adopt TSTCI's proposed definition of reasonable amount. The commission will consider evidence presented in Docket Number 18516 when deciding the SLECs' rate reductions. The commission reiterates that SLECs shall remain revenue neutral as a result of the implementation of §23.134.

TSTCI urged the commission to consider including special access in this section of the TUSF rule to enable SLECs to overcome deficiencies in their existing special access tariffs. TSTCI summarized the history of the existing TSTCI Intrastate Access Service Tariff, parts of which have been in place since the time of divestiture. According to TSTCI, the commission has adopted changes to switched access tariffs, but it has not granted past requests on the part of TSTCI to change special access tariffs. TSTCI implored the commission to take this opportunity to address special access by permitting the SLECs to mirror their interstate special access rates and rate structure. TSTCI's proposed revision to replace "CCL and RIC" with "intrastate access rates" would facilitate achieving complete interstate and intrastate access rate parity. TSTCI argued that the benefits of parity between the interstate and intrastate tariffs would not be achieved unless the SLECs were able to mirror all of the access rate elements in their currently approved interstate access tariffs.

TTA also supported allowing the SLECs to update their special access tariffs, which TTA called outdated. TTA stated that the estimated impact on TUSF for mirroring the interstate special access tariff would not exceed $3.8 million. TTA segregated the $3.8 million into two components: current special access billed revenue ($2,854,377) and current intraLATA private line billed revenue ($939,702). TTA analyzed a sample of SLECs that repriced their current inventory of special access and intraLATA private line services using the current interstate special access tariffs. Based on that sample, TTA indicated that the impact of mirroring special access tariffs would depend on whether the company has its own interstate tariff or concurs in the NECA interstate special access tariff. TTA reported that for companies concurring in the NECA interstate tariff, the impact would be an average reduction of 20 to 38% for intraLATA private line circuits and 19 to 24% for intrastate special access circuits. TTA concluded that the overall impact for the sample concurring in the NECA interstate tariff would be a reduction of 25 to 26%. TTA reported that overall impact for companies moving from their current intrastate tariff to their own interstate special access tariff would be a reduction of 52%. TTA's final conclusion, if the sample holds true for all SLECs, then the potential TUSF impact of mirroring the interstate special access tariffs would be an increase in the range of $814,846 to $2,131,964.

In its reply comments, AT&T strongly opposed SLEC recovery from the TUSF of lost revenues as a result of restructuring of special access rates. AT&T argued that special access services, typically non-switched, dedicated transmission paths, are competitive services whose revenues should not be replaced by an explicit subsidy. AT&T pointed to §58.151 of the Public Utility Regulatory Act, Texas Utilities Code Annotated §§11.001-63.063 (Vernon 1998) (PURA), which defines special access services as competitive services for the purpose of basket treatment for ILECs who elect incentive regulation under PURA Chapter 58. AT&T stated that while a SLEC may not have the statutory pricing flexibility of PURA Chapter 58 for its special ac-

cess services, there is no doubt that the commission would treat a SLEC special access tariff application in the same way, i.e., as though the service were competitive. During its quick review of the SLEC's switched access tariffs, AT&T found that some of the SLEC's interstate special access rates appear higher than their intrastate access rates. AT&T argued that changes to special access rates could be achieved by SLECs without the need of TUSF support. AT&T concluded that restructuring of special access in this proceeding introduces an unnecessary element of complexity, and is particularly inappropriate given the competitive nature of special access.

TTA clarified its position in response to issues raised by AT&T. TTA stated that it proposed to "grandfather" at current rates all private line and special access circuits that would otherwise experience a rate increase if the interstate special access rates were applied. TTA did not propose to increase rates for any in-place circuits.

In an additional filing, AT&T indicated that TTA's clarification that existing rates would be "grandfathered" is an appropriate step. AT&T also indicated that neither the amount of the impact on the TUSF of SLECs mirroring interstate special access tariffs or the potential increase in special access rates have been the focus of AT&T's concern. AT&T restated that its primary objection to the SLEC's proposal is that any resulting revenue loss to the SLECs would be made up from the TUSF. AT&T reiterated that special access services are competitive services that ought not receive a subsidy in order to achieve rate reductions. AT&T argued that while the commission has the authority to determine which rates ought to be reduced, the commission's deliberations thus far have been on reducing switched access, which is not competitive, and toll, which is generally not competitive in the absence of dialing parity. AT&T concluded that regardless of the amount of money involved, the policy issue remains the same: should ILECs be allowed a competitive advantage through TUSF subsidies?

At the public hearing, TTA agreed that special access services are competitive services. TTA argued that the competitive classification does not preclude the commission from using the TUSF to remove any implicit subsidies from special access rates. AT&T responded that the statute has made clear that for some specific discretionary services or competitive services, like intraLATA toll, SLECs should receive TUSF, but that the commission ought not give special consideration to something like special access.

The commission finds it inappropriate to make TSTCI and TTA's proposed changes because those proposals are beyond the scope of this rulemaking. The commission notes that the SLECs have the flexibility under Substantive Rule. §23.94 of this title (relating to Small Local Exchange Carrier Regulatory Flexibility), to reduce their special access tariffs on their own motion. SLECs also have the option of filing for additional universal service support under §23.138 of this title (relating to Additional Financial Assistance), in a PURA §§53.105, 53.151, or 53.306 proceeding.

This amendment is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998) (PURA), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, and specifically §51.001 which sets forth the state's policy regarding telecommunications; and Chapter 56, Subchapter B which sets forth the requirements for the TUSF.

Cross Index to Statutes: PURA §14.002 and §51.001, and Chapter 56, Subchapter B.

§23.134. Small and Rural Incumbent Local Exchange Carrier (ILEC) Universal Service Plan.

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

(e) Small and Rural ILEC Universal Service Plan monthly per-line support. A monthly per-line amount of support for each small or rural ILEC study area shall be determined in a one-time calculation using data from such small or rural ILEC's test year that has been audited by an independent auditor in conformance with generally accepted accounting principles (GAAP).

(1) Calculation of the monthly per-line amount of support for each small or rural ILEC. The toll pool amounts and access/toll revenue reductions determined in accordance with subparagraphs (A) and (B) of this paragraph shall be added together. To calculate the per-line amount of support, the resulting sum will then be divided by the average number of eligible lines served by such small or rural ILEC during the test year. To calculate the monthly per-line amount of support, the result shall be divided by 12.

(A) Toll pool amounts. The toll pool amount for a small or rural ILEC shall be determined by subtracting the actual toll billed by the small or rural ILEC during the test year from its toll pool revenue requirement for the test year, as certified by the Texas Exchange Carrier Association (TECA).

(B) Access/toll revenue reduction. At the time this section is implemented, a small or rural ILEC may reduce carrier common line (CCL), residual interconnection charge (RIC), and/or intraLATA toll rates. Upon commission approval a small or rural ILEC may recover a reasonable amount of the difference between the previous rates and the new rates, computed on the basis of minutes of use in the test year. This amount is calculated by multiplying the difference between the previous rates and the new rates by the test year minutes of use.

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

(f)-(h) (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.

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Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
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Chapter 25. Substantive Rules Applicable to Electric Service Providers

Subchapter A. General Provisions

16 TAC §25.5

The Public Utility Commission of Texas (PUC or commission) adopts new §25.5 relating to Definitions with changes to the proposed text as published in the May 15, 1998 *Texas Register* (23 TexReg 4723). Project Number 19120 is assigned to this proceeding. The proposed new section will replace §23.3 of this title (relating to Definitions) as it concerns electric service. Proposed new §25.5 gathers all the general definitions related to electric service located throughout Chapter 23 of this title into one section. The only definitions that remain in other sections are definitions that are section specific and would adversely affect other sections of Chapter 25 if moved to the general definition section. Definitions have been updated to reflect changes in the industries regulated by the commission and to reflect commission policy and existing practices.

The Appropriations Act of 1997, House Bill 1, Article IX, Section 167 (Section 167) requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Such reviews shall include, at a minimum, an assessment by the agency as to whether the reason for adopting or readopting the rule continues to exist. The PUC held three workshops to conduct a preliminary review of its rules. As a result of these workshops, the PUC is reorganizing its current substantive rules located in 16 Texas Administrative Code (TAC) Chapter 23 to (1) satisfy the requirements of Section 167; (2) repeal rules no longer needed; (3) update existing rules to reflect changes in the industries regulated by the commission; (4) do clean-up amendments made necessary by changes in law and commission organizational structure and practices; (5) reorganize rules into new chapters to facilitate future amendments and provide room for expansion; and (6) reorganize the rules according to the industry to which they apply. Chapter 25 has been established for all commission substantive rules applicable to electric service providers.

In the published review of §23.3 of this title in the May 15, 1998 *Texas Register* (23 TexReg 4935) the commission requested specific comments on the Section 167 requirement as to whether the reason for adopting §23.3 continues to exist in adopting corresponding §25.5. The commission received no comments on the Section 167 requirement. The commission finds that the reason for adopting §23.3 continues to exist in adopting corresponding §25.5 of this title.

The commission received comments on the proposed section from Central Power and Light Company (CPL), Southwestern Electric Power Company (SWEPCO), and West Texas Utilities Company (WTU), the electric utilities of the Central and South West Corporation that provide electric service in Texas (collectively, CSW); and Texas Utilities Electric Company (TUEC).

General comments:

TUEC supports the proposed consolidation of definitions contained in the Substantive Rules, and believes that, for the most part, the proposed definitions are accurate and should be adopted. CSW commented that the commission should make its intent clear as to specific definitions. CSW also commented that this effort to consolidate definitions should avoid substantive changes which should instead be addressed in a separate rulemaking.

The commission will clarify its intent, as appropriate, through its response to comments. The commission disagrees with the comments of CSW as they relate to substantive changes; the scope of change which may be accomplished by this rulemaking is established by the commission's published proposal. As stated in the preamble to the proposed rule, one of the purposes of this rulemaking includes updating existing rules to reflect changes in the industries regulated by the commission.

CSW recommended that terms defined by statute be defined in §25.5 by simply referring to the relevant statutory provisions. CSW also recommended that the definitions in §25.5 be consistent with the definitions in the commission's Procedural Rules.

Wherever possible, the commission has avoided incorporating definitions by reference in the Substantive Rules, so that persons using the commission's Substantive Rules will not need other documents to determine the meaning of the terms used. Customers of electric utilities who contact the commission regarding a specific question or problem with an electric utility often request a copy of the specific substantive rule section that relates to their question or problem. These customers seldom have a copy of the statutes available to assist them in understanding these rules. Where a term is defined by statute, the commission has generally defined the term identically in §25.5. The commission believes that §25.5 and the commission's Procedural Rules are consistent, if not identical.

Section 25.5(5) – Ancillary service provider:

CSW commented that the definition may be too restrictive, because ancillary services can be provided by persons other than electric utilities and their affiliates.

The commission agrees that persons other than electric utilities and their affiliates can provide ancillary services, as indicated in §23.70(d)(2)(B) of this title (relating to Terms and Conditions of Open-Access Comparable Transmission Service). However, the obligations contained in the rules with respect to ancillary services are limited to electric and municipally owned utilities. The commission has changed the definition to reflect this fact. The reference to affiliates of electric utilities has been deleted since they are not obligated to provide ancillary services.

Section 25.5(6) – Applicant:

TUEC recommended that the definition of this term be deleted because the term is straightforward and does not need a definition. Also, the term is used both to refer to a person seeking service from an electric utility in some substantive rules and to a person seeking relief from the commission in other substantive rules.

The commission agrees. The definition has been deleted.

Section 25.5(7) – Base rate:

CSW commented that it was unclear whether the commission intended a substantive change. In addition, CSW sought clarification of whether surcharges (e.g., rate case expenses, "House Bill 11 taxes") and an item such as a "power cost and conservation factor" would be classified as base rates. Finally, CSW requested that the commission reaffirm that it is not attempting to claim the authority to change base rates in a manner other than the traditional rate determination process.

The definition change is not intended to effect a substantive change. Rather, it is intended to reflect existing practice. The definition does not address the extent of the commission's authority to modify base rates. The definition has been changed to state that surcharges are not base rates, and the word "generally" has been added as recognition that the definition

is intended as a general description of base rates, and is not intended to be determinative of whether a particular rate is a base rate.

Section 25.5(16) – Distributed resource:

CSW commented that the definition may be too restrictive in that it is limited to a resource that is connected to an electric utility's distribution system. CSW stated that WTU has a tariff to offer photovoltaic facilities that do not require a connection to the transmission or distribution system.

The commission has changed the definition in the manner requested by CSW. The commission notes that the issue of off-grid and customer premises energy services is being considered by the commission in Project Number 19205, *Rulemaking on Unbundling of Energy Service.*

Section 25.5(18) - Electric utility:

CSW commented that the definition should include municipal utilities where appropriate and cited Public Utility Regulatory Act (PURA) §35.001.

PURA §35.001 defines "electric utility" to include a municipally owned utility for purposes of PURA Chapter 35, which addresses transmission and ancillary services. Rather than include municipally owned utilities in the definition of electric utility for purposes of transmission and ancillary services only, the commission has changed the definitions of ancillary service provider, eligible ancillary service customer, eligible transmission service customer, transmission service, and transmission service provider to expressly include municipally owned utilities.

Section 25.5(19) - Eligible ancillary service customer; and §25.5(20) - Eligible transmission customer:

CSW and TUEC recommended that "other wholesale customer" be deleted in the definition of "eligible transmission customer", so that the definition is limited to persons specifically listed in PURA as eligible for wholesale transmission service. CSW also challenged the commission's legal authority to adopt the proposed changes.

The commission has changed "other wholesale customer" to "other person whom the commission has determined to be an eligible transmission service customer" in order to avoid inappropriate requests for transmission service. This change narrows the definition but preserves the commission's ability to interpret and implement PURA. The commission does not agree with CSW's assertion that the lists of entities in PURA §35.004 and §35.005 are exclusive and limit the commission's authority as suggested. The commission has also changed the term "eligible transmission customer" to "eligible transmission service customer", and the term "transmission customer" to "transmission service customer". In addition, the commission has changed the definition of "eligible ancillary service customer", to "any person that is an eligible transmission service customer" so that it is consistent with the definition of eligible transmission service customer.

Section 25.5(24) - Good utility practice:

TUEC recommended that the references to the North American Electric Reliability Council (NERC) and the Electric Reliability Council of Texas (ERCOT) in the current rule be maintained.

The commission disagrees. The new definition is broad enough to include NERC and ERCOT guidelines where appropriate. Furthermore, not all electric utilities in Texas are in ERCOT.

Section 25.5(36) - Power marketer:

TUEC recommended that a reference to the registration requirements in §23.19 be included in the definition as was done in the definition of "exempt wholesale generator".

The commission agrees. TUEC's proposed change has been adopted.

Section 25.5(44) - Rate year:

CSW commented that the definition omits references to fuel matters and changes words of reference to bonded rates from "include" to "may include". CSW requested that the commission state that it intends no substantive change by the revisions to the existing definition.

The definition is not intended to effect a substantive change. Rather, it is intended to reflect existing practice and is not intended to be determinative of the rate year in a particular case.

Section 25.5(46) - Renewable energy technology; §25.5(47) - Renewable resources; and §25.5(53) - Supply-side resource:

CSW commented that, under these definitions, a solid waste fueled resource may be considered a "renewable resource" but not one which utilizes a "renewable energy technology". CSW requested that the commission resolve this potential inconsistency.

The commission has changed the definition of renewable resource to: "A resource that relies on renewable energy technology." Consistent with this change, the commission has changed the definition of supply-side resource to: "A resource, including a storage device, that provides electricity from fuels or renewable resources." The commission declines to decide in this context whether a resource that relies both on renewable and non-renewable energy technologies can be considered a renewable resource.

Section 25.5(50) - Service: CSW requested that the commission clarify why it is necessary to refer to telephone directory advertising.

The commission has deleted the last sentence of the proposed definition, which referred to telephone directory advertising. This reference is unnecessary for Texas Administrative Code, Chapter 25, which is limited to rules pertaining to electric service providers.

Section 25.5(52) - Submetering:

CSW requested that the commission clarify this term's intended use and explain why the term is limited to apartments.

The commission has deleted the limitation of the definition to submetering in apartment houses and changed the definition so that it is of general applicability. For example, the term is used in §23.51 of this title (relating to Utility Submetering) with respect to submetering of both apartment houses and mobile home parks. In addition, the term is used in §23.45(m)(3) of this title (relating to Billing) with respect to submetering of appliances in order to make bill adjustments due to meter tampering.

Section 25.5(61) - Transmission losses:

CSW commented that this definition is different from the current definition in that it deletes the second sentence of the definition in §23.67(b)(7) of this title (relating to Open-access Comparable Transmission Service). CSW opined that the deletion of

the second sentence is inappropriate because that sentence recognizes that capacity is required to generate the energy for transmission losses and recognizes that compensation for full costs of covering such losses is appropriate.

The commission disagrees. Deletion of the second sentence of the existing definition is appropriate because it addresses the calculation of transmission losses, rather than being limited to defining transmission losses. It is preferable to address the calculation of transmission losses in a section other than the definitions section.

Section 25.5(64) - Transmission service provider:

CSW recommended that the term "electric utility" include municipally owned utilities for transmission service.

Rather than include municipally owned utilities in the definition of electric utility for transmission service only, the commission has included municipally owned utilities in the definitions of ancillary service provider, eligible transmission service customer, transmission service, and transmission service provider. In addition, the commission has deleted the term "transmission provider" and changed the definition of transmission service provider to capture the proposed definition of transmission provider. Changing the term to "transmission service provider" makes it consistent with the term "ancillary service provider". The commission has also deleted the reference to affiliates in the definition of transmission service provider. The obligation to provide transmission service is on utilities, not their affiliates. In addition, the commission has changed "owns or controls" to "owns or operates", making it consistent with the wording of the definition of electric utility.

Section 25.5(67) - Transmission upgrade:

TUEC and CSW asked whether the commission intended a substantive change by deleting "constructed by a transmission provider" from the existing definition.

The commission did not intend a substantive change. Therefore, the phrase "owned or operated by a transmission service provider" has been added. Use of "owned or operated" is more consistent with the definitions of transmission service provider and electric utility than use of "constructed by".

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting this section, the commission makes other minor modifications for the purpose of clarifying its intent and conforming to the preferred formatting of the *Texas Register.*

This section is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998) (PURA) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction.

Cross Index to Statutes: Public Utility Regulatory Act §14.002.

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

(1) Administrative review - A process under which an application may be approved without a formal hearing.

(2) Affected person - means:

(A) a public utility affected by an action of a regulatory authority;

(B) a person whose utility service or rates are affected by a proceeding before a regulatory authority; or

(C) a person who:

(i) is a competitor of a public utility with respect to a service performed by the utility; or

(ii) wants to enter into competition with a public utility.

(3) Affiliate - means:

(A) a person who directly or indirectly owns or holds at least 5.0% of the voting securities of a public utility;

(B) a person in a chain of successive ownership of at least 5.0% of the voting securities of a public utility;

(C) a corporation that has at least 5.0% of its voting securities owned or controlled, directly or indirectly, by a public utility;

(D) a corporation that has at least 5.0% of its voting securities owned or controlled, directly or indirectly, by:

(i) a person who directly or indirectly owns or controls at least 5.0% of the voting securities of a public utility; or

(ii) a person in a chain of successive ownership of at least 5.0% of the voting securities of a public utility;

(E) a person who is an officer or director of a public utility or of a corporation in a chain of successive ownership of at least 5.0% of the voting securities of a public utility; or

(F) a person determined to be an affiliate under Public Utility Regulatory Act §11.006.

(4) Ancillary service - A service necessary to support the transmission of energy from resources to loads while maintaining reliable operation of transmission service providers' transmission systems in accordance with good utility practice.

(5) Ancillary service provider - An electric or municipally owned utility that provides an ancillary service.

(6) Base rate - Generally, a rate designed to recover the costs of electricity other than costs recovered through a fuel factor, power cost recovery factor, or surcharge.

(7) Commission - The Public Utility Commission of Texas.

(8) Control area - An electric power system or combination of electric power systems to which a common automatic generation control scheme is applied in order to:

(A) match, at all times, the power output of the generators within the electric power system(s) and capacity and energy purchased from entities outside the electric power system(s), with the load within the electric power system(s);

(B) maintain, within the limits of good utility practice, scheduled interchange with other control areas;

(C) maintain the frequency of the electric power system(s) within reasonable limits in accordance with good utility practice; and

(D) obtain sufficient generating capacity to maintain operating reserves in accordance with good utility practice.

(9) Cooperative corporation -

(A) An electric cooperative corporation organized and operating under the Electric Cooperative Corporation Act, Texas Utilities Code Annotated, Chapter 161, or a predecessor statute to Chapter 161 and operating under that chapter; or

(B) A telephone cooperative corporation organized under the Telephone Cooperative Act, Texas Utilities Code, Chapter 162, or a predecessor statute to Chapter 162 and operating under that chapter.

(10) Corporation - A domestic or foreign corporation, joint-stock company, or association, and each lessee, assignee, trustee, receiver, or other successor in interest of the corporation, company, or association, that has any of the powers or privileges of a corporation not possessed by an individual or partnership. The term does not include a municipal corporation, except as expressly provided by the Public Utility Regulatory Act.

(11) Customer class - A group of customers with similar electric usage service characteristics (e.g., residential, commercial, industrial, sales for resale) taking service under one or more rate schedules. Qualified businesses as defined by the Texas Enterprise Zone Act, Texas Government Code, Title 10, Chapter 2303 may be considered to be a separate customer class of electric utilities.

(12) Demand-side management - Activities that affect the magnitude and/or timing of customer electricity usage to produce desirable changes in the utility's load shape.

(13) Demand-side resource or demand-side management resource - Activities that result in reductions in electric generation, transmission, or distribution capacity needs or reductions in energy usage or both.

(14) Distribution line - A power line operated below 60,000 volts, when measured phase-to-phase.

(15) Distributed resource - A generation, energy storage, or targeted demand-side resource, generally between one kilowatt and ten megawatts, located at a customer's site or near a load center, which may be connected at the distribution voltage level (60,000 volts and below), that provides advantages to the system, such as deferring the need for upgrading local distribution facilities.

(16) Electric Reliability Council of Texas (ERCOT) - Refers to the organization and, in a geographic sense, refers to the area served by electric utilities that are not synchronously interconnected with electric utilities outside of the State of Texas.

(17) Electric utility -

(A) A person or river authority that owns or operates for compensation in this state equipment or facilities to produce, generate, transmit, distribute, sell, or furnish electricity in this state. The term includes a lessee, trustee, or receiver of an electric utility and a recreational vehicle park owner who does not comply with Texas Utilities Code, Subchapter C, Chapter 184, with regard to the metered sale of electricity at the recreational vehicle park. The term does not include:

(i) a municipal corporation;

(ii) a qualifying facility;

(iii) an exempt wholesale generator;

(iv) a power marketer;

(v) a corporation described by Public Utility Regulatory Act §32.053 to the extent the corporation sells electricity exclusively at wholesale and not to the ultimate consumer; or

(vi) a person not otherwise an electric utility who:

(I) furnishes an electric service or commodity only to itself, its employees, or its tenants as an incident of employment or tenancy, if that service or commodity is not resold to or used by others;

(II) owns or operates in this state equipment or facilities to produce, generate, transmit, distribute, sell or furnish electric energy to an electric utility, if the equipment or facilities are used primarily to produce and generate electric energy for consumption by that person; or

(III) owns or operates in this state a recreational vehicle park that provides metered electric service in accordance with Texas Utilities Code, Subchapter C, Chapter 184.

(B) With respect to transmission service and ancillary service, the term includes municipally owned utilities and river authorities that are not otherwise subject to the commission's ratesetting authority.

(18) Eligible ancillary service customer - Any person that is an eligible transmission service customer.

(19) Eligible transmission service customer - A transmission service provider (for all uses of its transmission system) or any electric utility, municipally owned utility, federal power marketing agency, exempt wholesale generator, qualifying facility, power marketer, or other person whom the commission has determined to be an eligible transmission service customer.

(20) Energy efficiency - Management of energy resources through efficacy in the utilization of electrical energy through: end-user conservation (a single device, measure, or practice, or a grouping thereof, to reduce energy or demand and that can be measured at the customer meter); utility-controlled options such as optimization of existing and planned generation, transmission, and distribution facilities through direct load management (reduction in peak demand on an electric utility system by direct control of electric devices), cogeneration (reduction in additions to electric utility planned generation expansion as a result of using firm and reliable capacity from an industrial company), peak shaving (reduction in peak demand on an electric utility system by the storage of energy produced during an off-peak period and then utilizing it to serve loads during the peak period), small power production (reduction in additions to electric utility planned generation additions by the installation of dependable, long-life generating plants utilizing direct conversion of renewable resources of electric energy), power plant productivity improvement (reduction in additions to electric utility planned generation expansion as a result of improvements in the productivity of existing or new generating units), and power plant efficiency improvement (reduction in the utilization of natural resources in their conversion to electrical energy as a result of improvements in the efficiency of existing and new generating units); and optimal conversion of renewable resources to electrical energy.

(21) Exempt wholesale generator - A person who is engaged directly or indirectly through one or more affiliates exclusively in the business of owning or operating all or part of a facility for generating electric energy and selling electric energy at wholesale who does not own a facility for the transmission of electricity, other than an essential interconnecting transmission facility necessary to effect a sale of electric energy at wholesale, and who is in compliance with

the registration requirements of §23.19 of this title (relating to Registration of Power Marketers and Exempt Wholesale Generators).

(22) Facilities - All the plant and equipment of an electric utility, including all tangible and intangible real and personal property without limitation, and any and all means and instrumentalities in any manner owned, operated, leased, licensed, used, controlled, furnished, or supplied for, by, or in connection with the business of any electric utility, including any construction work in progress allowed by the commission.

(23) Good utility practice - Any of the practices, methods, and acts engaged in or approved by a significant portion of the electric utility industry during the relevant time period, or any of the practices, methods, and acts that, in the exercise of reasonable judgment in light of the facts known at the time the decision was made, could have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, reliability, safety, and expedition. Good utility practice is not intended to be limited to the optimum practice, method, or act, to the exclusion of all others, but rather is intended to include acceptable practices, methods, and acts generally accepted in the region.

(24) Hearing - Any proceeding at which evidence is taken on the merits of the matters at issue, not including prehearing conferences.

(25) License - The whole or part of any commission permit, certificate, approval, registration, or similar form of permission required by law.

(26) Licensing - The commission process respecting the granting, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license.

(27) Municipality - A city, incorporated village, or town, existing, created, or organized under the general, home rule, or special laws of the state.

(28) Municipally owned utility - Any utility owned, operated, and controlled by a municipality or by a nonprofit corporation whose directors are appointed by one or more municipalities.

(29) Native load customer - A wholesale or retail customer on whose behalf an electric utility, by statute, franchise, regulatory requirement, or contract, has an obligation to construct and operate its system to meet in a reliable manner the electric needs of the customer.

(30) Person - Any natural person, partnership, municipal corporation, cooperative corporation, corporation, association, governmental subdivision, or public or private organization of any character other than an agency.

(31) Planned resources - Generation resources owned, controlled, or purchased by a transmission customer, and designated as planned resources for the purpose of serving load.

(32) Planned transmission service - Use by a transmission service customer of a transmission service provider's transmission system for the delivery of power from planned resources to the customer's loads.

(33) Pleading - A written document submitted by a party, or a person seeking to participate in a proceeding, setting forth allegations of fact, claims, requests for relief, legal argument, and/or other matters relating to a proceeding.

(34) Power cost recovery factor - A charge or credit that reflects an increase or decrease in purchased power costs not in base rates.

(35) Power marketer - A person who becomes an owner of electric energy in this state for the purpose of selling the electric energy at wholesale; does not own generation, transmission, or distribution facilities in this state; does not have a certificated service area; and who is in compliance with the registration requirements of §23.19 of this title (relating to Registration of Power Marketers and Exempt Wholesale Generators).

(36) Pre-existing transmission contract - A contract for transmission or wheeling services that took effect prior to March 4, 1996.

(37) Premises - A tract of land or real estate including buildings and other appurtenances thereon.

(38) Proceeding - A hearing, investigation, inquiry, or other procedure for finding facts or making a decision. The term includes a denial of relief or dismissal of a complaint. It may be rulemaking or nonrulemaking; rate setting or non-rate setting.

(39) Public utility or utility - A person or river authority that owns or operates for compensation in this state equipment or facilities to convey, transmit, or receive communications over a telephone system as a dominant carrier. The term includes a lessee, trustee, or receiver of any of those entities, or a combination of those entities. The term does not include a municipal corporation. A person is not a public utility solely because the person:

(A) furnishes or furnishes and maintains a private system;

(B) manufactures, distributes, installs, or maintains customer premise communications equipment and accessories; or

(C) furnishes a telecommunications service or commodity only to itself, its employees, or its tenants as an incident of employment or tenancy, if that service or commodity is not resold to or used by others.

(40) Public Utility Regulatory Act (PURA) - The enabling statute for the Public Utility Commission of Texas, located in the Texas Utilities Code Annotated, §§11.001 - 63.063, (Vernon 1998).

(41) Rate - Includes:

(A) any compensation, tariff, charge, fare, toll, rental, or classification that is directly or indirectly demanded, observed, charged, or collected by a public utility for a service, product, or commodity described in the definition of utility in the Public Utility Regulatory Act, §31.002; and

(B) a rule, practice, or contract affecting the compensation, tariff, charge, fare, toll, rental, or classification.

(42) Rate class - A group of customers taking electric service under the same rate schedule.

(43) Rate year - The 12-month period beginning with the first date that rates become effective. The first date that rates become effective may include, but is not limited to, the effective date for bonded rates or the effective date for interim or temporary rates.

(44) Regulatory authority - In accordance with the context where it is found, either the commission or the governing body of a municipality.

(45) Renewable energy technology - Any technology that exclusively relies on an energy source that is naturally regenerated over a short time scale and derived directly from the sun (solar-thermal, photochemical, and photoelectric), indirectly from the sun (wind, hydropower, and biomass), or from other natural movements and mechanisms of the environment (geothermal and tidal energy). A renewable energy technology does not rely on energy resources derived from fossil fuels, waste products from fossil fuels, or waste products from inorganic sources.

(46) Renewable resources - A resource that relies on renewable energy technology.

(47) Rule - A statement of general applicability that implements, interprets, or prescribes law or policy, or describes the procedure or practice requirements of the commission. The term includes the amendment or repeal of a prior rule, but does not include statements concerning only the internal management or organization of the commission and not affecting private rights or procedures.

(48) Rulemaking proceeding - A proceeding conducted pursuant to the Administrative Procedure Act, Texas Government Code, §§2001.021 - 2001.037 to adopt, amend, or repeal a commission rule.

(49) Service - Has its broadest and most inclusive meaning. The term includes any act performed, anything supplied, and any facilities used or supplied by a public utility or an electric utility in the performance of its duties under the Public Utility Regulatory Act to its patrons, employees, other public utilities or electric utilities and the public. The term also includes the interchange of facilities between two or more public utilities or electric utilities.

(50) Spanish speaking person - a person who speaks any dialect of the Spanish language exclusively or as their primary language.

(51) Submetering - Metering of electricity consumption on the customer side of the point at which the electric utility meters electricity consumption for billing purposes.

(52) Supply-side resource - A resource, including a storage device, that provides electricity from fuels or renewable resources.

(53) Tariff - The schedule of a utility containing all rates and charges stated separately by type of service and the rules and regulations of the utility.

(54) Tenant - A person who is entitled to occupy a dwelling unit to the exclusion of others and who is obligated to pay for the occupancy under a written or oral rental agreement.

(55) Test year - The most recent 12 months for which operating data for an electric utility are available and shall commence with a calendar quarter or a fiscal year quarter.

(56) Transmission facilities study - An engineering study conducted by a transmission service provider subsequent to a system security study to determine the required modifications to its transmission system, including the detailed costs and scheduled completion date for such modifications, that will be required to provide a requested transmission service.

(57) Transmission interconnection agreement - An agreement that sets forth requirements for physical connection or other terms relating to electrical connection between an eligible transmission service customer and a transmission service provider, including contracts or tariffs for transmission service that include provisions for interconnection. Transmission service providers must have such an agreement with all transmission service providers to whom they are physically connected.

(58) Transmission line - A power line that is operated at 60,000 volts or above, when measured phase-to-phase.

(59) Transmission losses - Energy losses resulting from the transmission of power.

(60) Transmission service - Service that allows a transmission service customer to use the transmission and distribution facilities of electric and municipally owned utilities to efficiently and economically utilize generation resources to reliably serve its loads and to deliver power to another transmission customer.

(61) Transmission service customer - An eligible transmission customer receiving transmission service. Where consistent with the context, "transmission service customer" includes an eligible transmission service customer seeking transmission service.

(62) Transmission service provider - An electric or municipally owned utility that owns or operates facilities used for the transmission of electricity and provides transmission service.

(63) Transmission system - The transmission facilities at or above 60 kilovolts owned, controlled, operated, or supported by a transmission provider or transmission customer that are used to provide transmission service.

(64) Transmission system security study - An assessment by a transmission service provider of the adequacy of the transmission system to accommodate a request for transmission service and whether any costs are anticipated in order to provide transmission service.

(65) Transmission upgrade - A modification or addition to transmission facilities owned or operated by a transmission service provider.

(66) Unplanned resources - Generation resources owned, controlled or purchased by the transmission customer that have not been designated as planned resources.

(67) Unplanned transmission service - Use by a transmission service customer of a transmission service provider's transmission system for the delivery of power from resources that the customer has not designated as planned resources to the customer's loads.

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 August 27, 1998.

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Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
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For further information, please call: (512) 936–7308

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Subchapter D. Records, Reports and Other Required Information

16 TAC §25.87

The Public Utility Commission of Texas (commission) adopts new §25.87 relating to Distribution Unbundling Reports, and new §25.221 relating to Electric Cost Separation with changes to the proposed text as published in the March 13, 1998 *Texas Register* (23 TexReg 2652). The new regulations are adopted under Project Number 16536. Also proposed under this project was new §25.41 relating to Calculation, Rendering, and Form of Certain Electric Bills, which the commission declines to adopt at this time. Section 25.87 is necessary to provide the commission with information concerning the number of meters each utility serves under each customer class and rate schedule, as well as information on each utility's customer service programs. Section 25.221 will require electric utilities to adjust the way they record and account for costs incurred in providing distribution service and customer service. While still consistent with the Federal Energy Regulatory Commission system of accounts, electric utilities will record their distribution service and customer service costs in a way that permits the commission to track costs associated with specific services, functions, or activities.

The commission initiated this rulemaking proceeding by publishing questions on the general topic of distribution functional unbundling. The questions appeared in the December 20, 1996 *Texas Register* (21 TexReg 12340), and comments were received in January, 1997. The staff of the commission conducted a workshop on the classification of distribution functions and activities on February 6, 1997. On October 24, 1997, the commission invited comment on a table which set forth a classification scheme for distribution functions and activities. Comments were received on November 4, 1997. On January 22, 1998 the commission conducted a workshop on the future structure of the electric industry in an effort to address issues raised in the comments.

The commission received written comments and replies to comments on the proposed regulations from Bailey County Electric Cooperative (Bailey); Cap Rock Electric Cooperative (Cap Rock); Center for Energy and Economic Development (CEED); Central and South West Corporation Utilities (CSW), representing Central Power & Light Company, West Texas Utilities Company, and Southwestern Electric Power Company; the Cities of Austin (COA), Bryan, Garland, and Greenville; Coalition of Commercial Customers (CCC); Consumers Union (CU); East Texas Cooperatives (East Texas); El Paso Electric Company (EPE); Environmental Defense Fund (EDF); Enron Energy Services (Enron); Entergy Gulf States (EGS); Guadalupe Valley Electric Cooperative (GVEC); Houston Lighting & Power Company (HL&P); Mid-South Electric Cooperative (MSEC); Office of the Attorney General of Texas (OAG); Office of Public Utility Counsel (OPC); Pedernales Electric Cooperative (PEC); PG&E Corporation (PG&E); Public Citizen; South Texas Electric Cooperative (STEC); Southwestern Public Service (SPS); Texas Electric Cooperatives (TEC); Texas Industrial Energy Customers (TIEC); Texas New-Mexico Power Company (TNMP); Texas Propane Gas Association (TPGA); Texas Ratepayers Alliance to Save Energy (Texas ROSE); and Texas Utilities Electric Company (TUEC). Parties who filed only reply comments were City of Houston (Houston), and National Association of Energy Service Companies (NAESCO). Such comments are summarized below.

A public hearing on the proposal was held at commission offices on May 8, 1998, at 9:00 a.m. Representatives from CSW, CCC, CU, EPE, EDF, Enron, HL&P, OAG, OPC, STEC, SPS, TIEC, TNMP, Texas ROSE, TUEC, and Wharton Country Electric Cooperative, Inc. (Wharton) attended the hearing and provided comments. To the extent that these comments differ from the submitted written comments, such comments are summarized herein.

When these proposed rules were published in the *Texas Register* on March 13, 1998, the commission listed three goals: (1) separate the costs of electric service by function so that the commission can monitor the cost of service components; (2) begin the process of removing regulation from those services and markets which are sufficiently competitive that regulatory-based pricing and oversight are no longer needed; and (3) enhance public awareness of electricity production and delivery costs.

The commission has decided to concentrate on the first goal–cost separation–in this project. The second goal–removing competitive services from regulation–will be addressed in a separate rulemaking proceeding relating to the unbundling of energy service. The third goal, enhancing public awareness of cost, was a proposal to educate the public through changes to the format of monthly electric bills. The commission has decided to defer this matter until it can examine the results of the cost separation rules and any statutory changes made during the 1999 legislative session.

The new regulations are necessary to allow the commission to monitor more closely the activities conducted and the costs incurred in local delivery of electricity and in the provision of electric services to retail customers. The commission adopts a standard form for reporting and cost accounting in order to analyze and assign utilities' fully embedded costs to specific services, and to compare electric utility costs and services. The cost separation regulations require electric utilities to record and account separately for costs incurred in providing generation service, transmission service, distribution service, and customer service, based on the Federal Energy Regulatory Commission system of accounts and regulations specific to the Texas commission. The cost accounting and cost separation principles reflected in these rules are necessary to ensure that the costs associated with competitive services are not being subsidized by customers of regulated services and products. Cost tracking of certain activities by subaccount may become necessary to allow the commission to identify the cost of specific activities.

The new annual reports require electric utilities to provide information pertaining to customer services on forms provided by the commission. The reports relate to meters, tariffs, and related customer services.

After publication of the proposals in Project Number 16536, the commission proposed new regulations relating to the unbundling of energy service to address more fully the goal of removing competitive services from regulation. The energy service unbundling rulemaking was assigned Project Number 19205.

Two groups supported parts of the proposed regulations. Potential competitors to utilities and large customers (CCC, Enron, NAESCO, PG&E, TIEC, and TPGA) favored the cost separation and reporting portions of the proposed regulations. Consumer and environmental groups (CU, EDF, Public Citizen, and Texas ROSE) supported the emissions reporting requirements. The investor-owned utilities (CSW, EPE, EGS, HL&P, SPS, TNMP, and TUEC) generally opposed the proposed rules, often suggesting the deletion or substantial revision of sections. The

electric cooperatives (Bailey, Cap Rock, East Texas, GVEC, MSEC, PEC, STEC, and TEC) were also generally opposed to the proposed regulations and generally argued for exclusions from the rules.

In addition to requesting comments on the proposed rules, the commission requested responses to eight related questions. The first question addressed the application of the rules to utilities of different sizes; the next three questions addressed customer billing; the fifth question addressed reporting of emissions by utilities; the sixth related to the classification scheme for services; the seventh question addressed the quality of the cost separation data; and the final question related to the costs and benefits of the proposed regulations.

In the first question, the commission posed a general question relating to the application of the proposed regulations, particularly to utilities of different size. COA, Bryan, Garland, and Greenville argued that municipal utilities are or should be exempt from the proposed rules. Cap Rock, East Texas, GVEC, PEC, STEC, and TEC claimed that small utilities should be exempt from the requirements of the proposed regulations. CSW, EGS, Enron, EPE, HL&P, PG&E, and TNMP stated that no utility should be exempt, but that some accommodations might be provided to electric cooperatives, such as additional time to comply with the proposed regulations. NAESCO also believed that the proposed rules should apply to all utilities unless the commission determines that the cost of accounting and reporting is too burdensome on small utilities. NAESCO also pointed out that utilities with over 20,000 meters, to comply with the commission's energy efficiency reports, should already have the separate accounting in place to comply with the energy service portion of the rule.

The commission has determined that an improved understanding of the retail activities of all electric utilities is warranted. Although PURA §14.151 grants the commission the authority to regulate the manner in which municipal utilities maintain their books, the commission declines to apply these regulations to municipal utilities at this time. The commission elects to exclude municipal utilities from these regulations, because the commission's motivation for separating costs is to facilitate the correct assignment of costs for competitive services and the degree to which municipal utilities will participate in competitive markets and against competitive services is currently unclear.

The size of a utility may affect the manner in which the information may be efficiently provided; therefore, the commission will consider utility size when deciding whether a utility must file such annual reports. In adopting reporting requirements relating to meters and the services provided to retail customers, the commission concludes that all investor-owned electric utilities and other electric utilities with more than 20,000 meters in service must file an annual report. The commission provides this exclusion because small utilities tend to offer fewer special services, therefore the cost of complying with these reporting requirements is disproportionally higher than for larger utilities. The exemption will apply to approximately 55 cooperative utilities.

The commission will allow an additional twelve months for cooperatives and river authorities to implement new cost accounting requirements compared to the investor- owned utilities. The commission has chosen to defer the compliance deadline for cooperatives to permit the staff and the investor-owned utilities to complete the first iteration of implementation and compliance activities associated with the new regulations.

The second, third, and fourth questions addressed issues related to proposed new §25.41 relating to the Calculation, Rendering, and Form of Certain Electric Bills. The regulations would have required a separate display of the components of electric cost on each retail bill to raise public awareness of cost of electricity production and delivery.

A widely-held view among interested parties was that modification of the electric bills is premature, and that the commission should wait for legislative direction prior to changing electric bill formats (Cap Rock, CU, East Texas, EGS, Garland, Greenville, PEC, TEC, and TUEC). In response to a question relating to the terminology proposed by the commission, several parties indicated that the terms "generation," "transmission," and "distribution" should be relied upon because these terms are already familiar to electric customers. (Cap Rock, EPE, PEC, HL&P) CSW argued that costs should be segregated into the general categories of cost of power and cost of power delivery. STEC argued that "cost of transmission and distribution" was preferable to "cost of power delivery;" "cost of local and state fees, assessments, and taxes" was preferable to "cost of retail taxes;" and "cost of energy conservation" should be deleted. PG&E indicated that the commission should first identify the competitive and monopoly services and then establish terminology for the electric bill that is consistent with the classification of services. TIEC argued that the commission's cost categories should be divided even more than proposed in the rule. TUEC argued against the proposed billing labels in the rule, however, it did not offer any alternative language. The inclusion of metering and billing service with power delivery instead of customer service was recommend by several parties. Cap Rock, East Texas, and PEC indicated that the metering functions should continue to be the responsibility of the distribution electric utility currently providing billing service. Enron stated that two categories should be established for the purpose of billing: one for the cost of power and the other for the cost of metering, billing, and other customer services. CSW and EPE also suggested that the costs of educating customers be recoverable in rates.

CU, PEC stated that customer education should wait for legislative direction. CSW, CU, EPE, Garland, Greenville, GVEC, HL&P and PG&E stated that education should begin before distribution unbundling, and HL&P, PG&E, and SPS stated that it should be provided by others besides the incumbent utility. TIEC argued that the commission should play a central role in the customer education effort, but that the cost separation activities should not be delayed by the education effort.

The commission declines to adopt the proposal at this time. The comments of the parties are instructive and will be considered in the future, possibly in a rulemaking or a report. The estimated cost of implementing the proposed billing changes and the possibility that statutory changes adopted during the 1999 legislative session could require additional changes to customers' bills has persuaded the commission that adoption of this section is premature.

The commission's fifth question addressed the proposed reporting requirement in §25.87 relating to the generation mix and emissions of each electric utility. This question drew significant comment. Non-generating utilities (Cap Rock, East Texas, PEC) stated that the wholesale power purchasers would have no control over the accuracy of the information provided by

the generators of power. GVEC stated that because it purchases all of its power from one source, the reporting of generation mix serves no purpose. MSEC argued that monthly reporting of the generation mix and emissions seemed excessive and might increase costs. CSW suggested that the degree of accuracy required in the rule, 0.5%, was too high and that a lower degree of accuracy, 7.5 to 10%, would be more realistic, especially when considering the uncertainty of emissions associated with purchased power. EDF and Enron stated that purchased power could be reported once a simplifying assumption was made regarding the average emissions of purchased power. EPE also stated that the emissions data associated with purchased power might be especially hard to acquire. HL&P argued that no reporting of generation mix and emission should be required. PG&E stated that generation mix and emission reporting should only be required of suppliers claiming to offer "green" or environmentally-benign power resources. STEC recommended that the commission modify its reporting requirement to an annual report of the previous year and the rule should require all power suppliers to provide the necessary information. TNMP recommended an annual reporting of emissions be limited to only the generation owned by the utility. CU, Public Citizen, and EDF stated that a generation mix and emission report should be simple, standardized, and personalized and must be provided frequently without the necessity of a request by the customer. Conversely, CEED argued that the deletion of the generation mix and emissions reporting requirements would have no impact on the commission's three stated goals.

The commission believes that reporting of generation mix and emissions is important information that should be provided to consumers. Rather than adopt reporting requirements for all utilities at this time, the commission will take up this issue in Project Number 19087 relating to renewable resource tariffs. Upon adoption of a reporting requirement for that project, the commission will reassess whether a broader industry-wide reporting requirement or customer education program is necessary to support the development of competitive markets.

The sixth question addressed a general topic on which the commission sought comment, the classification scheme and definitions for electric services. Proposed §25.221 defined six categories of service: generation service, transmission service, distribution service, metering and billing service, customer service, and energy service. The commission later proposed a similar classification scheme in Project Number 19205, published in the May 8, 1998 issue of the *Texas Register* (23 TexReg 4500). The commission stated in Project Number 19205 that all comments provided on the definitions common to Project Number 16536 would be incorporated by reference in the later project.

The commission received a variety of comments relating to the classification of distribution services, metering and billing services, customer services, and energy services. For example, many utilities stated that metering service should remain a monopoly function provided by the distribution service company (Cap Rock, PEC, STEC). PG&E offered a different perspective, stating that metering could become a competitive service. Cap Rock, PEC, and TUEC argued that the classification of services was premature and should wait direction from the Legislature. CSW stated that the numerous sub-activities in the proposal needed to be defined clearly and consistently. EPE argued that the unbundling would represent a major variance from the FERC Uniform System of Accounts. HL&P suggested that it would be preferable to separate metering and billing in preparation for possible legislative action in the 1999 session. HL&P also argued that several items the rule defines as energy services would be more appropriately classified as distribution services. NAESCO supported the creation of the "energy service" category for cost tracking. OPC argued that the fundamental goal of unbundling is to prevent monopoly services from subsidizing competitive services, but noted that the rule does not provide for a review process to prevent cross-subsidies. TIEC argued that costs should be unbundled to a greater extent than in the proposal. Correspondingly, TIEC argued for the creation of new cost categories, such as public policy programs, power merchant services, and ancillary services. TNMP argued that ancillary services should be classified as generation services rather than transmission services. Additionally, TNMP urged the Commission to track and report costs according to only the six categories in the proposal, not the various subcategories. Texas ROSE suggested that the commission create a separate cost category to track low-income programs.

It is not necessary that the commission provide an exhaustive response at this time, because these issues are more closely related to Project Number 19205. However, from the comments received to this and related questions on the labeling of monthly electric bills, the commission is persuaded that the terms "generation," "transmission," and "distribution" are familiar to customers. Furthermore, the commission finds that Enron's recommendation that the commission should create a category that includes metering, billing, and all other customer services has merit. Therefore, the commission adopts general definitions for four terms: generation service, transmission service, distribution service, and customer service. The term "distribution service" is limited to the low- voltage delivery of power from the transmission system to customers. Other services and functions historically associated with the term "distribution" are grouped in the term "customer service". The principal distinction relates to the division of wires-related services (distribution services) and customer-related services. Therefore, customer service includes subcategories such as metering service, billing service, tariff administration, and the provision of related energy services. It is not necessary that the commission adopt detailed definitions for each component of customer service at this time to achieve the cost separation goal that is the primary intent of this project. However, the commission believes that the costs for these subcategories should be separately recorded and would encourage utilities to begin tracking these costs separately even before the commission adopts specific rules to define the subcategories.

The commission requested comment on the appropriate cost data that should be relied upon during the compliance phase of these proceeding. Of the eight questions asked, the commission received the greatest diversity of responses to this question. Cap Rock, CSW, Enron, HL&P, PEC, SPS, and TIEC argued in favor of using the utilities' most recent cost of service study in the compliance filing. TNMP argued for the use of the same cost of service study used by the commission to set transmission pricing in ERCOT. OPC argued that the sufficiency of previously filed cost of service studies would depend on the commission's use of the results of the unbundling compliance filings. If the commission wants to use the results as a customer information and education tool, then old studies are probably appropriate. The cost of service studies upon which those unbundled rates are based should be updated if the commission intends to use the unbundled costs derived from old

cost of service studies to identify and prevent cross- subsidies between service offerings, or if the commission or the legislature might allocate any future recovery of stranded costs or non-bypassable access charge on the basis of the unbundled costs. OAG recommended that the commission require updated cost of service studies because so many are old or were developed through stipulation. CCC argued that cost of service studies over three years old or studies that show a relative rate of return in excess of two percentage points above or below 100% should be updated to eliminate historical allocation disparities. EGS observed that a utility's past cost of service studies will not have the historic embedded costs separated into the functional definitions proposed. GVEC argued that the 75th legislature exempted them from preparing a new cost of service study if one had been prepared within the last five years. STEC argued that the commission should provide distribution utilities an exemption from updating their cost of service studies if they plan to modify their cost accounting software to track costs as required by the proposed rules. TPGA argues that out-of-date cost of service studies will cause difficulty in separating out competitive from monopoly activities. PG&E suggested that the commission first determine which services are viably competitive before deciding whether an updated cost of service study is needed.

The commission concludes that for comparative and educational purposes, the utilities' cost of service studies need not be updated. However, use of unbundled costs based on an outdated cost of service study would not be suitable for all purposes. Accordingly, the commission will not require utilities to update their cost of service studies to comply with this proposal.

The commission disagrees with PG&E's assertion that an activity or service must be found competitive before the cost separation occurs. The commission believes that utilities can begin recording separated costs in anticipation that the commission or the legislature will someday classify the activity as competitive. Most importantly, the commission's goal is to begin recording separated costs so when services become competitive, the costs embedded in utility rates can be more easily identified.

The commission revises its cost separation compliance requirements from a rate case style filing requirement to a one-time filing of a report describing the utilities' cost separation implementation plans. To support this change, the commission staff will develop cost separation guidelines for investor-owned utilities and cooperatives and they will calculate unbundled unit costs for investor-owned utilities. The guidelines will provide detailed guidance to the utilities regarding the methodology that the staff will use to calculate the utilities' unbundled unit costs. The cost separation guidelines for the investor-owned utilities will be considered for adoption in September or October of 1998. The calculation of the unbundled unit costs will be completed by December 31, 1998. The cost separation guidelines for cooperatives will be developed after the staff completes the calculation of the investor-owned utilities' unbundled unit costs.

The commission's eighth question addressed the costs and benefits of the proposed rules. When the proposal was published, the commission estimated that, depending on the size of the utility, it would cost approximately $20,000 to $2.5 million per utility to comply with the proposed rules. The commission recognized the difficulty of estimating the cost of compliance, and invited the utilities to estimate these costs. Those parties who commented on the cost of compliance (Bailey, Cap Rock, CSW, Garland, Greenville, East Texas, EPE, EGS, GVEC, HL&P, MSEC, PEC, STEC, SPS, TEC, TNMP, TUEC) each stated that the commission's estimate was too low, and provided estimates as high as $14 million for one-time compliance costs. The majority of these costs were associated with the implementation of new §25.41 relating to the form of customers' monthly bills.

The commission shares parties' concerns that the cost of changing the format of customers' bills could exceed the benefits, especially in the early years. The parties' comments and the uncertainty of statutory changes during the upcoming legislative session persuaded the commission to defer the adoption of new regulations relating to the format of customers' bills. The commission does not desire to burden the utilities or their customers with excessive costs that may not produce commensurate long-term benefits.

The parties were invited to comment on the proposed regulations in addition to the eight questions. In light of the comments received regarding competition in the provision of metering and billing service and related retail services, the commission makes the following changes to §25.87 relating to Distribution Unbundling Reports.

The commission adopts with changes a reporting requirement relating to meters and metering technologies. This is a new reporting requirement that will provide baseline data and annual updates. The paragraph will expire on April 1, 2001 because the commission anticipates that the way in which metering service is provided will change, and will make these reporting requirements unnecessary. The data that the commission requires at this time include the number of different types of meters in use, any special metering activities or investments in which the utility is engaged, and the manner in which metered data are transferred to the utility billing system. Because some meters facilitate the provision of special or innovative rate designs and demand-side management services, the reporting of metering technologies will help the commission to identify opportunities for increased efficiency in the use, control, and measurement of electricity. These data will also aid in the development of policies relating to metering service.

To fulfill its second goal of removing regulation from those services and markets which are sufficiently competitive, the commission has determined that it needs better information about the retail services offered by the utilities that it regulates. While many of these services are provided pursuant to a tariff, certain services and activities are provided to retail customers in an informal manner. The commission adopts with changes a reporting requirement relating to customer services provided to retail customers, including the revenues and number of customers obtaining the service under each tariff, and the participation level for each non-tariff service offered by the utility. This is a new reporting requirement; however, many of these data have been reported by utilities with more than 20,000 customers as part of the biennial energy efficiency plan report filed since 1985 pursuant to §23.22 relating to Energy Efficiency Plan. These data will allow the commission to understand the programs and activities associated with the cost information reported and tracked pursuant to §25.221 relating to Electric Cost Separation.

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting this

section, the commission makes other minor modifications for the purpose of clarifying its intent.

These sections are adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052 (Vernon 1998), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure; and specifically, §14.151, which requires a public utility to keep its books, accounts, records, and memoranda in the form and manner prescribed by the Commission, and §38.002 and §38.003, which provides the commission with authority to adopt reasonable standards and classifications with respect to electric services.

Cross Index to Statutes: Public Utility Regulatory Act §14.002, §14.052, §14.151, §38.002, and §32.003.

§25.87. Distribution Unbundling Reports.

(a) Purpose. The purpose of this section is to require the filing of certain reports by affected utilities.

(b) Application. This section shall apply to all investor-owned electric utilities and to other electric utilities that provide retail electric utility service in Texas to more than 20,000 meters in service as measured on the last day of the reporting year. This section shall not apply to municipal utilities.

(c) Compliance and timing. Affected utilities shall file annual reports with the commission's filing clerk on the last working day of March each year, which shall cover the 12 months of the preceding calendar year. The first such report may cover months prior to the effective date of this section.

(d) Definitions. As used in this section, the terms affected utility, generation service, transmission service, distribution service, and customer service have the meanings set forth in §25.221 of this title (relating to Electric Cost Separation).

(e) Reports. Affected utilities shall file the following reports on forms provided by the commission.

(1) Meters. The report shall indicate the number of meters in service at year end by customer class, rate schedule, metering technology, and any other information requested by the commission. The report shall describe any non-routine meter replacement activities, end-use and metering research, and special metering activities, and shall state the affected utility's goals with respect to improvements in metering technology. The report shall indicate the manner in which meters are read and the data communicated to the billing system. This requirement will expire on April 1, 2001.

(2) Customer service.

(A) Tariffs. The report shall indicate the number of customers taking service under each rate design or service regulation during the reporting year, the base rate, fixed fuel factor, and purchased power recovery factor revenues, and any other information requested by the commission.

(B) Non-tariffed activities. The report shall be organized by individual activity, program, or service and shall include a description of each. The report shall indicate the number of participants or other measure of activity during the reporting year, the charge, compensation, or rebate, if any, related to the activity, program, or service, and any other information requested by the commission.

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 August 27, 1998.

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Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
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For further information, please call: (512) 936–7308

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Subchapter I. Transmission and Distribution

16 TAC §25.221

These sections are adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052 (Vernon 1998), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure; and specifically, §14.151, which requires a public utility to keep its books, accounts, records, and memoranda in the form and manner prescribed by the Commission, and §38.002 and §38.003, which provides the commission with authority to adopt reasonable standards and classifications with respect to electric services.

Cross Index to Statutes: Public Utility Regulatory Act §14.002, §14.052, §14.151, §38.002, and §32.003.

§25.221. Electric Cost Separation.

(a) Purpose. The purpose of this section is to identify the costs incurred by electric utilities that provide retail electric utility service, and to separate such costs into four categories: generation service, transmission service, distribution service, and customer service. This section establishes procedures for cost separation.

(b) Application. This section shall apply to electric utilities that provide retail electric service in Texas. This section shall not apply to municipal utilities.

(c) Definitions. As used in this section, the following terms have the following meanings unless the context clearly indicates otherwise:

(1) Affected utilities - shall refer to all utilities to which this section applies.

(2) Customer service - A service that consists of metering, billing, tariff administration, energy service, and related services. Customer service does not include generation service, transmission service, or distribution service; however, it does include all retail customer interaction necessary for the administration of tariffs that include charges for generation service, transmission service, and distribution service.

(3) Distribution service - A service that ensures safe and reliable delivery of electric power from the transmission system to retail customers, generally, but not exclusively, below 60 kilovolts. Distribution service does not include generation service, transmission service, or customer service.

(4) Generation service - The production and purchase of electricity for retail customers and the production, purchase, and sale of electricity in the wholesale power market.

(5) Transmission service - As defined in §25.5 of this title (relating to Definitions). For the purpose of this section, ancillary service, as defined in §25.5 of this title, is a component of transmission service.

(6) Working day - A day on which the commission is open for the conduct of business.

(d) Cost separation. Affected utilities shall maintain a cost-accounting and records system based on the Federal Energy Regulatory Commission chart of accounts system, as it may be updated, to ensure that the costs associated with generation service, transmission service, distribution service, and customer service are accurately and separately identified. Affected utilities shall create and maintain any additional accounts necessary to identify and separate costs incurred to provide retail electric utility service. Within the customer service category, the utility shall separate its costs on its books in sufficient detail to track costs specific to unique services, activities, or functions. The commission may adopt cost separation guidelines to assist affected utilities in separating their costs.

(e) Compliance filing.

(1) Affected utilities shall report to the commission on strategies to comply with the cost separation requirements of this section in accordance with the commission cost separation guidelines. The filing shall provide a narrative that discusses the types of distribution and customer service costs and activities that the utility will begin to track separately to comply with this section. The narrative shall explain the changes needed in accounting procedures, activity tracking, timekeeping, and other management functions necessary to track the newly segregated costs, including a list that identifies costs that the utility will begin to track separately.

(2) Compliance filing date. Affected utilities shall make a compliance filing according to the following schedule:

(A) Investor-owned electric utilities shall file by December 31, 1998.

(B) All other affected utilities shall file by December 31, 1999.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 27, 1998.

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Public Utility Commission of Texas
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For further information, please call: (512) 936–7308

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Chapter 26. Substantive Rules Applicable to Telecommunications Service Providers

Subchapter A. General Provisions

16 TAC §26.5

The Public Utility Commission of Texas (PUC or commission) adopts new §26.5 relating to Definitions with changes to the proposed text as published in the May 15, 1998 *Texas Register* (23 TexReg 4734). Project Number 19120 is assigned to this proceeding. The proposed new section will replace §23.3 of this title (relating to Definitions) as it concerns telecommunications service. Proposed new §26.5 gathers all the general definitions related to telecommunications service located throughout Chapter 23 of this title into one section. The only definitions that remain in other sections are definitions that are section specific and would adversely affect other sections of Chapter 26 if moved to the general definition section. Definitions have been updated to reflect changes in the industries regulated by the commission and to reflect commission policy and existing practices.

The Appropriations Act of 1997, House Bill 1, Article IX, Section 167 (Section 167) requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Such reviews shall include, at a minimum, an assessment by the agency as to whether the reason for adopting or readopting the rule continues to exist. The PUC held three workshops to conduct a preliminary review of its rules. As a result of these workshops, the PUC is reorganizing its current substantive rules located in 16 Texas Administrative Code (TAC) Chapter 23 to (1) satisfy the requirements of Section 167; (2) repeal rules no longer needed; (3) update existing rules to reflect changes in the industries regulated by the commission; (4) do clean-up amendments made necessary by changes in law and commission organizational structure and practices; (5) reorganize rules into new chapters to facilitate future amendments and provide room for expansion; and (6) reorganize the rules according to the industry to which they apply. Chapter 26 has been established for all commission substantive rules applicable to telecommunications service providers.

In the published review of §23.3 of this title in the May 15, 1998 *Texas Register* (23 TexReg 4935) the commission requested specific comments on the Section 167 requirement as to whether the reason for adopting §23.3 continues to exist in adopting corresponding §26.5. The commission received no comments on the Section 167 requirement. The commission finds that the reason for adopting §23.3 continues to exist in adopting corresponding §26.5 of this title.

The commission received comments on the proposed section from AT&T Communications of the Southwest, Inc. (AT&T); and Central Power and Light Company, Southwestern Electric Power Company, and West Texas Utilities Company, the electric utilities of the Central and South West Corporation that provide retail electric service in Texas (collectively, CSW). CSW referenced both §25.5 of this title (relating to Definitions) as it relates to electric service, and §26.5 of this title (relating to Definitions) as it relates to telecommunications service, in their comments. Therefore, CSW's comments regarding "General Comments Regarding Consolidation" and "Consistency of Definitions" are summarized in both the preambles for §25.5 and §26.5. CSW's comments relating to transmission service and specific definitions only concerned §25.5 as it relates to electric service and are not summarized in this preamble for §26.5.

Texas Utilities Electric Company (TUEC) in its comments on §25.5 recommended that the definition of the term "applicant" be deleted because the term is straightforward and does not need a definition. Also, the term is used both to refer to a person

seeking service from a utility in some substantive rules and to a person seeking relief from the commission in other substantive rules. The commission agrees with TUEC and deleted the term from §25.5. The commission also deletes the term from §26.5 for consistency.

General comments:

AT&T expresses a general concern that the proposed reorganization of commission definitions may have "unintended consequences". As an example, AT&T points out that the definition of the term "access services" is limited to dominant certificated telecommunications utilities (DCTUs). AT&T states that the limitation to DCTUs is appropriate within the context of Substantive Rule §23.23(d) of this title (relating to Rate Design), but not for general use of the term.

The commission realizes that it must take care not to have unintended consequences on other rule sections in consolidating its definitions and approached this consolidation process with this concern in mind. The commission believes that §26.5 as adopted will not have unintended consequences on other rule sections.

AT&T is concerned that the use of general definitions could result in the commission's rules being applied to entities over which it has only limited jurisdiction. AT&T again refers to the definition of "access service" to show that, if the definition is not tied to Substantive Rule §23.23(d), it could be misinterpreted to apply to CTUs other than DCTUs.

The commission will state any limitations to definitions for a particular rule in the rule section or subsection to which the limitation applies.

CSW commented that the commission should make its intent clear as to specific definitions. CSW also commented that this effort to consolidate definitions should avoid substantive changes, which should instead be addressed in a separate rulemaking.

The commission will clarify its intent, as appropriate, through its response to comments. The commission disagrees with the comments of CSW as they relate to substantive changes; the scope of change which may be accomplished by this rulemaking is established by the commission's published proposal. As stated in the preamble to the proposed rule, one of the purposes of this rulemaking includes updating existing rules to reflect changes in the industries regulated by the commission.

CSW recommended that terms defined by statute be defined in §26.5 by simply referring to the relevant statutory provisions. CSW also recommends that the definitions in §26.5 be consistent with the definitions in the commission's Procedural Rules.

Wherever possible, the commission has avoided incorporating definitions by reference in the Substantive Rules, so that persons using the commission's Substantive Rules will not need other documents to determine the meaning of the terms used in the Substantive Rules. Customers of utilities who contact the commission regarding a specific question or problem with a utility often request a copy of the specific substantive rule section that relates to their question or problem. These customers seldom have a copy of the statutes available to assist them in understanding these rules. Where a term is defined by statute, the commission has generally defined the term identically in §26.5. The commission believes that §26.5 and the commission's Procedural Rules are consistent, if not identical.

Section 26.5(63) - Dominant carrier:

AT&T recommends the PURA definition for "dominant carrier" be used instead of the proposed definition.

The commission agrees and has made this change.

Section 26.5(105) - Interexchange carrier (IXC):

AT&T recommends the definition of "interexchange carrier (IXC)" be changed to make clear that incumbent local exchange companies (ILECs), and their affiliates, who provide interLATA long distance service are subject to the same rules as other IXCs. AT&T proposes that the definition of "interexchange carrier" be modified to remove the phrase "other than a DCTU" and to add the sentence "The term also includes an ILEC or ILEC affiliate to the extent that it is providing such service."

The commission agrees DCTUs should not be automatically excluded from being considered as an IXC. Furthermore, the concern expressed by AT&T is not necessarily limited to ILECs. The commission should retain discretion to act on a case by case basis in deciding if a CTU should be considered an IXC. Therefore, the definition has been modified to provide the commission with this discretion.

Section 26.5(174) - Regulatory authority:

AT&T recommends the definition of "regulatory authority" be deleted as unnecessary. Alternatively, AT&T proposes the term be modified to exclude the reference to municipalities, as municipalities have no jurisdiction to regulate the entry, rates, or services of telecommunications utilities.

The commission declines to delete or modify the term "regulatory authority". The term as defined in the Substantive Rules is consistent with the term as defined in PURA, Subtitle A, §11.003(17), which relates to provisions applicable to all utilities. Because the municipality reference is preceded by "in accordance with the context where it is found" the commission does not share AT&T's concern regarding the definition. The commission recognizes that municipalities do not currently have the sort of regulatory jurisdiction described by AT&T over telecommunications services.

Definitions consolidated into §26.5 from §23.91 of this title (relating to Long Run Incremental Cost Methodology for Dominant Certificated Telecommunications Utility (DCTU) Services):

AT&T suggests that the terms "group of services", "measure of unit cost", "network access", "subcategories of basic network functions", and "switching and switch functions" that were consolidated into the general definitions section from §23.91 be deleted and remain in §23.91 as section specific definitions.

The commission agrees with AT&T on these five terms and deletes the terms from §26.5. Definitions of these terms will remain in §23.91.

AT&T recommended that some definitions be modified to delete language which limits their application to DCTUs, when the definitions should encompass all carriers. AT&T suggested modifications to the terms "access customer", "access services", "direct-trunked transport", "equal access", "meet point billing", "percent interstate usage", "switched access", "switched access minutes", "switched transport", and "tandem-switched transport".

The commission finds that in the new Chapter 26 general definitions section the more encompassing term "certificated telecommunications utility" is appropriate for these terms. However, in Chapter 23 the terms identified by AT&T and others sometimes only apply to DCTUs. Therefore, the commission has amended the definition of these terms and other terms as necessary, containing the language "certificated telecommunications utility" to include the sentence, "In Chapter 23 of this title, this term is applicable only to dominant certificated telecommunications utilities when the context clearly indicates."

The commission also modifies the terms "access customer" and "equal access" to recognize that they may apply to holders of certificates of operating authority and service provider certificates of operating authority, who, although required to have their rates on file with the commission, are not required to have an access service tariff.

AT&T suggested minor modifications to clarify other terms as follows: "certificated service area", clarify that the term also applies to service provider certificate of operating authority holders; "experimental service", delete unnecessary language as a result of moving the definition to the new section; "extended local calling service (ELCS)", add reference to subsection (c) of §23.49 of this title (relating to Telephone Extended Area Service (EAS) and Expanded Toll- free Local Calling Areas); "per call blocking", change the word "provider" to the word "utility"; "Public Utility Regulatory Act (PURA)", change citation to Texas Utilities Code to reference §§11.001 "et seq."; and "telecommunications utility", delete the reference to §51.002(8) from the citation to PURA and reference only §51.002(11).

The commission agrees with AT&T's suggestions regarding "certificated service area", "experimental service", and "extended local calling service" and has made the changes as suggested. The commission disagrees with AT&T's suggestion regarding "per-call blocking". Changing the word "provider" to the word "utility" is not a minor change and interested persons have not had an opportunity to comment on such a change. The commission also declines to modify the citation to the Texas Utilities Code in the definition of PURA. *The Bluebook, A Uniform System of Citation* recommends that when citing consecutive sections or subsections, provide the inclusive numbers when possible instead of "et seq.". The commission agrees with AT&T that the reference to §51.002(8) should be deleted from the term "telecommunications utility". As a result of deleting the reference to §51.002(8), the commission will repeat the PURA definition for "telecommunications utility" in its Substantive Rules, instead of defining the term with a reference to PURA.

In adopting this section, the commission makes other minor modifications for the purpose of clarifying its intent and to conform to the *Texas Register's* preferred format for definitions. All comments, including any not specifically referenced herein, were fully considered by the commission.

This section is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998) (PURA) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction.

Cross Index to Statutes: Public Utility Regulatory Act §14.002.

§26.5. Definitions.

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

(1) Access customer - Any user of access services which are obtained from a certificated telecommunications utility. In Chapter 23 of this title, this term is applicable only to dominant certificated telecommunications utilities when the context clearly indicates.

(2) Access services -Certificated telecommunications utility services which provide connections for or are related to the origination or termination of intrastate telecommunications services that are generally, but not limited to, interexchange services. In Chapter 23 of this title, this term is applicable only to dominant certificated telecommunications utilities when the context clearly indicates.

(3) Administrative review - A process under which an application may be approved without a formal hearing.

(4) Affected person - means:

(A) a public utility affected by an action of a regulatory authority;

(B) a person whose utility service or rates are affected by a proceeding before a regulatory authority; or

(C) a person who:

(i) is a competitor of a public utility with respect to a service performed by the utility; or

(ii) wants to enter into competition with a public utility.

(5) Affiliate - means:

(A) a person who directly or indirectly owns or holds at least 5.0% of the voting securities of a public utility;

(B) a person in a chain of successive ownership of at least 5.0% of the voting securities of a public utility;

(C) a corporation that has at least 5.0% of its voting securities owned or controlled, directly or indirectly, by a public utility;

(D) a corporation that has at least 5.0% of its voting securities owned or controlled, directly or indirectly, by:

(i) a person who directly or indirectly owns or controls at least 5.0% of the voting securities of a public utility; or

(ii) a person in a chain of successive ownership of at least 5.0% of the voting securities of a public utility;

(E) a person who is an officer or director of a public utility or of a corporation in a chain of successive ownership of at least 5.0% of the voting securities of a public utility; or

(F) a person determined to be an affiliate under Public Utility Regulatory Act §11.006.

(6) Aggregate customer proprietary network information (CPNI) - a configuration of customer proprietary network information that has been collected by a telecommunications utility and organized such that none of the information will identify an individual customer.

(7) Assumed name - Has the meaning assigned by Texas Business and Commerce Code, §36.10.

(8) Automatic dial announcing device (ADAD) - Any automated equipment used for telephone solicitation or collection that:

(A) is capable of storing numbers to be called, or has a random or sequential number generator capable of producing numbers to be called; and

(B) alone or in conjunction with other equipment, can convey a prerecorded or synthesized voice message to the number called without the use of a live operator.

(9) Automatic number identification (ANI) - The automatic transmission by the local switching system of the originating telephone number to an interexchange or other communications carrier or to the operator of a 911 system.

(10) Base rate area - A specific area within an exchange area, as set forth in the dominant certificated telecommunications utilities' tariffs, maps or descriptions, wherein local exchange service is furnished at uniform rates without extra mileage charges.

(11) Basic local telecommunications service - flat rate residential and business local exchange telephone service, including primary directory listings; tone dialing service; access to operator services; access to directory assistance services; access to 911 service where provided by a local authority or dual party relay service; the ability to report service problems seven days a week; lifeline and tel-assistance services; and any other service the commission, after a hearing, determines should be included in basic local telecommunications service.

(12) Baud - Unit of signaling speed reflecting the number of discrete conditions or signal elements transmitted per second.

(13) Bellcore - Bell Communications Research, Inc.

(14) Bit Error Ratio (BER) - The ratio of the number of bits received in error to the total number of bits transmitted in a given time interval.

(15) Bit Rate - The rate at which data bits are transmitted over a communications path, normally expressed in bits per second.

(16) Bona fide request - A written request to an incumbent local exchange company (ILEC) from a certificated telecommunications utility or an enhanced service provider, requesting that the ILEC unbundle its network/services to the extent ordered by the Federal Communications Commission. A bona fide request indicates an intent to purchase the service subject to the purchaser being able to obtain acceptable rates, terms, and conditions.

(17) Business service - A telecommunications service provided a customer where the use is primarily of a business, professional, institutional or otherwise occupational nature.

(18) Busy hour - The clock hour each day during which the greatest usage occurs.

(19) Busy season - That period of the year during which the greatest volume of traffic is handled in a switching office.

(20) Call aggregator - Any person or entity that owns or otherwise controls telephones intended to be utilized by the public, which control is evidenced by the authority to post notices on and/or unblock access at the telephone.

(21) Call splashing - Call transferring (whether caller-requested or operator service provider-initiated) that results in a call being rated and/or billed from a point different from that where the call originated.

(22) Call transferring - Handing off a call from one operator service provider (OSP) to another OSP.

(23) Caller identification materials (caller ID materials) - Any advertisements, educational materials, training materials, audio and video marketing devices, and any information disseminated about caller ID services.

(24) Caller identification service (caller ID service) - A service offered by a telecommunications provider that provides calling party information to a device capable of displaying the information.

(25) Calling area - The area within which telecommunications service is furnished to customers under a specific schedule of exchange rates. A "local" calling area may include more than one exchange area.

(26) Calling party information -

(A) the telephone listing number and/or name of the customer from whose telephone instrument a telephone number is dialed; or

(B) other information that may be used to identify the specific originating number or originating location of a wire or electronic communication transmitted by a telephone instrument.

(27) Capitalization - Long-term debt plus total equity.

(28) Carrier of choice - An option that allows an individual to choose an interexchange carrier for long distance calls made through Telecommunications Relay Service.

(29) Carrier-initiated change - A change in the telecommunications utility serving a customer that was initiated by the telecommunications utility to which the customer is changed, whether the switch is made because a customer did or did not respond to direct mail solicitation, telemarketing, or other actions initiated by the carrier.

(30) Central office - A switching unit in a telecommunications system which provides service to the general public, having the necessary equipment and operating arrangements for terminating and interconnecting customer lines and trunks or trunks only.

(31) Census block group (CBG) - A United States Census Bureau geographic designation that generally contains between 250 and 550 housing units.

(32) Certificated service area - The geographic area within which a company has been authorized to provide basic local telecommunications services pursuant to a certificate of convenience and necessity (CCN), a certificate of operating authority (COA), or a service provider certificate of operating authority (SPCOA) issued by the commission.

(33) Certificated telecommunications utility - A telecommunications utility that has been granted either a certificate of convenience and necessity (CCN), a certificate of operating authority (COA), or a service provider certificate of operating authority (SPCOA).

(34) Class of service or customer class - A description of utility service provided to a customer which denotes such characteristics as nature of use (business or residential) or type of rate (flat rate or message rate). Classes may be further subdivided into grades, denoting individual or multiparty line or denoting quality of service.

(35) Commission - The Public Utility Commission of Texas.

(36) Competitive exchange service - Any of the following services, when provided on an inter- or intrastate basis within an exchange area: central office based PBX- type services for systems of 75 stations or more; billing and collection services; (high speed private line services of 1.544 megabits or greater; customized services; private line and virtual private line services; resold or shared local exchange telephone services if permitted by tariff; dark fiber services; non-voice data transmission service when offered as a separate service and not as a component of basic local telecommunications service; dedicated or virtually dedicated access services; services for which a local exchange company has been granted authority to engage in pricing flexibility pursuant to §23.27 of this title (relating to Rate-Setting Flexibility); any service initially provided within an exchange after October 26, 1992, if first provided by an entity other than the incumbent local exchange company (companies) certificated to provide service within that exchange; and any other service the commission declares is not local exchange telephone service.

(37) Completed call - a call that is answered by the called party.

(38) Complex service - The provision of a circuit requiring special treatment, special equipment, or special engineering design, including but not limited to private lines, WATS, PBX trunks, rotary lines, and special assemblies.

(39) Consumer good or service -

(A) real property or tangible or intangible personal property that is normally used for personal, family, or household purposes, including personal property intended to be attached to or installed in any real property;

(B) a cemetery lot;

(C) a time-share estate; or

(D) a service related to real or personal property.

(40) Consumer telephone call - An unsolicited call made to a residential telephone number to:

(A) solicit a sale of a consumer good or service;

(B) solicit an extension of credit for a consumer good or service; or

(C) obtain information that will or may be used to directly solicit a sale of a consumer good or service or to extend credit for the sale.

(41) Cooperative - An incumbent local exchange company that is a cooperative corporation.

(42) Cooperative corporation -

(A) An electric cooperative corporation organized and operating under the Electric Cooperative Corporation Act, Texas Utilities Code Annotated, Chapter 161, or a predecessor statute to Chapter 161 and operating under that chapter; or

(B) A telephone cooperative corporation organized under the Telephone Cooperative Act, Texas Utilities Code, Chapter 162, or a predecessor statute to Chapter 162 and operating under that chapter.

(43) Corporate name - Has the meaning assigned by Texas Business Corporation Act, Article §2.05.

(44) Corporation - A domestic or foreign corporation, joint-stock company, or association, and each lessee, assignee, trustee, receiver or other successor in interest of the corporation, company, or association, that has any of the powers or privileges of a corporation not possessed by an individual or partnership. The term does not include a municipal corporation, except as expressly provided by the Public Utility Regulatory Act.

(45) Custom calling-type services - Call management services available from a central office switching system including, but not limited to, call forwarding, call waiting, caller ID, or automatic recall.

(46) Customer access line - A unit of measurement representing a telecommunications circuit or, in the case of ISDN, a telecommunications channel designated for a particular customer. One customer access line shall be counted for each circuit which is capable of generating usage on the line side of the switched network or a private line circuit, regardless of the quantity or ownership of customer premises equipment connected to each circuit. In the case of multiparty lines, each party shall be counted as a separate customer access line.

(47) Customer-initiated change - A change in the telecommunications utility serving a customer that is initiated by the customer and is not the result of direct mail solicitation, telemarketing, or other actions initiated by the carrier.

(48) Customer premises equipment (CPE) - Telephone terminal equipment located at a customer's premises. This does not include overvoltage protection equipment, inside wiring, coin-operated (or pay) telephones, "company-official" equipment, mobile telephone equipment, "911" equipment, equipment necessary for provision of communications for national defense, or multiplexing equipment used to deliver multiple channels to the customer.

(49) Customer proprietary network information (CPNI), customer-specific - Any information compiled about a customer by a telecommunications utility in the normal course of providing telephone service that identifies the customer by matching such information with the customer's name, address, or billing telephone number. This information includes, but is not limited to: line type(s), technical characteristics (e.g., rotary service), class of service, current telephone charges, long distance billing record, local service billing record, directory assistance charges, usage data, and calling patterns.

(50) Customer trouble report - Any oral or written report from a customer or user of telecommunications service received by any telecommunications utility relating to a physical defect, difficulty, or dissatisfaction with the service provided by the telecommunications utility's facilities. Each telephone or PBX switchboard position reported in trouble shall be counted as a separate report when several items are reported by one customer at the same time, unless the group of troubles so reported is clearly related to a common cause.

(51) dBrn - A unit used to express noise power relative to one Pico watt (-90 dBm).

(52) dBrnC - Noise power in dBrn, measured with C-message weighting.

(53) dBrnCO - Noise power in dBrnC referred to or measured at a zero transmission level point.

(54) D-Channel - The integrated-services-digital-network out-of-band signaling channel.

(55) Dedicated signaling transport - Transmission of out-of-band signaling information between an access customer's common channel signaling network and a certificated telecommunications utility's signaling transport point on facilities dedicated to the use of

a single customer. In Chapter 23 of this title, this term is applicable only to dominant certificated telecommunications utilities when the context clearly indicates.

(56) Depreciation expenses - The charges based on the depreciation accrual rates designed to spread the cost recovery of the property over its economic life.

(57) Direct-trunked transport - Transmission of traffic between the serving wire center and another certificated telecommunications utility's office, without intermediate switching. It is charged on a flat-rate basis. In Chapter 23 of this title, this term is applicable only to dominant certificated telecommunications utilities when the context clearly indicates.

(58) Disconnection of telephone service - The event after which a customer's telephone number is deleted from the central office switch and databases.

(59) Discretionary services - Services that may be added, at the user's option, to basic local telecommunications service, such as call waiting, call forwarding, and caller ID.

(60) Distance learning- Instruction, learning, and training that is transmitted from one site to one or more sites by telecommunications services that are used by an educational institution predominantly for such instruction, learning, or training– including: video, data, voice, and electronic information.

(61) Distribution lines - Those lines from which the end user may be provided direct service.

(62) Dominant carrier- A provider of a communication service provided wholly or partly over a telephone system who the commission determines has sufficient market power in a telecommunications market to control prices for that service in that market in a manner adverse to the public interest. The term includes a provider who provided local exchange telephone service within certificated exchange areas on September 1, 1995, as to that service and as to any other service for which a competitive alternative is not available in a particular geographic market. In addition with respect to:

(A) intraLATA long distance message telecommunications service originated by dialing the access code "1-plus," the term includes a provider of local exchange telephone service in a certificated exchange area for whom the use of that access code for the origination of "1-plus" intraLATA calls in the exchange area is exclusive; and

(B) interexchange services, the term does not include an interexchange carrier that is not a certificated local exchange company.

(63) Dominant certificated telecommunications utility (DCTU) - A certificated telecommunications utility that is also a dominant carrier. Unless clearly indicated otherwise, the rules applicable to a DCTU apply specifically to only those services for which the DCTU is dominant.

(64) Dual-party relay service - A service using oral and printed translations, by either a person or an automated device, between hearing- or speech-impaired individuals who use telecommunications devices for the deaf, computers, or similar automated devices, and others who do not have such equipment.

(65) Educational institution - Accredited primary or secondary schools owned or operated by state and local government entities or by private entities; institutions of higher education as defined by the Education Code, §61.003(13); the Texas Education Agency, its successors and assigns; regional education service centers established and operated pursuant to the Education Code, Chapter 8; and the Texas Higher Education Coordinating Board, its successors and assigns.

(66) Electing local exchange company (LEC) - A certificated telecommunications utility electing to be regulated under the terms of the Public Utility Regulatory Act, Chapter 58.

(67) Electric utility -

(A) A person or river authority that owns or operates for compensation in this state equipment or facilities to produce, generate, transmit, distribute, sell, or furnish electricity in this state. The term includes a lessee, trustee, or receiver of an electric utility and a recreational vehicle park owner who does not comply with Texas Utilities Code, Chapter 184, Subchapter C, with regard to the metered sale of electricity at the recreational vehicle park. The term does not include:

(i) a municipal corporation;

(ii) a qualifying facility;

(iii) an exempt wholesale generator;

(iv) a power marketer;

(v) a corporation described by Public Utility Regulatory Act §32.053 to the extent the corporation sells electricity exclusively at wholesale and not to the ultimate consumer; or

(vi) a person not otherwise an electric utility who:

(I) furnishes an electric service or commodity only to itself, its employees, or its tenants as an incident of employment or tenancy, if that service or commodity is not resold to or used by others;

(II) owns or operates in this state equipment or facilities to produce, generate, transmit, distribute, sell or furnish electric energy to an electric utility, if the equipment or facilities are used primarily to produce and generate electric energy for consumption by that person; or

(III) owns or operates in this state a recreational vehicle park that provides metered electric service in accordance with Texas Utilities Code, Chapter 184, Subchapter C.

(B) With respect to transmission service and ancillary service, the term includes municipally owned utilities and river authorities that are not otherwise subject to the commission's ratesetting authority.

(68) Element - Unbundled network elements, including: interconnection, physical- collocation, and virtual-collocation elements.

(69) Eligible telecommunications provider (ETP) service area - The geographic area, determined by the commission, containing high cost rural areas which are eligible for Texas Universal Service Funds support under §23.133 or §23.134 of this title (relating to Texas High Cost Universal Service Plan (THCUSP) and Small and Rural Incumbent Local Exchange Company (ILEC) Universal Service Plan).

(70) Embedded customer premises equipment - All customer premises equipment owned by a telecommunications utility, including inventory, which was tariffed or subject to the separations process of January 1, 1983.

(71) End user choice - A system that allows the automatic routing of interexchange, operator-assisted calls to the billed party's chosen carrier without the use of access codes.

(72) Enhanced service provider - A company that offers computer-based services over transmission facilities to provide the customer with value-added telephone services.

(73) Entrance facilities - The transmission path between the access customer's (such as an interexchange carrier's) point of demarcation and the serving wire center.

(74) Equal access -Access which is equal in type, quality and price to Feature Group C, and which has unbundled rates. From an end user's perspective, equal access is characterized by the availability of "1-plus" dialing with the end user's carrier of choice.

(75) Equipment distribution program (EDP) - Program to assist individuals who are deaf or hard of hearing or who have an impairment of speech to purchase specialized telecommunications devices for telephone service access, authorized by 1997 Texas General Laws Chapter 149, to be jointly administered by the commission and the Texas Commission for the Deaf and Hard of Hearing.

(76) Equipment distribution program (EDP) voucher - a voucher issued by Texas Commission for the Deaf and Hard of Hearing under the equipment distribution program, in accordance with its rules, that an eligible individual may use to acquire eligible specialized telecommunications devices from a vendor of such equipment.

(77) Exchange area - The geographic territory delineated as an exchange area by official commission boundary maps. An exchange area usually embraces a city or town and its environs. There is usually a uniform set of charges for telecommunications service within the exchange area. An exchange area may be served by more than one central office and/or one certificated telephone utility. An exchange area may also be referred to as an exchange.

(78) Expenses - Costs incurred in the provision of services that are expensed, rather than capitalized, in accordance with the Uniform System of Accounts applicable to the carrier.

(79) Experimental service - A new service that is proposed to be offered on a temporary basis for a specified period not to exceed one year from the date the service is first provided to any customer.

(80) Extended area service (EAS) - A telephone switching and trunking arrangement which provides for optional calling service by dominant certificated telecommunications utilities within a local access and transport area and between two contiguous exchanges or between an exchange and a contiguous metropolitan exchange local calling area. For purposes of this definition, a metropolitan exchange local calling area shall include all exchanges having local or mandatory EAS calling throughout all portions of any of the following exchanges: Austin metropolitan exchange, Corpus Christi metropolitan exchange, Dallas metropolitan exchange, Fort Worth metropolitan exchange, Houston metropolitan exchange, San Antonio metropolitan exchange, or Waco metropolitan exchange. EAS is provided at rate increments in addition to local exchange rates, rather than at toll message charges.

(81) Extended local calling service (ELCS) - Service provided pursuant to §23.49(c) of this title (relating to Telephone Extended Area Service and Expanded Toll-free Local Calling Areas).

(82) Facilities - All the plant and equipment of a public utility, including all tangible and intangible real and personal property without limitation, and any and all means and instrumentalities in any manner owned, operated, leased, licensed, used, controlled, furnished, or supplied for, by, or in connection with the business of any public utility, including any construction work in progress allowed by the commission.

(83) Foreign exchange (FX) - exchange service furnished by means of a circuit connecting a customer's station to a primary serving office of another exchange.

(84) Foreign serving office (FSO) - Exchange service furnished by means of a circuit connecting a customer's station to a serving office of the same exchange but outside of the serving office area in which the station is located.

(85) Forward-looking common costs - Economic costs efficiently incurred in providing a group of elements or services that cannot be attributed directly to individual elements or services.

(86) Forward-looking economic cost - The sum of the total element long-run incremental cost of an element and a reasonable allocation of its forward-looking common costs.

(87) Forward-looking economic cost per unit - The forward-looking economic cost of the element as defined in this section, divided by a reasonable projection of the sum of the total number of units of the element that the dominant certificated telephone utility (DCTU) is likely to provide to requesting telecommunications carriers and the total number of units of the element that the DCTU is likely to use in offering its own services, during a reasonable time period.

(88) Geographic scope - The geographic area in which the holder of a Certificate of Operating Authority or of a Service Provider Certificate of Operating Authority is authorized to provide service.

(89) Grade of service - The number of customers a line is designated to serve.

(90) Hearing - Any proceeding at which evidence is taken on the merits of the matters at issue, not including prehearing conferences.

(91) Hearing carryover - A technology that allows an individual who is speech- impaired to hear the other party in a telephone conversation and to use specialized telecommunications devices to send communications through the telecommunications relay service operator.

(92) High cost area - A geographic area for which the costs established using a forward- looking economic cost methodology exceed the benchmark levels established by the commission.

(93) High cost assistance (HCA) - A program administered by the commission in accordance with the provisions of §23.133 of this title (relating to Texas High Cost Universal Service Plan (THCUSP).

(94) Identity - The name, address, telephone number, and/or facsimile number of a person, whether natural, partnership, municipal corporation, cooperative corporation, corporation, association, governmental subdivision, or state agency and the relationship of the person to the entity being represented.

(95) Impulse noise - Any momentary occurrence of the noise on a channel significantly exceeding the normal noise peaks.

It is evaluated by counting the number of occurrences that exceed a threshold. This noise degrades voice and data transmission.

(96) Incumbent local exchange company (ILEC) - A local exchange company that had a certificate of convenience and necessity on September 1, 1995.

(97) Information sharing program - Instruction, learning, and training that is transmitted from one site to one or more sites by telecommunications services that are used by a library predominantly for such instruction, learning, or training, including video, data, voice, and electronic information.

(98) Integrated services digital network (ISDN) - a digital network architecture that provides a wide variety of communications services, a standard set of user- network messages, and integrated access to the network. Access methods to the ISDN are the Basic Rate Interface (BRI) and the Primary Rate Interface (PRI).

(99) Interactive multimedia communications - Real-time, two-way, interactive voice, video, and data communications conducted over networks that link geographically dispersed locations. This definition includes interactive communications within or between buildings on the same campus or library site.

(100) Intercept service - A service arrangement provided by the local exchange carrier whereby calls placed to a disconnected or discontinued telephone number are intercepted and the calling party is informed by an operator or by a recording that the called telephone number has been disconnected, discontinued, changed to another number, or otherwise is not in service.

(101) Interconnection - Generally means: The point in a network where a customer's transmission facilities interface with the dominant carrier's network under the provisions of this section. More particularily it means: The termination of local traffic (including basic telecommunications service as delineated in §24.32 of this title (Relating to Universal Service) or integrated services digital network (ISDN) as defined in this section and/or extended area service/extended local calling service traffic of a certificated telephone utility (CTU) using the local access lines of another CTU, as described in section §23.97(d)(4)(A)(i) of this title (relating to Interconnection). Interconnection shall include non-discriminatory access to signaling systems, databases, facilities and information as required to ensure interoperability of networks and efficient, timely provision of services to customers without permitting access to network proprietary information or customer proprietary network information, as defined in §23.57 of this title (relating to Telecommunications Privacy), unless otherwise permitted in §23.97 of this title.

(102) Interconnector - A customer that interfaces with the dominant carrier's network under the provisions of §23.92 of this title (relating to Expanded Interconnection).

(103) Interexchange carrier (IXC) - A carrier providing any means of transporting intrastate telecommunications messages between local exchanges, but not solely within local exchanges, in the State of Texas. The term may include a certificated telecommunications utility (CTU) or CTU affiliate to the extent that it is providing such service. An entity is not an IXC solely because of:

(A) the furnishing, or furnishing and maintenance of a private system;

(B) the manufacture, distribution, installation, or maintenance of customer premises equipment;

(C) the provision of services authorized under the FCC's Public Mobile Radio Service and Rural Radio Service rules; or

(D) the provision of shared tenant service.

(104) Interoffice trunks - Those communications circuits which connect central offices.

(105) IntraLATA equal access - The ability of a caller to complete a toll call in a local access and transport area (LATA) using his or her provider of choice by dialing "1" or "0" plus an area code and telephone number.

(106) Intrastate - Refers to communications which both originate and terminate within Texas state boundaries.

(107) Least cost technology - The technology, or mix of technologies, that would be chosen in the long run as the most economically efficient choice. The choice of least cost technologies, however, shall:

(A) be restricted to technologies that are currently available on the market and for which vendor prices can be obtained;

(B) be consistent with the level of output necessary to satisfy current demand levels for all services using the basic network function in question; and

(C) be consistent with overall network design and topology requirements.

(108) License - The whole or part of any commission permit, certificate, approval, registration, or similar form of permission required by law.

(109) Licensing - The commission process respecting the granting, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license.

(110) Lifeline Service - A program certified by the Federal Communications Commission to provide for the reduction or waiver of the federal subscriber line charge for residential consumers.

(111) Line - A circuit or channel extending from a central office to the customer's location to provide telecommunications service. One line may serve one customer, or all customers served by a multiparty line.

(112) Local access and transport area (LATA) - A geographic area established for the provision and administration of communications service. It encompasses one or more designated exchanges, which are grouped to serve common social, economic and other purposes. For purposes of these rules, market areas, as used and defined in the Modified Final Judgment and the GTE Final Judgment, are encompassed in the term local access and transport area.

(113) Local call - A call within the certificated telephone utility's toll-free calling area including calls which are made toll-free through a mandatory extended area service (EAS) or expanded local calling (ELC) proceeding.

(114) Local calling area - The area within which telecommunications service is furnished to customers under a specific schedule of exchange rates. A local calling area may include more than one exchange area.

(115) Local exchange company (LEC) - A telecommunications utility that has been granted either a certificate of convenience and necessity or a certificate of operating authority to provide local exchange telephone service, basic local telecommunications service,

or switched access service within the state. A local exchange company is also referred to as a local exchange carrier.

(116) Local exchange telephone service or local exchange service - A telecommunications service provided within an exchange to establish connections between customer premises within the exchange, including connections between a customer premises and a long distance provider serving the exchange. The term includes tone dialing service, service connection charges, and directory assistance services offered in connection with basic local telecommunications service and interconnection with other service providers. The term does not include the following services, whether offered on an intraexchange or interexchange basis:

(A) central office based PBX-type services for systems of 75 stations or more;

(B) billing and collection services;

(C) high-speed private line services of 1.544 megabits or greater;

(D) customized services;

(E) private line or virtual private line services;

(F) resold or shared local exchange telephone services if permitted by tariff;

(G) dark fiber services;

(H) non-voice data transmission service offered as a separate service and not as a component of basic local telecommunications service;

(I) dedicated or virtually dedicated access services;

(J) a competitive exchange service; or

(K) any other service the commission determines is not a "local exchange telephone service."

(117) Local message - A completed call between customer access lines located within the same local calling area.

(118) Local message charge - The charge that applies for a completed telephone call that is made when the calling customer access line and the customer access line to which the connection is established are both within the same local calling area, and a local message charge is applicable.

(119) Local service charge - The charge for furnishing facilities to enable a customer to send or receive telecommunications within the local calling area. This local calling area may include more than one exchange area.

(120) Local telecommunications traffic:

(A) Telecommunications traffic between a dominant certificated telecommunications utility (DCTU) and a telecommunications carrier other than a commercial mobile radio service (CMRS) provider that originates and terminates within the mandatory single or multi-exchange local calling area of a DCTU including the mandatory extended area service (EAS) areas served by the DCTU; or

(B) Telecommunications traffic between a DCTU and a CMRS provider that, at the beginning of the call, originates and terminates within the same major trading area.

(121) Long distance telecommunications service - That part of the total communication service rendered by a telecommunications utility which is furnished between customers in different local calling areas in accordance with the rates and regulations specified in the utility's tariff.

(122) Long run - A time period long enough to be consistent with the assumption that the company is in the planning stage and all of its inputs are variable and avoidable.

(123) Long run incremental cost (LRIC) - The change in total costs of the company of producing an increment of output in the long run when the company uses least cost technology. The LRIC should exclude any costs that, in the long run, are not brought into existence as a direct result of the increment of output.

(124) Mandatory minimum standards - The standards established by the Federal Communications Commission, outlining basic mandatory telecommunication relay services.

(125) Meet point billing - An access billing arrangement for services to access customers when local transport is jointly provided by more than one certificated telecommunications utility. In Chapter 23 of this title, this term is applicable only to dominant certificated telecommunications utilities when the context clearly indicates.

(126) Message - A completed customer telephone call.

(127) Message rate service - A form of local exchange service under which all originated local messages are measured and charged for in accordance with the utility's tariff.

(128) Minor change - A change, including the restructuring of rates of existing services, that decreases the rates or revenues of the small local exchange company (SLEC) or that, together with any other rate or proposed or approved tariff changes in the 12 months preceding the date on which the proposed change will take effect, results in an increase of the SLEC's total regulated intrastate gross annual revenues by not more than 5.0%. Further, with regard to a change to a basic local access line rate, a minor change may not, together with any other change to that rate that went into effect during the 12 months preceding the proposed effective date of the proposed change, result in an increase of more than 10%.

(129) Municipality - A city, incorporated village, or town, existing, created, or organized under the general, home rule, or special laws of the state.

(130) National integrated services digital network (ISDN) - the standards and services promulgated for integrated services digital network by Bellcore.

(131) Negotiating party - A certificated telecommunications utility (CTU) or other entity with which a requesting CTU seeks to interconnect in order to complete all telephone calls made by or placed to a customer of the requesting CTU.

(132) New service - Any service not offered on a tariffed basis prior to the date of the application relating to such service and specifically excludes basic local telecommunications service including local measured service. If a proposed service could serve as an alternative or replacement for a service offered prior to the date of the new-service application and does not provide significant improvements (other than price) over, or significant additional services not available under, a service offered prior to the date of such application, it shall not be considered a new service.

(133) Non-discriminatory - Type of treatment that is not less favorable than that an interconnecting certificated telecommunications utility (CTU) provides to itself or its affiliates or other CTUs.

(134) Non-dominant certificated telecommunications utility (NCTU) - A certificated telecommunications utility (CTU) that is not a dominant certificated telecommunications utility (DCTU) and has been granted a certificate of convenience and necessity (CCN) (after September 1, 1995, in an area already certificated to a DCTU), a certificate of operating authority (COA), or a service provider certificate of operating authority (SPCOA) to provide local exchange service.

(135) Nondominant carrier -

(A) An interexchange telecommunications carrier (including a reseller of interexchange telecommunications services).

(B) Any of the following that is not a dominant carrier:

(i) a specialized communications common carrier;

(ii) any other reseller of communications;

(iii) any other communications carrier that conveys, transmits, or receives communications in whole or in part over a telephone system; or

(iv) a provider of operator services that is not also a subscriber.

(136) Open network architecture - The overall design of an incumbent local exchange company's (ILEC's) network facilities and services to permit all users of the network, including the enhanced services operations of an ILEC and its competitors, to interconnect to specific basic network functions on an unbundled and non-discriminatory basis.

(137) Operator service - Any service using live operator or automated operator functions for the handling of telephone service, such as local collect, toll calling via collect, third number billing, credit card, and calling card services. The transmission of "1-800" and "1-888" numbers, where the called party has arranged to be billed, is not operator service.

(138) Operator service provider (OSP) - Any person or entity that provides operator services by using either live or automated operator functions. When more than one entity is involved in processing an operator service call, the party setting the rates shall be considered to be the OSP. However, subscribers to customer-owned pay telephone service shall not be deemed to be OSPs.

(139) Originating line screening (OLS) - A two digit code passed by the local switching system with the automatic number identification (ANI) at the beginning of a call that provides information about the originating line.

(140) Out-of-service trouble report - An initial customer trouble report in which there is complete interruption of incoming or outgoing local exchange service. On multiple line services a failure of one central office line or a failure in common equipment affecting all lines is considered out of service. If an extension line failure does not result in the complete inability to receive or initiate calls, the report is not considered to be out of service.

(141) Partial deregulation - The ability of a cooperative to offer new services on an optional basis and/or change its rates and tariffs under the provisions of the Public Utility Regulatory Act, §§53.351 - 53.359.

(142) Pay-per-call-information services - Services that allow a caller to dial a specified 1-900-XXX-XXXX or 976-XXXX number. Such services routinely deliver, for a predetermined (sometimes time-sensitive) fee, a pre-recorded or live message or interactive program. Usually a telecommunications utility will transport the call and bill the end-user on behalf of the information provider.

(143) Pay telephone access service (PTAS) - A service offered by a certificated telecommunications utility which provides a two-way, or optionally, a one-way originating-only business access line composed of the serving central office line equipment, all outside plant facilities needed to connect the serving central office with the customer premises, and the network interface; this service is sold to pay telephone service providers.

(144) Pay telephone service (PTS) - A telecommunications service utilizing any coin, coinless, credit card reader, or cordless instrument that can be used by members of the general public, or business patrons, employees, and/or visitors of the premise's owner, provided that the end user pays for local or toll calls from such instrument on a per call basis. Pay per call telephone service provided to inmates of confinement facilities is PTS. For purposes of this section, coinless telephones provided in guest rooms by a hotel/motel are not pay telephones. A telephone that is primarily used by business patrons, employees, and/or visitors of the premise's owner is not a pay telephone if all local calls and "1-800" and "1-888" type calls from such telephone are free to the end user.

(145) Per-call blocking - A telecommunications service provided by a telecommunications provider that prevents the transmission of calling party information to a called party on a call-by-call basis.

(146) Per-line blocking - A telecommunications service provided by a telecommunications utility that prevents the transmission of calling party information to a called party on every call, unless the calling party acts affirmatively to release calling party information.

(147) Percent interstate usage (PIU) - An access customer-specific ratio or ratios determined by dividing interstate access minutes by total access minutes. The specific ratio shall be determined by the certificated telecommunications utility (CTU) unless the CTU's network is incapable of determining the jurisdiction of the access minutes. A PIU establishes the jurisdiction of switched access usage for determining rates charged to switched access customers and affects the allocation of switched access revenue and costs by CTUs between the interstate and intrastate jurisdictions. In Chapter 23 of this title, this term is applicable only to dominant certificated telecommunications utilities when the context clearly indicates.

(148) Person - Any natural person, partnership, municipal corporation, cooperative corporation, corporation, association, governmental subdivision, or public or private organization of any character other than an agency.

(149) Pleading - A written document submitted by a party, or a person seeking to participate in a proceeding, setting forth allegations of fact, claims, requests for relief, legal argument, and/or other matters relating to a proceeding.

(150) Prepaid local telephone service (PLTS) - Prepaid local telephone service means:

(A) voice grade dial tone residential service consisting of flat rate service or local measured service, if chosen by the customer and offered by the dominant certificated telecommunications utility (DCTU);

(B) if applicable, mandatory services, including extended area service, extended metropolitan service, or expanded local calling service;

(C) tone dialing service;

(D) access to 911 service;

(E) access to dual party relay service;

(F) the ability to report service problems seven days a week;

(G) access to business office;

(H) primary directory listing;

(I) toll blocking service; and

(J) non-published service and non-listed service at the customer's option.

(151) Premises - A tract of land or real estate including buildings and other appurtenances thereon.

(152) Pricing flexibility - Discounts and other forms of pricing flexibility may not be preferential, prejudicial, or discriminatory. Pricing flexibility includes:

(A) customer specific contracts;

(B) volume, term, and discount pricing;

(C) zone density pricing;

(D) packaging of services; and

(E) other promotional pricing flexibility.

(153) Primary interexchange carrier (PIC) - The provider chosen by a customer to carry that customer's toll calls.

(154) Primary interexchange carrier (PIC) freeze indicator - An indicator that the end user has directed the certificated telecommunications utility to make no changes in the end user's PIC.

(155) Primary rate interface (PRI) integrated services digital network (ISDN) - One of the access methods to ISDN, the 1.544-Mbps PRI comprises either twenty- three 64 Kbps B-channels and one 64 Kbps D-channel (23B+D) or twenty-four 64 Kbps B-channels (24B) when the associated call signaling is provided by another PRI in the group.

(156) Primary service - The initial provision of voice grade access between the customer's premises and the switched telecommunications network. This includes the initial connection to a new customer or the move of an existing customer to a new premises but does not include complex services.

(157) Print translations - The temporary storage of a message in an operator's screen during the actual process of relaying a conversation.

(158) Privacy issue - An issue that arises when a telecommunications provider proposes to offer a new telecommunications service or feature that would result in a change in the outflow of information about a customer. The term privacy issue is to be construed broadly. It includes, but is not limited to, changes in the following:

(A) the type of information about a customer that is released;

(B) the customers about whom information is released;

(C) the entity or entities to whom the information about a customer is released;

(D) the technology used to convey the information;

(E) the time at which the information is conveyed; and

(F) any other change in the collection, use, storage, or release of information.

(159) Private line - A transmission path that is dedicated to a customer and that is not connected to a switching facility of a telecommunications utility, except that a dedicated transmission path between switching facilities of interexchange carriers shall be considered a private line.

(160) Proceeding - A hearing, investigation, inquiry, or other procedure for finding facts or making a decision. The term includes a denial of relief or dismissal of a complaint. It may be rulemaking or nonrulemaking; rate setting or non-rate setting.

(161) Promotional rate - A temporary tariff, fare, toll, rental or other compensation charged by a certificated telecommunications utility (DCTU) to new or new and existing customers and designed to induce customers to test a service. A promotional rate shall incorporate a reduction or a waiver of some rate element in the tariffed rates of the service, or a reduction or waiver of the service's installation charge and/or service connection charges, and shall not incorporate any charge for discontinuance of the service by the customer. Such rates may not be offered for basic local telecommunications service, including local measured service.

(162) Provider of pay telephone service - The entity that purchases pay telephone access service (PTAS) from a certificated telecommunications utility (CTU) and registers with the Public Utility Commission as a provider of pay telephone service (PTS) to end users.

(163) Public utility or utility - A person or river authority that owns or operates for compensation in this state equipment or facilities to convey, transmit, or receive communications over a telephone system as a dominant carrier. The term includes a lessee, trustee, or receiver of any of those entities, or a combination of those entities. The term does not include a municipal corporation. A person is not a public utility solely because the person:

(A) furnishes or furnishes and maintains a private system;

(B) manufactures, distributes, installs, or maintains customer premise communications equipment and accessories; or

(C) furnishes a telecommunications service or commodity only to itself, its employees, or its tenants as an incident of employment or tenancy, if that service or commodity is not resold to or used by others.

(164) Public Utility Regulatory Act (PURA) - The enabling statute for the Public Utility Commission of Texas, located in the Texas Utilities Code Annotated, §§11.001 - 63.063, (Vernon 1998).

(165) Qualifying low-income consumer - A consumer that participates in one of the following programs: Medicaid, food stamps, Supplemental Security Income, federal public housing assistance, or Low-Income Home Energy Assistance Program.

(166) Qualifying services -

(A) residential flat rate basic local exchange service;

(B) residential local exchange access service; and

(C) residential local area calling usage.

(167) Rate - Includes:

(A) any compensation, tariff, charge, fare, toll, rental, or classification that is directly or indirectly demanded, observed, charged, or collected by a public utility for a service, product, or commodity, described in the definition of utility in the Public Utility Regulatory Act §§31.002 or 51.002; and

(B) a rule, practice, or contract affecting the compensation, tariff, charge, fare, toll, rental, or classification.

(168) Reciprocal compensation - An arrangement between two carriers in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of local telecommunications traffic that originates on the network facilities of the other carrier.

(169) Redirect the call - A procedure used by operator service providers (OSPs) that transmits a signal back to the originating telephone instrument that causes the instrument to disconnect the OSP's connection and to redial the digits originally dialed by the caller directly to the local exchange carrier's network.

(170) Regulatory authority - In accordance with the context where it is found, either the commission or the governing body of a municipality.

(171) Relay Texas Advisory Committee (RTAC) - The committee authorized by the Public Utility Regulatory Act, §56.110 and 1997 Texas General Laws Chapter 149.

(172) Relay Texas - The name by which telecommunications relay service in Texas is known.

(173) Relay Texas administrator - The individual employed by the commission to oversee the administration of statewide telecommunications relay service.

(174) Repeated trouble report - A customer trouble report regarding a specific line or circuit occurring within 30 days or one calendar month of a previously cleared trouble report on the same line or circuit.

(175) Residual charge - The per-minute charge designed to account for historical contribution to joint and common costs made by switched transport services.

(176) Retail service - A telecommunications service is considered a retail service when it is provided to residential or business end users and the use of the service is other than resale. Each tariffed or contract offering which a customer may purchase to the exclusion of other offerings shall be considered a service. For example: the various mileage bands for standard toll services are rate elements, not services; however, individual optional calling plans that can be purchased individually and which are offered as alternatives to each other are services, not rate elements.

(177) Return-on-assets - After-tax net operating income divided by total assets.

(178) Reversal of partial deregulation - The ability of a minimum of 10% of the members of a partially deregulated cooperative to request, in writing, that a vote be conducted to determine whether members prefer to reverse partial deregulation. Ten percent shall be calculated based upon the total number of members of record as of the calendar month preceding receipt of the request from members for reversal of partial deregulation.

(179) Rule - A statement of general applicability that implements, interprets, or prescribes law or policy, or describes the procedure or practice requirements of the commission. The term includes the amendment or repeal of a prior rule but does not include statements concerning only the internal management or organization of the commission and not affecting private rights or procedures.

(180) Rulemaking proceeding - A proceeding conducted pursuant to the Administrative Procedure Act, Texas Government Code, §§2001.021 - 2001.037 to adopt, amend, or repeal a commission rule.

(181) Rural incumbent local exchange company (ILEC) - An ILEC that qualifies as a "rural telephone company" as defined in 47 United States Code §3(37) and/or 47 United States Code §251(f)(2).

(182) Separation - The division of plant, revenues, expenses, taxes, and reserves applicable to exchange or local service if these items are used in common to provide public utility service to both local exchange telephone service and other service, such as interstate or intrastate toll service.

(183) Service - Has its broadest and most inclusive meaning. The term includes any act performed, anything supplied, and any facilities used or supplied by a public utility in the performance of the utility's duties under the Public Utility Regulatory Act to its patrons, employees, other public utilities, and the public. The term also includes the interchange or facilities between two or more public utilities. The term does not include the printing, distribution, or sale of advertising in a telephone directory.

(184) Service connection charge - A charge designed to recover the costs of non- recurring activities associated with connection of local exchange telephone service.

(185) Service provider certificate of operating authority (SPCOA) reseller - A holder of a service provider certificate of operating authority that uses only resold telecommunications services provided by an incumbent local exchange company (ILEC) or by a certificate of operating authority (COA) holder or by a service provider certificate of operating authority (SPCOA) holder.

(186) Service restoral charge - A charge applied by the DCTU to restore service to a customer's telephone line after it has been suspended by the DCTU.

(187) Serving wire center (SWC) - The certificated telecommunications utility designated central office which serves the access customer's point of demarcation. In Chapter 23 of this title, this term is applicable only to dominant certificated telecommunications utilities when the context clearly indicates.

(188) Signaling for tandem switching - The carrier identification code (CIC) and the OZZ code or equivalent information needed to perform tandem switching functions. The CIC identifies the interexchange carrier and the OZZ digits identify the call type and thus the interexchange carrier trunk to which traffic should be routed.

(189) Small certificated telecommunications utility (CTU) - A CTU with fewer than 2.0% of the nation's subscriber lines installed in the aggregate nationwide.

(190) Small local exchange company (SLEC) - Any incumbent certificated telecommunications utility as of September 1, 1995, that has fewer than 31,000 access lines in service in this state, including the access lines of all affiliated incumbent local exchange companies within the state, or a telephone cooperative organized

pursuant to the Telephone Cooperative Act, Texas Utilities Code Annotated, Chapter 162.

(191) Small incumbent local exchange company (Small ILEC) - An incumbent local exchange company that is a cooperative corporation or has, together with all affiliated incumbent local exchange companies, fewer than 31,000 access lines in service in Texas.

(192) Spanish speaking person - a person who speaks any dialect of the Spanish language exclusively or as their primary language.

(193) Special access - A transmission path connecting customer designated premises to each other either directly or through a hub or hubs where bridging, multiplexing or network reconfiguration service functions are performed and includes all exchange access not requiring switching performed by the dominant carrier's end office switches.

(194) Stand-alone costs - The stand-alone costs of an element or service are defined as the forward-looking costs that an efficient entrant would incur in providing only that element or service.

(195) Station - A telephone instrument or other terminal device.

(196) Study area - An incumbent local exchange company's (ILEC's) existing service area in a given state.

(197) Supplemental services - Telecommunications features or services offered by a certificated telecommunications utility for which analogous services or products may be available to the customer from a source other than a dominant certificated telecommunications utility. Supplemental services shall not be construed to include optional extended area calling plans that a dominant certificated telecommunications utility may offer pursuant to §23.49 of this title (relating to Telephone Extended Area Service (EAS) and Expanded Toll-free Local Calling Area), or pursuant to a final order of the commission in a proceeding pursuant to the Public Utility Regulatory Act, Chapter 53. In Chapter 23 of this title, this term is applicable only to dominant certificated telecommunications utilities when the context clearly indicates.

(198) Suspension of service - That period during which the customer's telephone line does not have dial tone but the customer's telephone number is not deleted from the central office switch and databases.

(199) Switched access - Access service that is provided by certificated telecommunications utilities (CTUs) to access customers and that requires the use of CTU network switching or common line facilities generally, but not necessarily, for the origination or termination of interexchange calls. Switched access includes all forms of transport provided by the CTU over which switched access traffic is delivered. In Chapter 23 of this title, this term is applicable only to dominant certificated telecommunications utilities when the context clearly indicates.

(200) Switched access demand - Switched access minutes of use, or other appropriate measure where not billed on a minute of use basis, for each switched access rate element, normalized for out of period billings. For the purposes of this section, switched access demand shall include minutes of use billed for the local switching rate element.

(201) Switched access minutes - The measured or assumed duration of time that a certificated telecommunications utility's network facilities are used by access customers. Access minutes are measured for the purpose of calculating access charges applicable to access customers. In Chapter 23 of this title, this term is applicable only to dominant certificated telecommunications utilities when the context clearly indicates.

(202) Switched transport - Transmission between a certificated telecommunications utility's central office (including tandem-switching offices) and an interexchange carrier's point of presence.

(203) Tandem-switched transport - Transmission of traffic between the serving wire center and another certificated telecommunications utility office that is switched at a tandem switch and charged on a usage basis. In Chapter 23 of this title, this term is applicable only to dominant certificated telecommunications utilities when the context clearly indicates.

(204) Tariff - The schedule of a utility containing all rates, tolls, and charges stated separately by type or kind of service and the customer class, and the rules and regulations of the utility stated separately by type or kind of service and the customer class.

(205) Tel-assistance service - A program providing eligible consumers with a 65% reduction in the applicable tariff rate for qualifying services.

(206) Texas Universal Service Fund (TUSF) - The fund authorized by the Public Utility Regulatory Act, §56.021 and 1997 Texas General Laws Chapter 149.

(207) Telecommunications relay service (TRS) - A service using oral and print translations by either live or automated means between individuals who are hearing-impaired or speech-impaired who use specialized telecommunications devices and others who do not have such devices. Unless specified in the text, this term shall refer to intrastate telecommunications relay service only.

(208) Telecommunications relay service (TRS) carrier - The telecommunications carrier selected by the commission to provide statewide telecommunications relay service.

(209) Telecommunications utility -

(A) a public utility;

(B) an interexchange telecommunications carrier, including a reseller of interexchange telecommunications services;

(C) a specialized communications common carrier;

(D) a reseller of communications;

(E) a communications carrier who conveys, transmits, or receives communications wholly or partly over a telephone system;

(F) a provider of operator services as defined by §55.081, unless the provider is a subscriber to customer-owned pay telephone service; and

(G) a separated affiliate or an electronic publishing joint venture as defined in the Public Utility Regulatory Act, Chapter 63.

(210) Telephones intended to be utilized by the public - Telephones that are accessible to the public, including, but not limited to, pay telephones, telephones in guest rooms and common areas of hotels, motels, or other lodging locations, and telephones in hospital patient rooms.

(211) Telephone solicitation - An unsolicited telephone call.

(212) Telephone solicitor - A person who makes or causes to be made a consumer telephone call, including a call made by an automatic dialing/announcing device.

(213) Test year - The most recent 12 months, beginning on the first day of a calendar or fiscal year quarter, for which operating data for a public utility are available.

(214) Tier 1 local exchange company - A local exchange company with annual regulated operating revenues exceeding $100 million.

(215) Title IV-D Agency - The office of the attorney general for the state of Texas.

(216) Toll blocking - A service provided by telecommunications carriers that lets consumers elect not to allow the completion of outgoing toll calls from their telecommunications channel.

(217) Toll control - A service provided by telecommunications carriers that allows consumers to specify a certain amount of toll usage that may be incurred on their telecommunications channel per month or per billing cycle.

(218) Toll limitation - Denotes both toll blocking and toll control.

(219) Total element long-run incremental cost (TELRIC) - The forward-looking cost over the long run of the total quantity of the facilities and functions that are directly attributable to, or reasonably identifiable as incremental to, such element, calculated taking as a given the certificated telecommunications utility's (CTU's) provision of other elements. In Chapter 23 of this title, this term is applicable only to dominant certificated telecommunications utilities when the context clearly indicates.

(220) Transport - The transmission and/or any necessary tandem and/or switching of local telecommunications traffic from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves the called party, or equivalent facility provided by a carrier other than a dominant certificated telecommunications utility.

(221) Trunk - A circuit facility connecting two switching systems.

(222) Two-primary interexchange carrier (Two-PIC) equal access - A method that allows a telephone subscriber to select one carrier for all 1+ and 0+ interLATA calls and the same or a different carrier for all 1+ and 0+ intraLATA calls.

(223) Unbundling - The disaggregation of the ILEC's network/service to make available the individual network functions or features or rate elements used in providing an existing service.

(224) Unit cost - A cost per unit of output calculated by dividing the total long run incremental cost of production by the total number of units.

(225) Usage sensitive blocking - Blocking of a customer's access to services which are charged on a usage sensitive basis for completed calls. Such calls shall include, but not be limited to, call return, call trace, and auto redial.

(226) Virtual private line - Circuits or bandwidths, between fixed locations, that are available on demand and that can be dynamically allocated.

(227) Voice carryover - A technology that allows an individual who is hearing-impaired to speak directly to the other party in a telephone conversation and to use specialized telecommunications devices to receive communications through the telecommunications relay service operator.

(228) Volume insensitive costs - The costs of providing a basic network function (BNF) that do not vary with the volume of output of the services that use the BNF.

(229) Volume sensitive costs - The costs of providing a basic network function (BNF) that vary with the volume of output of the services that use the BNF.

(230) Wholesale service - A telecommunications service is considered a wholesale service when it is provided to a telecommunications utility and the use of the service is to provide a retail service to residence or business end-user customers.

(231) Working capital requirements - The additional capital required to fund the increased level of accounts receivable necessary to provide telecommunications service.

(232) "0-" call - A call made by the caller dialing the digit "0" and no other digits within five seconds. A "0-" call may be made after a digit (or digits) to access the local network is (are) dialed.

(233) "0+" call - A call made by the caller dialing the digit "0" followed by the terminating telephone number. On some automated call equipment, a digit or digits may be dialed between the "0" and the terminating telephone number.

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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Rules Coordinator
Public Utility Commission of Texas
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For further information, please call: (512) 936–7308

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Subchapter F. Regulation of Telecommunications Service

16 TAC §26.125

The Public Utility Commission of Texas (PUC) adopts new §26.125, relating to Automatic Dial Announcing Devices (ADAD) with changes to the proposed text as published in the July 24, 1998 *Texas Register* (23 TexReg 7481). The rule is necessary to conform §26.125 to House Bill 2128 (75th Legislature) requirements which restrict ADAD solicitation and impose additional obligations upon ADAD solicitors. Further, the rule is needed by the commission in the execution of its jurisdiction under PURA, subchapter F, which concerns the regulation and permitting process for ADADs and requires the commission to create a permitting scheme for ADAD operators and to investigate complaints relating to the use of ADADs; PURA §55.134(a)(2), which grants to the commission the power to enforce subchapter F; and, PURA §52.001(b), which requires the commission to adopt rules that protect the public interest. This new section was adopted under Project Number 14966.

The Appropriations Act of 1997, House Bill 1, Article IX, Section 167 (Section 167) requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Such reviews shall include, at a minimum, an assessment by the agency as to whether the reason for adopting or readopting the rule continues to exist. The PUC held three workshops to conduct a preliminary review of its rules. As a result of these workshops, the PUC is reorganizing its current substantive rules located in 16 Texas Administrative Code (TAC) Chapter 23 to (1) satisfy the requirements of Section 167; (2) repeal rules no longer needed; (3) update existing rules to reflect changes in the industries regulated by the commission; (4) do clean-up amendments made necessary by changes in law and commission organizational structure and practices; (5) reorganize rules into new chapters to facilitate future amendments and provide room for expansion; and (6) reorganize the rules according to the industry to which they apply. Chapter 26 has been established for all commission substantive rules applicable to telecommunications service providers.

The commission requested specific comments on the Section 167 requirement as to whether the reason for adopting or readopting the rule continues to exist (Section 167 comments). Texas State Telephone Cooperative, Inc. (TSTCI) filed Section 167 comments. TSTCI believed that the rule is necessary in order to protect the public interest, reduce the number of consumer complaints concerning ADADs, and to bring ADAD operators into compliance with provisions of PURA. No other Section 167 comments were filed. The commission finds that the reason for adopting the rule continues to exist.

A public hearing on the rule was not held as no request for a hearing was received by the commission.

The commission received written comments on the proposed new section from TSTCI, Advisory Commission on State Emergency Communication (ACSEC), and GTE Southwest Incorporated (GTE).

TSTCI supports the rule but recommends that §26.125(g)(1) & (2) concerning the display of ADAD's telephone number, per-line blocking and per-call blocking be consistent with provisions found in House Bill 2128 as well as staff's proposed revision to §26.126(c)(3) and (4). TSTCI proposes using language that is identical to that proposed for adoption in §26.126(c)(3) and (4). The commission adopts the language proposed by TSTCI, finding it to be an improvement over the language in the staff proposal. TSTCI also asked for a sixty (60) day compliance deadline for the filing of tariffs by telephone companies. The commission rejects this request because it is beyond the jurisdiction of the commission as HB2128 provides an effective date of September 1, 1998 for the amendments to PURA.

GTE generally supported the rule but recommended one change to proposed §26.125(b)(6). GTE pointed out that the proposed section requires that messages be shorter than 30 seconds or that devices be capable of terminating a call with 30 seconds if an answering machine is reached. GTE submits that PURA §55.128 sets the time limits at one minute. GTE, however, failed to note the HB2128 amendment to PURA §3.653(a)(5) which has not yet been incorporated into the Texas Utilities Code. That amendment expressly changes the time limits to 30 seconds. For this reason the commission rejects GTE's suggested change to the proposed rule.

ACSEC supported the rule and especially voiced its support for §26.125(b)(8) which prohibits the use of ADADs for calling emergency numbers such as 9-1-1. ACSEC did express concern about Text Telephone (TTY) devices that are programmed to operate very much like ADADs for calls to emergency numbers. These devices automatically play and continue to repeat requests for emergency assistance when the callers use the TTYs to call 9-1-1. Because the messages are continually repeated, the call takers at the Public Safety Answering Point (PSAP) can encounter problems in answering and responding to TTY calls. ACSEC asked the commission to consider adding language to the rule to prohibit the use of these devices for TTY calls to 9-1-1 if the devices are not modified to stop repeating the automated messages for emergency assistance. The commission declines to adopt such language for several reasons. Most significantly, PURA §55.121 defines ADADs as "automated equipment used for telephone solicitation or collection" and does not include TTY devices in the definition. Further, the notice provided with the publication of the proposed rule can not be reasonably construed to include issues concerning TTY devices. Finally, the commission believes that further action by the Texas Legislature is needed prior to the commission being able to adopt a rule with the language requested by ACSEC.

This new section is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998) (PURA) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction and specifically, PURA §55.137 which grants the commission authority to impose an administrative penalty against a person who operates an ADAD in violation of subchapter F of PURA and PURA §55.134 which requires the commission to enforce subchapter F of PURA and to investigate complaints relating to the use of ADADs.

Cross Index to Statutes: Public Utility Regulatory Act §§14.002, 14.052, and 55.121- 55.138.

§26.125. Automatic Dial Announcing Devices (ADAD).

(a) Purpose. The purpose of this section is to regulate the use of automatic dial announcing devices.

(b) Requirements for use of an automatic dial announcing device. A person who operates an ADAD to make a telephone call in which the device plays a recorded message when a connection is completed to a telephone number must comply with the following requirements.

(1) An ADAD operator must obtain a permit from the commission and give written notice specifying the type of device to be connected to each telecommunications utility over whose system the device is to be used.

(2) The device must not be used for random number dialing or to dial numbers by successively increasing or decreasing integers. In addition, the device must not be used in a way such that two or more telephone lines of a multi-line business are engaged simultaneously.

(3) Within the first 30 seconds of the call, the ADAD message must clearly state the nature of the call, the identity of the business, individual, or other entity initiating the call, and the telephone number (other than that of the ADAD which placed the call) or address of such business, individual, or other entity. However, if an ADAD is used for debt collection purposes and the use complies with applicable federal law and regulations, and the ADAD is used

by a live operator for automatic or hold announcement purposes, the use complies with this paragraph.

(4) The entire ADAD message must be delivered in a single language.

(5) The device must disconnect from the called person's line no later than 30 seconds after the call is terminated by either party or, if the device cannot disconnect within that period, a live operator must introduce the call and receive the oral consent of the called person before beginning the message. In addition, the device must comply with the line seizure requirements in 47 Code of Federal Regulations §68.318(c)(2).

(6) The device, when used for solicitation purposes, must have a message shorter than 30 seconds or have the technical capacity to recognize a telephone answering device on the called person's line and terminate the call within 30 seconds.

(7) For calls terminating in Texas, the device must not be used to make a call:

(A) for solicitation before noon or after 9:00 p.m. on a Sunday or before 9:00 a.m. or after 9:00 p.m. on a weekday or a Saturday; or

(B) for collection purposes at an hour at which collection calls would be prohibited under the federal Fair Debt Collection Practices Act (15 United States Code §1692, et seq.).

(8) Calls may not be made to emergency telephone numbers of hospitals, fire departments, law enforcement offices, medical physician or service offices, health care facilities, poison control centers, "911" lines, or other entities providing emergency service. In addition, calls may not be made to telephone numbers of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment, any telephone numbers assigned to paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier, or any service for which the called party is charged for the call.

(9) If during a call a cross-promotion or reference to a pay-per-call information service is made, the call must include:

(A) a statement that a charge will be incurred by a caller who makes a call to a pay-per-call information services telephone number;

(B) the amount of the flat-rate or cost-per-minute charge that will be incurred or the amount of both if both charges will be incurred; and

(C) the estimated amount of time required to receive the entire information offered by the service during a call.

(c) Permit to operate an ADAD.

(1) An application for a permit to use one or more ADADs must be made using a form prescribed by the commission and must be accompanied by a fee of $500. A permit is valid for one year after its date of issuance. Renewals must be applied for no later than 90 days prior to the expiration date of the current permit. Subject to paragraph (3) of this subsection, a permit may be renewed annually by making the filing required by this section and paying a renewal fee of $100.

(2) Each application for the issuance or renewal of a permit under this section must contain the telephone number of each ADAD that will be used and the physical address from which the ADAD will operate. If the telephone number of an ADAD or the physical address from which the ADAD operates changes, the owner or operator of the ADAD shall notify the commission by certified mail of each new number or address not later than the 48th hour before the hour at which the ADAD will begin operating with the new telephone number or at the new address. If the owner or operator of an ADAD fails to notify the commission as required by this subsection within the period prescribed by this subsection, the permit is automatically invalid.

(3) In determining if a permit should be issued or renewed, the commission will consider the compliance record of the owner or operator of the ADAD. The commission may deny an application for the issuance or renewal of a permit because of the applicant's compliance record.

(4) A local exchange company (LEC) may obtain, on request to the commission, a copy of a permit issued under this section and of any changes relating to the permit.

(5) The commission may revoke a permit to operate an ADAD for failure to comply with this section.

(d) Exceptions. This section does not apply to the use of an ADAD to make a telephone call:

(1) relating to an emergency or a public service under a program developed or approved by the emergency management coordinator of the county in which the call was received; or

(2) made by a public or private primary or secondary school system to locate or account for a truant student.

(e) Complaints, investigation, and enforcement.

(1) If the commission determines that a person has violated the requirements of this section, the telecommunications utility providing service to the user of the ADAD shall comply with a commission order to disconnect service to the person. The telecommunications utility may reconnect service to the person only on a determination by the commission that the person will comply with this section. The utility shall give notice to the person using the device of the utility's intent to disconnect service not later than the third day before the date of the disconnection, except that if the device is causing network congestion or blockage, the notice may be given on the day before the date of disconnection.

(2) A telecommunications utility may, without an order by the commission or a court, disconnect or refuse to connect service to a person using or intending to use an ADAD if the utility determines that the device would cause or is causing network harm.

(3) A LEC that receives a complaint relating to the use of an ADAD shall send the complaint to the commission according to the following guidelines:

(A) the complaint shall be recorded on a form prescribed by the commission;

(B) the LEC shall inform the complainant that the complaint, including the identity of the complainant and other information relevant to the complaint, will be forwarded to the commission;

(C) the complaint form and any written complaint shall be forwarded to the commission within three business days of its receipt by the LEC.

(f) Permit Suspension/Child Support Enforcement. In consideration of the Texas Family Code Annotated, Chapter 232, as it may be subsequently amended, which provides for the suspension of state-issued licenses for failure to pay child support, the commission shall follow the procedures set out in this subsection.

(1) Provision of information to a Title IV-D agency. Upon request, the commission shall provide a Title IV-D agency with the name, address, social security number, license renewal date, and other identifying information for each person who holds, applies for, or renews an ADAD permit issued by the commission. This information shall be provided in a format agreed to between the Title IV-D agency and the commission.

(2) Suspension of permit. Upon receipt of a final order issued by a court or a Title IV- D agency suspending an ADAD permit under the provisions of the Texas Family Code, Chapter 232, the commission shall immediately:

(A) record the suspension of the permit in the commission's files; and

(B) notify the telecommunications utility providing service to the user of an ADAD that the permit has been suspended.

(3) Service disconnection. Upon receipt of notification by the commission that a permit has been suspended under the provisions of this subsection, the telecommunications utility providing service to that user of an ADAD shall immediately disconnect service to that person.

(4) Refund of fees. A person who holds, applies for, or renews an ADAD permit issued by the commission that is suspended under the provisions of this subsection is not entitled to a refund of any fees paid under subsection (c) of this section.

(5) Reinstatement. The commission may not modify, remand, reverse, vacate, or reconsider the terms of a final order issued by the court or a Title IV-D agency suspending a permit under the provisions of the Texas Family Code, Chapter 232. However, upon receipt of an order by the court or Title IV-D agency vacating or staying an order suspending a person's permit to operate an ADAD, the commission shall promptly issue or re-issue the affected permit to that person if that person is otherwise qualified for the permit and has paid the applicable fees as set out in subsection (c) of this section.

(g) Obligations of the ADAD Solicitor.

(1) An ADAD solicitor may not use any method, including per call blocking or per-line blocking, that prevents caller identification information from the ADAD solicitor's lines from being shown by an end user's caller identification device.

(2) The ADAD solicitor's displayed caller identification number must be one at which telephone calls may be received from end users if the ADAD solicitor uses a device which plays a recorded message when a connection is completed to a telephone number. All ADAD solicitors must comply with this provision by September 1, 1998.

(h) Penalties. A person who operates an ADAD without a valid permit, with an expired permit, or with a permit that has been suspended under the provisions of subsection (f) of this section or who otherwise operates the ADAD in violation of this section or a commission order is subject to an administrative penalty of not more than $1,000 for each day or portion of a day during which the ADAD was operating in violation of this section. However, nothing in this subsection is intended to limit the commission's authority under the Public Utility Regulatory Act §15.021, et seq. (Vernon 1998).

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 August 27, 1998.

TRD-9813649
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Effective date: September 16, 1998
Proposal publication date: July 24, 1998
For further information, please call: (512) 936–7308

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16 TAC §26.126

The Public Utility Commission of Texas (PUC or commission) adopts new §26.126, relating to Telephone Solicitation with no changes to the proposed text as published in the July 24, 1998 *Texas Register* (23 TexReg 7484). The rule is necessary to conform §26.126 to House Bill 2128 (75th Legislature) requirements which impose additional obligations upon telephone solicitors. Further, the rule is needed by the commission in the execution of its jurisdiction under the Public Utility Regulatory Act (PURA) §55.151, which grants to the commission certain enforcement powers over telephone solicitors; PURA §55.152, which requires the commission to require by rule that a local exchange company (LEC) inform its customers of certain provisions of the law relating to telephone solicitation; and PURA §52.001(b), which requires the commission to adopt rules that protect the public interest. This new section was adopted under Project Number 14967.

The Appropriations Act of 1997, House Bill 1, Article IX, Section 167 (Section 167) requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Such reviews shall include, at a minimum, an assessment by the agency as to whether the reason for adopting or readopting the rule continues to exist. The PUC held three workshops to conduct a preliminary review of its rules. As a result of these workshops, the PUC is reorganizing its current substantive rules located in 16 Texas Administrative Code (TAC) Chapter 23 to (1) satisfy the requirements of Section 167; (2) repeal rules no longer needed; (3) update existing rules to reflect changes in the industries regulated by the commission; (4) do clean-up amendments made necessary by changes in law and commission organizational structure and practices; (5) reorganize rules into new chapters to facilitate future amendments and provide room for expansion; and (6) reorganize the rules according to the industry to which they apply. Chapter 26 has been established for all commission substantive rules applicable to telecommunications service providers.

The commission requested specific comments on the §167 requirement as to whether the reason for adopting or readopting the rule continues to exist (Section 167 comments). Texas State Telephone Cooperative, Inc. (TSTCI) filed §167 comments. TSTCI believed that the rule is necessary and is consistent with both the language and spirit of House Bill 2128. AT&T Communications of the Southwest, Inc. (AT&T) filed extensive comments, some of which suggested portions of the rule are beyond the commission's jurisdiction and authority. AT&T did recommend that a rule with revisions suggested by AT&T be adopted. No other §167 comments were filed. The commission finds that the reason for adopting the rule continues to exist.

A public hearing on the rule was not held as no request for a hearing was received by the commission.

The commission received written comments on the proposed new section from TSTCI and AT&T.

TSTCI supports the rule as consistent with the language and spirit of House Bill 2128 and recommends that it be adopted without changes.

AT&T generally supported the rule but recommended several changes. AT&T first addressed §26.125(b) and argued that it conflicts with PURA §55.152 in that it requires a LEC to provide notice to its customers *both* through an annual billing statement mailed to the customer *and* by publication of the notice in the local telephone directories. AT&T contended that PURA §55.152 directs the commission to adopt rules requiring the notice to be provided by an annual billing statement *or* by publication of the notice in local telephone directories. AT&T also argued that the existing §23.33, which is to be replaced by §26.125 and contains similar notice language has been in conflict with PURA since its adoption in 1995. AT&T recommended that §26.125(b) be changed to provide the LEC with an option as to how to provide notice to its customers. The commission declines to adopt AT&T's proposed change. The commission's authority to regulate telephone solicitation arises from PURA §§55.151, 55.152, the aforementioned legislation (codified at Acts 1997, 75th Legislation, Chapter 1402, §4, adding §3.661, Educational Programs), as well as under PURA §§14.001, 14.002 and the commission's authority to protect the public interest as granted in PURA §52.001(b)(1).

AT&T also argued that §26.126(c)(2) and the particular form of notice contain an inaccurate statement concerning the requirements applicable to telephone solicitors. AT&T maintained that there is no statutory requirement for the solicitor to "identify the telephone number at which the person, company, or organization making the call may be reached." AT&T wanted that provision removed from the rule.

The commission has the authority and responsibility under PURA §55.151 to adopt rules that clarify and facilitate a telephone solicitor's compliance with PURA §55.151(a) requirements to adopt systems and procedures which assure that a solicitor makes every effort not to call consumers who ask not to be called. This authority is strengthened by PURA §55.151(b), which grants the commission enforcement powers on this matter. The rule requires that the solicitor provide a telephone number at which he or she can be reached, and requires that LECs inform their customers of this requirement (relying upon the authority of House Bill 2128, adding §3.661 to create an educational program to inform the public of its rights with respect to telephone solicitation). This provision makes it less likely that a solicitor will call a consumer who has asked not to be called and is a reasonable implementation of PURA §55.152, Notice to Customers.

Finally, AT&T contended that the requirements in §26.126(c)(3) and (4) are beyond the commission's jurisdiction and, in some respects, not technologically feasible. New §3.302 is the source of the requirements implemented in Substantive Rule §26.126(c)(3) and (4). Because these requirements have been mandated by statute, the commission rejects AT&T's argument that they should be removed from the rule. AT&T also raised an issue of technological feasibility, noting that the provisions of §26.126(c)(3) and (4) establish conditions "which some solicitors may be unable to satisfy" because of the nature of their trunking and PBX service. The statute allows no waiver to its requirement that a telephone solicitor's caller identification information must be displayed not later than September 1, 1998; in fact, the statute states that a solicitor who "violates this subsection is subject to an administrative penalty not to exceed $1,000 per day ... in which the person uses a method prohibited by this subsection." However, if the failure to provide caller identification information is due to physical limitations of the solicitor's operation and not to devices designed to specifically block caller identification, and if the solicitor makes this showing and demonstrates that corrective action is being taken, then the imposition of penalties under §26.126(d) should be deferred until January 1, 1999.

This new section is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998) (PURA) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, PURA §55.151 which grants the commission authority to enforce PURA §55.151 and PURA §55.152 which requires the commission to require local exchange companies and telephone cooperatives to provide to consumers the notice specified in §55.152.

Cross Index to Statutes: Public Utility Regulatory Act §§14.002, 55.151 and 55.152.

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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Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Effective date: September 16, 1998
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For further information, please call: (512) 936–7308

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Part III. Texas Alcoholic Beverage Commission

Chapter 45. Marketing Practices

Subchapter D. Advertising and Promotion-All Beverages

16 TAC §45.109

The Texas Alcoholic Beverage Commission adopts an amendment to §45.109 without changes to the text as originally published in the July 10, 1998, edition of the *Texas Register*, (23 TexReg 7163). The amendment operates to allow industry members of the wholesale tier, and certain members of the manufacturing tier, to manipulate competitor's products, under circumstances stated in the rule, while in the course of stocking or restocking product on retail premises.

Industry members subject to §45.109 are permitted to stock, rotate and rearrange product in retail premises so long as competitor's products are not altered or disturbed, §45.109(b). These industry members are also allowed to organize and construct displays of their product on retail premises, §45.109(c). Space allotted to end caps and floor displays in retail premises

is commonly used by retail members to display competing products on a regularly rotating basis. Under the prior rule, an upper tier member was unable to remove a competitor's floor or end cap display in order to replace it with his/her own product. This rule proved to be unnecessarily disruptive of the delivery schedules and space management decisions of industry members. The commission concluded that the more efficient approach is reflected in the adopted amendment wherein the replacing industry member may remove his/her competitor's product from an end cap or floor display in order to make room for the replacing product.

There were no comments received with regard to this proposed amendment.

This amendment is adopted under the authority of §5.31 and §102.20 of the Alcoholic Beverage Code.

Cross Reference: Alcoholic Beverage Code, §102.20, is affected by this amendment.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 28,1998.

TRD-9813681
Doyne Bailey
Administrator
Texas Alcoholic Beverage Commission
Effective date: September 17, 1998
Proposal publication date: July 10, 1998
For further information, please call: (512) 206–3204

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16 TAC §45.111

The Texas Alcoholic Beverage Commission adopts new §45.111, governing display of signs or advertising materials at charitable or civic events with changes to the text as published in the July 10, 1998, edition of the *Texas Register*, (23 TexReg 7163).

Subsection (d) was amended to delete the words "provided that there is" from the first sentence of the paragraph and to add the words "for the placement of any sign" to the end of the second sentence of the paragraph. This amendment was adopted to clarify the meaning of this subsection. The language as originally published could be interpreted to mean that while upper tier members could not give consideration to retailers for placement of temporary advertising, they could give consideration to retailers for placement of other types of signs. The proposed language was amended to make clear that upper tier members may not give consideration to retailers for placement of any sign.

Section 108.53 of the Alcoholic Beverage Code mandates that billboards and electric signs may not be erected within two hundred feet of retail establishments without specific permission of the commission. Effective September 1, 1997, this provision was amended to allow advertising to be placed within two hundred feet of retail premises during temporary civic or charitable events. This rule is adopted pursuant to the direction of that amending statute to allow placement of such advertising.

No comments were received regarding adoption of the new rule.

This rule is adopted pursuant to Alcoholic Beverage Code, §5.31 and §108.53(d) which provides the Alcoholic Beverage Commission with the authority to prescribe and publish rules necessary to carry out the provisions of the Alcoholic Beverage Code.

Cross Reference: Alcoholic Beverage Code, §108.53, is affected by this rule.

§45.111. Advertising Signs at Charitable or Civic Events.

(a) This rule is enacted pursuant to §108.53(d) of the Alcoholic Beverage Code.

(b) At a charitable or civic event of a temporary nature, members of the alcoholic beverage industry may place signs or other advertising materials indicating their participation in, or sponsorship of, the charitable or civic event.

(c) It is the intent of this rule that any proceeds from signs advertising alcoholic beverages be received directly by the charity or civic endeavor.

(d) Notwithstanding any other provision of the Alcoholic Beverage Code, signs at a charitable or civic event of a temporary nature may be within 200 feet of the licensed premises of a retailer of alcoholic beverages. No consideration of any kind may be given directly or indirectly, in any form or degree, to any retailer for the placement of any sign.

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 August 28,1998.

TRD-9813682
Doyne Bailey
Administrator
Texas Alcoholic Beverage Commission
Effective date: September 17, 1998
Proposal publication date: July 10, 1998
For further information, please call: (512) 206–3204

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Subchapter F. Advertising and Promotion-Liquor (Distilled Spirits and Wine)

16 TAC §45.117

The Texas Alcoholic Beverage Commission adopts an amendment to §45.117, without changes to the text as published in the July 10, 1998, edition of the *Texas Register*, (23 TexReg 7164). The amendment allows members of the manufacturing and wholesale tiers of the liquor and wine industry to furnish meeting rooms to retailers for the purpose of providing product samples and food.

A common marketing technique used for the introduction of new products is for a supplier to assemble potential customers for the purpose of offering samples of the offered product. Within the beer industry this technique is allowed between members of the manufacturing and wholesale tiers and members of the retail tier by virtue of §45.113(e)(2). Similar allowance has not previously been granted by the commission to members of the liquor and wine industry. The adopted amendment conforms the practice of the beer and liquor and wine industries. Further, the amendment allows upper tier members of the liquor and

wine industry to efficiently and economically introduce potential customers to new products.

No comments were received regarding adoption of the amendment.

This amendment is imposed under the authority of the Alcoholic Beverage Code, §5.31 which provides the Alcoholic Beverage Commission with the authority to prescribe and publish rules necessary to carry out the provisions of the Alcoholic Beverage Code.

Cross Reference: Alcoholic Beverage Code, §102.07, is affected by this 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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Doyne Bailey
Administrator
Texas Alcoholic Beverage Commission
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For further information, please call: (512) 206–3204

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TITLE 19. EDUCATION

Part II. Texas Education Agency

Chapter 89. Adaptations for Special Populations

Subchapter CC. Commissioner's Rules Concerning Adult and Community Education

19 TAC §89.1311

The Texas Education Agency (TEA) adopts new §89.1311, concerning a memorandum of understanding (MOU) to provide educational services to released offenders, with changes to the proposed text published in the July 10, 1998, issue of the *Texas Register* (23 TexReg 7164). The MOU is between the Texas Department of Criminal Justice (TDCJ) and the Texas Education Agency (TEA) to provide educational services to released offenders. The MOU is to realize a human service system that offers releasees choices and opportunities, within the realm of educational services, to remain outside prison and achieve maximum integration in the community. The following guiding principles should be considered to accomplish the objectives of this memorandum: (1) the releasee will achieve more success outside of prison if a support system is in place to promote educational growth; (2) the releasee may be less likely to become a repeat offender if he/she pursues education further; and (3) the releasee must be encouraged to recognize the need for increasing his/her educational level to remain in the free world and learn to function as a productive citizen.

Pursuant to the Texas Government Code, §508.318, the TDCJ and the TEA shall set forth the respective responsibilities of the department and the agency in implementing a continuing education program to increase the literacy of releasees.

One change was made since the section was proposed. In subsection (a), the term "board" was changed to read "department".

No comments were received on the proposed new section.

The new section is adopted under the Texas Government Code, §508.318, as added by the 75th Texas Legislature, 1997, Chapter 165, §12.01, which authorizes the Texas Department of Criminal Justice and the Texas Education Agency to adopt a memorandum of understanding that establishes the respective responsibilities of the department and the agency in implementing a continuing education program to increase the literacy of releases.

§89.1311. Memorandum of Understanding to Provide Educational Services to Released Offenders.

(a) Purpose. This memorandum of understanding is a non-financial, mutual agreement between the Texas Department of Criminal Justice (TDCJ) and the Texas Education Agency (TEA). Pursuant to the Texas Government Code, §508.318, the TDCJ and the TEA shall set forth the respective responsibilities of the department and the agency in implementing a continuing education program to increase the literacy of releasees.

(b) Objective. This memorandum of understanding is to realize a human service system that offers releasees choices and opportunities, within the realm of educational services, to remain outside prison and achieve maximum integration in the community. The following guiding principles should be considered to accomplish the objectives of this memorandum:

(1) the releasee will achieve more success outside of prison if a support system is in place to promote educational growth;

(2) the releasee may be less likely to become a repeat offender if he/she pursues education further; and

(3) the releasee must be encouraged to recognize the need for increasing his/her educational level to remain in the free world and learn to function as a productive citizen.

(c) Participation.

(1) The Texas Department of Criminal Justice (TDCJ) will:

(A) establish a continuing education system to increase literacy for releasee(s) in the Day Resource Centers;

(B) establish a system whereby the TDCJ will inform adult education cooperatives of the process and requirements for continued education of the releasee(s);

(C) provide adult education cooperatives with assessment and educational profile information that will facilitate student placement in appropriate programs;

(D) coordinate with adult education cooperatives in implementing a system for identification of student needs and barriers, student referral, outreach activities, and releasee's compliance with educational requirements;

(E) identify resources that assist local adult education cooperatives in expanding services for releasees; and

(F) participate in training necessary to develop the capacity at the local level to access and interact effectively with adult education service providers.

(2) The Texas Education Agency will:

(A) coordinate with the TDCJ to inform local parole offices of services available through the adult education cooperative system in which local school districts, junior colleges, and educational service centers provide instructional programs throughout the state;

(B) assist the TDCJ in identifying barriers to provide adult education services to released offenders;

(C) assist local adult education programs in developing the capacity to serve the released offender population;

(D) coordinate with the TDCJ in establishing a referral process between local parole offices and local adult education cooperatives whereby releasees will be referred to adult education programs;

(E) assist local adult education cooperatives in providing services to releasees in adult education programs on a first-come, first-served basis and to the extent the funds and classroom space are available;

(F) assist local adult education cooperatives in communicating and coordinating with local parole offices on prospective students awaiting referral to education programs, availability of services, identification of financial resources, and other educational programs available for released offenders;

(G) coordinate with the TDCJ in developing program objectives and collecting data to establish educational performance standards for released offenders;

(H) coordinate with the TDCJ in providing training to assist local parole officers with the coordination of adult education services to released offenders; and

(I) monitor program quality and compliance of local adult education programs serving released offenders.

(d) Terms of the memorandum of understanding. This memorandum of understanding shall be adopted by rule by each participating agency and shall be effective October 1, 1998. The memorandum may be considered for expansion, modification, or amendment at any time upon the mutual agreement of the executive officers of the named agencies.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 31, 1998.

TRD-9813792
Criss Cloudt
Associate Commissioner, Policy Planning and Research
Texas Education Agency
Effective date: October 1, 1998
Proposal publication date: July 10, 1998
For further information, please call: (512) 463–9701

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TITLE 22. EXAMINING BOARDS

Part XXIX. Texas Board of Professional Land Surveying

Chapter 661. General Rules of Procedures and Practices

Subchapter A. The Board

22 TAC §§661.3, 661.4, 661.9, 661.11

The Texas Board of Professional Land Surveying adopts amendments to §§661.3, 661.4, 661.9, and 661.11, concerning the board without changes to the proposed text as published in the July 17, 1998, issue of the *Texas Register* (23 TexReg 7324) and will not be republished.

The amendments are adopted for clarification on existing rules and language in the Texas Board of Professional Land Surveying Practices Act (Act).

No comments were received regarding adoption of the amendments.

The amendments are adopted under Texas Civil Statutes, Article 5282c, §9, which provides the Texas Board of Professional Land Surveying with the authority to make and enforce all reasonable and necessary rules, regulations and bylaws not inconsistent with the Texas Constitution, the laws of this state, and this 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.

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TRD-9813769
Sandy Smith
Executive Director
Texas Board of Professional Land Surveying
Effective date: September 20, 1998
Proposal publication date: July 17, 1998
For further information, please call: (512) 452-9427

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Subchapter E. Contested Case

22 TAC §661.63, §661.75

The Texas Board of Professional Land Surveying adopts amendments to §661.63 and §661.75, concerning contested case without changes to the proposed text as published in the July 17, 1998, issue of the *Texas Register* (23 TexReg 7325) and will not be republished.

The amendments are adopted for clarification on existing rules and language in the Texas Board of Professional Land Surveying Practices Act (Act).

No comments were received regarding adoption of the amendments.

The amendments are adopted under Texas Civil Statutes, Article 5282c, §9, which provides the Texas Board of Professional Land Surveying with the authority to make and enforce all reasonable and necessary rules, regulations and bylaws not inconsistent with the Texas Constitution, the laws of this state, and this 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.

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TRD-9813770
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. Ethic Standards

22 TAC §§663.5, 663.7, 663.10

The Texas Board of Professional Land Surveying adopts amendments to §§663.5, 663.7, and 663.10, concerning ethical standards without changes to the proposed text as published in the July 17, 1998, issue of the *Texas Register* (23 TexReg 7326) and will not be republished.

The amendments are adopted for clarification on existing rules and language in the Texas Board of Professional Land Surveying Practices Act (Act).

Comments were received in favor of the amendments.

The amendments are adopted under Texas Civil Statutes, Article 5282c, §9, which provides the Texas Board of Professional Land Surveying with the authority to make and enforce all reasonable and necessary rules, regulations and bylaws not inconsistent with the Texas Constitution, the laws of this state, and this 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.

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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 §§663.16, 663.17, 663.19

The Texas Board of Professional Land Surveying adopts amendments to §§663.16, 663.17, and 663.19, concerning professional and technical standards without changes to the proposed text as published in the July 17, 1998, issue of the *Texas Register* (23 TexReg 7327) and will not be republished.

The amendments are adopted for clarification on existing rules and language in the Texas Board of Professional Land Surveying Practices Act (Act).

Comments were received in favor of the amendments.

The amendments are adopted under Texas Civil Statutes, Article 5282c, §9, which provides the Texas Board of Professional Land Surveying with the authority to make and enforce all reasonable and necessary rules, regulations and bylaws not inconsistent with the Texas Constitution, the laws of this state, and this 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 August 31, 1998.

TRD-9813772
Sandy Smith
Executive Director
Texas Board of Professional Land Surveying
Effective date: September 20, 1998
Proposal publication date: July 17, 1998
For further information, please call: (512) 452-9427

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Part XXXV. Texas State Board of Examiners of Marriage and Family Therapists

Chapter 801. Licensure and Regulation of Marriage and Family Therapists

Subchapter A. Introduction

22 TAC §801.2

The Texas State Board of Examiners of Marriage and Family Therapists (board) adopts amendments to §§801.2, 801.19, 801.20, 801.143, 801.144, 801.203, 801.204, 801.263, 801.264, 801.265, 801.266, and 801.268 concerning the regulation of persons performing marriage and family therapy. Sections 801.2, 801.19, 801.144, 801.263, 801.264, and 801.265 are adopted with changes to the proposed text as published in the June 5, 1998, issue of the *Texas Register* (23 TexReg 5925). Sections 801.20, 801.143, 801.203, 801.204, 801.266, and 801.268 are adopted without changes, and therefore the sections will not be republished.

The amendments implement Texas Civil Statutes, Article 4512c-1 and provide for the effective regulation and licensure of marriage and family therapists. Section 801.2 is amended to identify definitions by number for ease in reference. Section 801.19 is amended to increase fees for examination, renewal and late renewal and by adding new fees for continuing education sponsors and for licensure verification to produce sufficient revenue to cover the cost of administering the Act. Section 801.20 is amended to clarify language concerning lost, misdirected or undelivered mail to assure proper responsibilities. Section 801.143 is amended by deleting the requirement of supervisor specific continuing education to provide equity in the renewal process. Section 801.144 is amended to clarify language concerning the relationships of supervisors and associates to provide a clearer understanding of responsibilities. The section is also amended to allow for a shared liability during this arrangement. Section 801.203 is amended to require proper documentation from individuals licensed by endorsement to assure equivalent education and training. Section 801.204 is amended to extend the period of temporary licensure to allow for more

time to gain experience and supervision. Section 801.263 is amended to adjust the number of continuing education hours to allow for equity among the mental health providers. Section 801.264 is amended to expand the types of continuing education activities to allow for a more comprehensive education experience. Section 801.265 is amended to allow for a fee for continuing education sponsors. The section is also amended to require a more frequent renewal of continuing education sponsorship to allow for an adequate monitoring system. Section 801.266 is amended to allow continuing education credit for clinical supervision of an intern or associate. Section 801.268 is amended to decrease the number of continuing education hours required for renewal to be more consistent with other mental health board requirements.

No comments were received on the proposed rules during the comment period. However, the staff has made minor editorial changes to clarify the intent and improve the accuracy of the sections.

Change: Concerning §801.2(23) and (24), the definitions of "Regionally accredited institutions" and "Recognized religious practitioner" were placed in alphabetical order. Also, §801.2(32), the definition of "Year" was deleted.

Change: Concerning §801.19(b)(5)(A) and (B), parentheses were deleted from the fee amounts.

Change: Concerning §801.144(l), the phrase "have no more than two" was added and "only have one" was deleted.

Change: Concerning §801.263, the phrase "three clock-hour" was changed to "3 clock-hour".

Change: Concerning §801.264(8), the phrase "Ethics may not" was changed to "Ethic hours may not".

Change: Concerning §801.265, fourth sentence, the word "presenters" was changed to "presenter's". Also, §801.265(4), the word "effective" was added, and "good" was deleted; and the phrase "date of receipt" was added and "receipt of said fee" was deleted.

The amendments are adopted under Texas Civil Statutes, Article 4512c-1, §§12, 13, and 21 which provides the board with authority to: establish fees to produce sufficient revenues to cover the cost of administering the Act; to draft rules for its own procedures and to determine the qualifications of fitness of applicants; and to establish a mandatory continuing education program including the minimum requirements for the renewal of a license.

§801.2. Definitions.

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

(1) Act - The Licensed Marriage and Family Therapist Act relating to the licensing and regulation of marriage and family therapists, Texas Civil Statutes, Article 4512c-1.

(2) Administrative Law Judge (ALJ) - A person within the State Office of Administrative Hearings who conducts hearings under this subchapter on behalf of the Board.

(3) APA - The Administrative Procedure Act, Texas Government Code, Chapter 2001.

(4) Associate - A marriage and family therapist associate.

(5) Board - The Texas State Board of Examiners of Marriage and Family Therapists.

(6) Completed application - The official marriage and family therapy application form, fees and all supporting documentation which meets the criteria set out in §801.73 of this title (relating to Required Application Materials).

(7) Contested case - A proceeding in accordance with the APA and this chapter, including, but not limited to, rule enforcement and licensing, in which the legal rights, duties, or privileges of a party are to be determined by the board after an opportunity for an adjudicative hearing.

(8) Department - The Texas Department of Health

(9) Family systems - An open, on-going, goal-seeking, self-regulating, social system which shares features of all such systems. Certain features such as its unique structuring of gender, race, nationality and generation set it apart from other social systems. Each individual family system is shaped by its own particular structural features (size, complexity, composition, life stage), the psychobiological characteristics of its individual members (age, race, nationality, gender, fertility, health and temperament) and its sociocultural and historic position in its larger environment.

(10) Formal hearing - A hearing or proceeding in accordance with this chapter, including a contested case as defined in this section to address the issues of a contested case.

(11) Group supervision - Supervision that involves a minimum of three and no more than six marriage and family supervisees or associates in a clinical setting during the supervision hour. A supervision hour is sixty minutes.

(12) Individual supervision - Supervision of no more than two marriage and family therapy supervisees or associates in a clinical setting during the supervision hour. A supervision hour is sixty minutes.

(13) Investigator - A professional complaint investigator employed by the Texas Department of Health.

(14) License - A marriage and family therapist license, a temporary marriage and family therapist associate license, or a provisional marriage and family therapist license.

(15) Licensed marriage and family therapist - An individual who offers to provide marriage and family therapy for compensation.

(16) Licensee - Any person licensed by the Texas State Board of Examiners of Marriage and Family Therapists.

(17) Marriage and family therapist associate - A person who holds a temporary license issued by the Texas State Board of Examiners of Marriage and Family Therapists to practice marriage and family therapy under the supervision of a board-approved supervisor.

(18) Marriage and family therapy - The rendering of professional therapeutic services to individuals, families, or married couples, singly or in groups, and involves the professional application of family systems, theories, and techniques in the delivery of therapeutic services to those persons. The term includes the evaluation and remediation of cognitive, affective, behavioral, or relational dysfunction within the context of therapy.

(19) Month - A calendar month.

(20) Party - Each person, governmental agency, or officer or employee of a governmental agency named by the Administrative Law Judge (ALJ) as having a justiciable interest in the matter being considered, or any person, governmental agency, or officer or

employee of a governmental agency meeting the requirements of a party as prescribed by applicable law.

(21) Person - An individual, corporation, partnership, or other legal entity.

(22) Pleading - Any written allegation filed by a party concerning its claim or position.

(23) Regionally accredited institutions - An institution accredited by one of the following accreditation associations will be accepted for licensing purposes: Middle States Association of Colleges and Schools, New England Association of Schools and Colleges, North Central Association of Colleges and Schools, Northwest Association of Schools and Colleges, Southern Association of Colleges and Schools, and Western Association of Schools and Colleges.

(24) Recognized religious practitioner - A rabbi, clergyman, or person of similar status who is a member in good standing of and accountable to a legally recognized denomination or legally recognizable religious denomination or legally recognizable religious organization and other individuals participating with them in pastoral counseling if:

(A) the therapy activities are within the scope of the performance of their regular or specialized ministerial duties and are performed under the auspices of sponsorship of an established and legally cognizable church, denomination or sect, or an integrated auxiliary of a church as defined in Federal Tax Regulations, 26, Code of Federal Regulation 1.6033-2,(g)(5)(i), (1982);

(B) the individual providing the service remains accountable to the established authority of that church, denomination, sect, or integrated auxiliary; and

(C) the person does not use the title of or hold himself or herself out as a licensed marriage and family therapist.

(25) Rules - The rules in this chapter are covering the designated policies and procedures of operation for the board and for individuals affected by the Act.

(26) Supervision - The guidance or management of an associate in the provision of direct clinical services.

(27) Supervisor - A person meeting the requirements set out in §801.143 of this title (relating to Supervisor Requirements), to supervise an associate and/or marriage and family therapist.

(28) Texas Open Meetings Act - Government Code, Chapter 551.

(29) Texas Open Records Act - Government Code, Chapter 552.

(30) Therapist - For purposes of this chapter, a Texas licensed marriage and family therapist.

(31) Waiver - The suspension of educational, professional, and/or examination requirements for applicants who meet the criteria for licensure under special conditions.

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 August 31, 1998.

TRD-9813801
George Pulliam
Chairman
Texas State Board of Examiners of Marriage and Family Therapists
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For further information, please call: (512) 458–7236

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Subchapter B. The Board

22 TAC §801.19 and §801.20

The amendments are adopted under Texas Civil Statutes, Article 4512c-1, §§12, 13, and 21 which provides the board with authority to: establish fees to produce sufficient revenues to cover the cost of administering the Act; to draft rules for its own procedures and to determine the qualifications of fitness of applicants; and to establish a mandatory continuing education program including the minimum requirements for the renewal of a license.

§801.19. Fees.

(a) The Texas State Board of Examiners of Marriage and Family Therapists (Board) has established the following fees for licenses, license renewals, examinations, and all other administrative expenses under the Licensed Marriage and Family Therapists Act (Act).

(b) The schedule of fees shall be as follows:

(1) (No change.)

(2) licensure examination - $195;

(3) (No change.)

(4) renewal fee - $65;

(5) late renewal fee - late renewal fees shall be set as follows:

(A) on or before 90 days - renewal fee plus one-half of the examination fee - $162.50; and

(B) longer than 90 days but less than one year - renewal fee plus fee equal to the examination fee - $260.00;

(6)-(9) (No change.)

(10) continuing education sponsor fee - $50;

(11) child support reinstatement fee - $40; and

(12) verification fee - $10.

(c)-(e) (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.

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George Pulliam
Chairman
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Subchapter G. Experience Requirements for Examination and Licensure

22 TAC §801.143 and §801.44

The amendments are adopted under Texas Civil Statutes, Article 4512c-1, §§12, 13, and 21 which provides the board with authority to: establish fees to produce sufficient revenues to cover the cost of administering the Act; to draft rules for its own procedures and to determine the qualifications of fitness of applicants; and to establish a mandatory continuing education program including the minimum requirements for the renewal of a license.

§801.144. Other Conditions for Supervised Experience.

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

(f) During the post graduate supervision, both the supervisor and the associate may have disciplinary actions taken against their licenses for violations of the rules.

(g) (No change.)

(h) If an associate enters into contracts with both a supervisor and an organization with which the supervisor is employed or affiliated:

(1) the therapeutic services shall be performed on the site(s) of the organization; and

(2) clients records shall remain the property of the organization.

(i)-(k) (No change.)

(l) An associate may have no more than two board-approved supervisors at a time, unless given prior approval by the board or its designee.

(m) (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.

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Subchapter I. Issuance of a License

22 TAC §801.203 and §801.204

The amendments are adopted under Texas Civil Statutes, Article 4512c-1, §§12, 13, and 21 which provides the board with authority to: establish fees to produce sufficient revenues to cover the cost of administering the Act; to draft rules for its own procedures and to determine the qualifications of fitness of applicants; and to establish a mandatory continuing education program including the minimum requirements for the renewal of a license.

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. Continuing Education Requirements

22 TAC §§801.263–801.266, 801.268

The amendments are adopted under Texas Civil Statutes, Article 4512c-1, §§12, 13, and 21 which provides the board with authority to: establish fees to produce sufficient revenues to cover the cost of administering the Act; to draft rules for its own procedures and to determine the qualifications of fitness of applicants; and to establish a mandatory continuing education program including the minimum requirements for the renewal of a license.

§801.263. Clock Hour Requirements for Continuing Education.

A licensee must complete 15 clock hours of continuing education acceptable to the Texas State Board of Examiners of Marriage and Family Therapists (board) each year as described in §801.262(b) of this title (relating to Deadlines). On or after September 1, 1995, a 3 clock-hour marriage and family ethics course must be submitted every third year. A clock-hour shall be 60 minutes of attendance and participation in an acceptable continuing education experience.

§801.264. Types of Acceptable Continuing Education.

Continuing education undertaken by a therapist shall be acceptable to the board as credit hours if it is offered by an approved sponsor(s) in the following categories:

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

(7) by teaching a graduate or undergraduate course in marriage and family therapy at a college or university (graduate work instruction may count for no more than one-half of annual continuing education); and

(8) by completing correspondence courses, satellite or distance learning courses, and/or audio-video courses relative to marriage and family therapy (no more than 4 hours per year). Ethic hours may not be obtained in this manner.

§801.265. Continuing Education Sponsor.

The Texas State Board of Examiners of Marriage and Family Therapists (board) is not responsible for approving individual continuing education programs. The Texas State Board of Examiners of Marriage and Family Therapists (board) will approve an institute, agency, office, organization, association, or individual as a continuing education sponsor of continuing education units. The board will grant a three-year certificate to organizations which shall permit the organizations to approve continuing education units for their marriage and family therapy courses, seminars, and conferences. These organizations must submit an annual list of their seminars, workshops and

courses with the presenter's name(s) to the board. Any university, professional organization, or individual who meets the required criteria may advertise as approved sponsors of continuing education for licensed marriage and family therapists.

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

(4) Sponsors shall pay a continuing education sponsor fee which will be effective for three years from date of receipt.

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-9813805

George Pulliam

Chairman

Texas State Board of Examiners of Marriage and Family Therapists

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For further information, please call: (512) 458–7236

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TITLE 30. ENVIRONMENTAL QUALITY

Part I. Texas Natural Resource Conservation Commission

Chapter 90. Regulatory Flexibility

Subchapter A. Purpose, Applicability, and Eligibility

30 TAC §90.1, §90.2

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts new §§90.1, 90.2, 90.10, 90.12, 90.14, 90.16, 90.18, and 90.20, concerning Regulatory Flexibility.

Sections 90.2, 90.10, 90.12, 90.14, 90.16, and 90.20 are adopted with changes to the proposed text as published in the May 8, 1998, issue of the *Texas Register* (23 TexReg 4519). Sections 90.1 and 90.18 are adopted without changes and will not be republished.

EXPLANATION OF ADOPTED RULES

Senate Bill (SB) 1591, 75th Legislature, 1997, provides the commission with the authority to exempt an applicant from a requirement of a statute or commission rule related to the control or abatement of pollution if the applicant applies an alternative method or standard that is at least as protective of the environment and is not inconsistent with federal law. This authority provides for the use of innovative methods of compliance that could potentially result in greater environmental performance. SB 1591 further directs the commission to specify by rule the procedure for obtaining an exemption, which must include public notice and public participation provisions.

The purpose of this rulemaking is to comply with the requirements of SB 1591 by establishing Regulatory Flexibility Order (RFO) application requirements and provisions for public notice/public participation.

Section 90.1, concerning Purpose, states the purpose of the new chapter, which is to provide regulatory flexibility to an applicant who proposes an alternative method or alternative standard to control or abate pollution. This section clearly identifies the objective of the adopted chapter and the authority under which the commission is adopting the new chapter.

Section 90.2, concerning Applicability and Eligibility, establishes that the adopted chapter applies to anyone subject to an environmental statute or commission rule. This section also establishes that persons referred to the attorney general and who incur a judgment, and persons convicted of willfully or knowingly committing an environmental crime are ineligible for three years. The program is a voluntary program meant for those persons who have demonstrated a willingness to comply with environmental requirements. The eligibility requirements were therefore written to allow persons with a less than perfect compliance history to remain eligible, while specifically excluding persons who are guilty of major or willful infractions.

Section 90.10, concerning Application for a Regulatory Flexibility Order, specifies the procedures for applying for an RFO, establishes minimum requirements for the application, and establishes a $250 application fee. Minimum requirements were developed to ensure consistency in applications received by the commission, to ensure consistency in the review of those applications, and to minimize the amount of time spent requesting additional information from the applicant.

Section 90.12, concerning Additional Fees; Cost Recovery, establishes a provision for additional fees if the executive director determines that the application is significant and complex. Under this provision, the executive director may require the applicant to enter into a cost recovery agreement in order for the commission to recover all costs associated with the review and approval of the application. This allows the commission to recover costs associated with the review and approval of applications, particularly those that require changes to existing permits or authorizations, or otherwise require extensive staff time and commission resources.

Section 90.14, concerning Commission Action on Application, establishes that the commission will act on the application consistent with provisions found in 30 Texas Administrative Code (TAC) Chapter 50, Subchapter B, concerning Action by the Commission, as applicable. Section 90.14 provides that the commission will consider, during review of the application, the applicant's compliance history and efforts made to achieve local community participation and support. This section was included to clearly indicate how the application will be processed and to ensure that potential applicants understand that their compliance history and efforts to involve the local community will be a factor in consideration of the proposal. Compliance history is important because it gives an indication of the applicant's ability or willingness to comply with an RFO. Local community participation is important because it identifies the preferences of the community relative to the proposal, exposes issues of importance to those in the locality, and provides the applicant with the information needed to address any potential community concerns prior to entering the application process.

Section 90.16, concerning Public Notice, Comment, and Hearing, establishes public notice and participation requirements. Public notice is divided into three segments: the first provides that applicants must comply with public notice requirements associated with the statute or commission rule for which they are

seeking an exemption; the second establishes public notice requirements if the statute or commission rule for which an applicant is requesting an exemption does not require public notice; and the third allows for the use of alternative public notice, provided the alternative is reasonably likely to provide greater public notice and opportunity for participation. In addition, this section establishes minimum requirements for public notice. The public notice provision was divided into three segments because it is meant to provide for the greatest or most effective means of public notice. In addition, in light of the fact that the adopted rule is meant to provide flexibility, the alternative notice provision is meant to allow for the use of an alternative, provided that the alternative is likely to be more effective.

Section 90.18, concerning Amendment/Renewal, establishes the procedures for amending or renewing an RFO. This section specifies that an application for amendment or renewal may be filed in the same manner as a new application. In addition, this section provides that if an application for renewal is submitted at least 180 days prior to the expiration date of the current RFO, the applicant can continue to operate under the existing order until such time as a decision is made on the renewal application. This provision clarifies the procedures for amending or renewing an RFO, and in the event an RFO expires, provides that the applicant can continue to operate under that order provided the renewal application is submitted within the specified time frame. This minimizes the chance of the applicant being penalized because the commission does not act on the renewal application prior to expiration of the order.

Section 90.20, concerning Termination, details termination procedures by the recipient and the commission. This section provides that if the RFO is terminated by the recipient, then the recipient must be in compliance with all existing statutes or commission rules at the time of termination. Termination language was included to allow the recipient to terminate the order in the event that the alternative does not result in an environmental or economic benefit. The recipient is required to immediately be in full compliance with existing statutes or commission rules, because it could operate under the RFO until such time as it is able to operate in full compliance with existing statutes or commission rules.

The commission may terminate the order if it finds that the recipient is not in compliance with the order or if the alternative is not or ceases to be at least as protective of the environment or public health, or becomes inconsistent with federal requirements. This section provides the recipient 30 days to request a show cause hearing before the commission to contest the decision to terminate. This section also provides that the executive director may grant a reasonable grace period to allow the recipient to come into full compliance with all existing statutes or commission rules. Otherwise, the recipient would be in immediate noncompliance upon termination.

FINAL REGULATORY IMPACT ANALYSIS

The commission has reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code (the Code), §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the Code, and it does not meet any of the four applicability requirements listed in §2001.0225(a).

The specific goal of these rules is to provide flexibility from existing statutes and commission rules, provided the proposed alternative is at least as protective as the statute or commission rule it replaces. These rules do not create or impose any additional burdens on the regulated community.

This rulemaking will 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. On the contrary, these rules are expected to have a positive effect on the economy and the environment.

This rulemaking will not exceed any state or federal requirement or a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government.

RFOs issued under these rules may create additional requirements for applicants, such as reporting or recordkeeping, beyond those already contained in the commission's rules. However, since the program is voluntary, no additional requirements will be imposed on the regulated community at large. RFOs may be surrendered at any time, without penalty, provided all existing requirements are met.

The commission did not receive any public comments on the Draft Regulatory Impact Analysis.

TAKINGS IMPACT STATEMENT

The commission has prepared a takings impact assessment for these rules under Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of the rules is to implement the commission's authority under Texas Water Code, §5.123, to provide regulatory flexibility to an applicant who proposes an alternative method or standard to control or abate pollution. The rules will substantially advance this specific purpose by establishing application and public notice/public participation procedures as required by SB 1591, 75th Legislature, 1997 (the legislation authorizing and requiring the commission to develop a regulatory flexibility program). Promulgation and enforcement of these rules will not affect private real property which is the subject of the rules because the Regulatory Flexibility Program is strictly voluntary, and therefore does not impose any burden. Applicants should be fully aware of any additional burdens as a result of program participation, and have the opportunity to withdraw at any time.

The commission did not receive any public comments on the Takings Impact Assessment.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed the adopted rulemaking and found that the rulemaking is identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Actions and Rules Subject to the Coastal Management Program (CMP), and will affect an action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11.

The commission has prepared a consistency determination for the adopted rules under 31 TAC §505.22 and has found that the rulemaking is consistent with the applicable CMP goals and policies. The following is a summary of that determination. CMP goals applicable to the adopted rule include: 1) protecting, preserving, restoring, and enhancing the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs); 2) ensuring sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone; 3) balancing the benefits from

economic development and multiple human uses of the coastal zone, the benefits from protecting, preserving, restoring, and enhancing CNRAs, the benefits from minimizing loss of human life and property, and the benefits from public access to and enjoyment of the coastal zone; 4) coordinating agency and subdivision decision-making affecting CNRAs by establishing clear, objective policies for the management of CNRAs; 5) making agency and subdivision decision-making affecting CNRAs efficient by identifying and addressing duplication and conflicts among local, state, and federal regulatory and other programs for the management of CNRAs; and 6) making coastal management processes visible, coherent, accessible, and accountable to the people of Texas by providing for public participation in the ongoing development and implementation of the Texas CMP.

CMP policies applicable to the adopted rules include the policies in the following policy categories: Category 3-Discharges of Wastewater and Disposal of Waste from Oil and Gas Exploration and Production Activities; Category 4-Construction and Operation of Solid Waste Treatment, Storage, and Disposal Facilities; Category 6-Discharge of Municipal and Industrial Wastewater to Coastal Waters; Category 7-Nonpoint-source Water Pollution; Category 8-Development in Critical Areas; Category 10-Dredging and Dredged Material Disposal and Placement; Category 13-Development Within Coastal Barrier Resource System Units and Otherwise Protected Areas on Coastal Barriers; Category 17-Emission of Air Pollutants; Category 18-Appropriations of Water; Category 19-Levee and Flood Control Projects; Category 20-Policy for Major Actions; and Category 21-Administrative Policies.

Promulgation and enforcement of these rules will not violate any standards identified in the applicable CMP goals and policies because the adopted rules are by definition consistent with the goals and policies of the CMP because any alternative must be shown to be consistent with federal law and to be at least as protective of human health and the environment as the rule for which an alternative is requested; and procedures are established for public notice, comment, and hearing.

The commission did not received any public comment on the consistency of these rules with the Coastal Management Plan.

HEARING AND COMMENTERS

A public hearing on these rules was held in Austin on June 2, 1998, and the public comment period closed on June 8, 1998. No oral comments were received at the public hearing, but written comments were submitted by Texas Association of Business and Chambers of Commerce (TABCC), Texas Chemical Council (TCC), United States Environmental Protection Agency (EPA), Henry, Lowerre, Johnson, Hess & Frederick (Henry, Lowerre), Texas Utilities Services (TU), and Brown McCarroll & Oaks Hartline, L.L.P. (Brown McCarroll). Comments were submitted in regard to the following categories: Public Notice/Participation, Application Requirements, Terminology, Fees, Renewal, Termination, Scope of Flexibility, Procedures, and Eligibility.

GENERAL COMMENTS

TU, TCC, and TABCC expressed support for the rules, but recommended changes. Brown McCarroll did not express support or opposition to the rules, but recommended changes. The EPA expressed support for reinvention and partnership efforts between the two agencies, but expressed concerns over the scope of flexibility that might be granted under these rules and recommended changes. Henry, Lowerre expressed opposition to the rules, suggested limitations to the scope of the program, and recommended changes.

SPECIFIC COMMENTS

PUBLIC NOTICE/PARTICIPATION

The TABCC commented that the public notice requirements included in §90.16(b) could be costly for small businesses. Specifically, the commenter mentioned the requirement to publish notice in a newspaper of largest general circulation. The TABCC suggested that the notice be published in a newspaper of general circulation, but not necessarily the largest circulation. In addition, the TABCC suggested that the rule allow notice to be placed in the classified advertising or legal section. Finally, the TABCC commented that small businesses could not utilize §90.16(c), because it only allows an alternative notice procedure that would provide greater public notice, and therefore, would result in a greater cost to the applicant.

The commission agrees, and believes that publication in a newspaper of general circulation is sufficient. The commission believes that there is no qualitative difference between the classified, advertising, or legal sections of the newspaper, and has therefore decided that notice should be allowed in any of these sections. The commission does not agree that §90.16(c) would necessarily result in a greater cost to the applicant, and suggests that other lower cost methods of public notice may be available, including alternate publication, radio broadcast, placarding, etc. Such proposals will be reviewed on a case-by-case basis, as provided for in §90.16(c).

The TABCC commented that §90.16(b)(2) contains more onerous public notice, comment, and hearing requirements for the applicant than would have been required under the rule for which the applicant is seeking flexibility.

The commission acknowledges the TABCC's comments, but does not agree with its concerns. The commission believes that the public notice, comment, and hearing procedures laid out in the rule are appropriate, and believes that providing meaningful opportunities for public participation is appropriate. If a rule for which an applicant is seeking an exemption contains public notice, comment, and hearing requirements, then §90.16(b)(2) does not apply.

The TCC commented that community involvement should vary, depending on the type of regulatory flexibility being sought, and that applicants should be encouraged to discuss proposals at local citizen advisory panels as appropriate.

The commission agrees that local community involvement should vary, depending on the scope of the proposal. Although the rule language does not, strictly speaking, require local community support, efforts made to achieve local community participation and support will be a factor in the decision by the commission to approve or deny the proposal. To the degree citizen advisory panels are available, the commission encourages utilizing those as a mechanism to inform and involve the public.

The TCC commented that public notice and public participation requirements are inconsistent and duplicative, may require applicants to go beyond regular public notice processes, and that a notice and comment type of hearing should suffice for an RFO.

The commission disagrees. Except for changes to §90.16(b)(2), concerning public comment, the commission believes that the

public notice, comment, and hearing procedures laid out in the rules are appropriate. The public participation procedures in the rule reference the existing procedures for the underlying requirements. Where there are no existing public notice requirements, the commission believes that providing meaningful opportunities for public participation is appropriate.

Henry, Lowerre commented that §90.16(a) requires applicants to comply with all public notice and participation requirements associated with the statutes or commission rules for which the applicant is seeking an exemption; however, the statutes and commission rules provide for no notice or participation requirements for RFOs. Therefore, Henry, Lowerre believes that the rules do not meet the public notice or participation requirements of Texas Water Code, §5.123.

The commission disagrees. An applicant seeking an exemption from statutes or commission rules which contain public notice and participation requirements must comply with those requirements. It is not necessary for those requirements to specify public notice and participation requirements for RFOs. They apply to specific activities undertaken which are affected by those rules, and a request for an exemption from those rules would be an activity which requires public notice and participation in accordance with those rules.

Henry, Lowerre commented that limiting comments to 30 days after the notice is given is not appropriate, and does not allow the public to submit comments on the proposed action of the executive director. The commenter stated that after notice is given, many changes could be made to the application and the position of the executive director, and that the proposed approval of the RFO should be subject to public notice, comment, and possibly a hearing.

The commission acknowledges Henry, Lowerre's concerns. Although orders issued by the commission do not provide for public notice of the final order, the public will be able to follow development of RFOs during the process and will be able to comment during the commission agenda in which the proposal is considered. In the event substantial changes have been made to the application from the time of public notice to consideration during commission agenda, the public has the opportunity to address this issue and ask the commission to consider asking for additional public notice.

Henry, Lowerre commented that the requirement for "greater public notice and opportunity for participation" under §90.16(c) was not defined, and that such alternative notice and participation could possibly violate EPA requirements for federally delegated programs. The commenter further stated that the rules do not provide guidance on when alternative public notice and participation can be authorized by the commission.

The commission acknowledges Henry, Lowerre's concerns and reiterates that each proposal will be considered on a case-by-case basis. This will allow for comprehensive review to determine if greater public notice will be provided under the proposed alternative. Additional guidance is not needed in the rule to ensure that EPA requirements are met. The statute requires an exemption to not be inconsistent with federal law. The proposed rule provides that the application must demonstrate that an exemption will not be inconsistent with federal law, including any requirement for a federally approved or authorized program. This includes any federal requirements for public notice and participation.

TU suggested that the alternative public notice provisions in §90.16(c)(2) allow for equivalent, and not only greater, public notice and opportunity for participation than §90.16(a) or (b) provides.

The commission disagrees. The focus of these rules is to provide dual opportunities for improved environmental performance and decreased costs. The commission believes that if a variance is to be granted from standard notice requirements already duly set out by statute and rule, it should only be granted if the variance will result in improved notice.

Brown McCarroll commented that §90.16(b) should not provide for a public hearing for an alternative method of compliance when one is not required for the original method of compliance.

The commission agrees. It was the commission's intent to provide an opportunity for public comment, but not for a hearing, in cases under §90.16(b). The language has been modified to clarify this intent.

APPLICATION REQUIREMENTS

The TABCC commented that small businesses will be reluctant to certify that "all information is true, accurate, and complete," as required in §90.10(c), because of a lack of confidence where environmental compliance is concerned. In addition, Brown McCarroll suggested that the certification be modified to read "to the best of my [~~the applicant's~~] knowledge, the application information is true, accurate and complete."

The commission agrees, and the language in §90.10(c) has been modified to read as follows: "The application must be signed by the applicant or its duly authorized agent and must certify that all information is true, accurate, and complete to the best of that person's knowledge."

The TCC commented that the language of §90.10(3) could be construed to mean that some type of continuous monitoring is required. The TCC suggested revisions which would allow recordkeeping and/or reporting to suffice when appropriate.

The commission agrees that the language is unclear and has made the following change to §90.10(3): "an implementation schedule which includes a proposal for monitoring, *recordkeeping*, and/*or* reporting, *where appropriate*, of environmental performance and compliance under the RFO."

Henry, Lowerre commented that three copies of the application, as required by §90.10(c), is not a sufficient number of copies. The commenter suggested that the rule require the submittal of eight to ten copies and the placement of one application in a public facility accessible to the public in the affected area.

The commission disagrees that eight to ten copies of applications are necessary. Section 90.10(d) is consistent with or more stringent than other commission rules relating to submission of applications, and the commission does not want to mandate the generation of unnecessary copies which may go unused. The commission agrees that copies should be made available to the public in the affected area. This is accomplished by requiring that a copy be sent to the appropriate regional office. An original copy will also be maintained in the Central Records file in the central office. Interested persons can review or procure copies from Central Records.

Henry, Lowerre commented that the rules do not contain adequate quality control provisions, such as a quick revocation

process, requirements for engineer seals on applicable materials, and a requirement for engineer certification.

The commission acknowledges Henry, Lowerre's comments, but points out that 30 TAC §305.66(f) provides for revocation of a permit if the permit holder or applicant made a false or misleading statement in connection with an application. This rule is applicable to RFOs, because an RFO meets the definition of permit in 30 TAC §3.2. Otherwise, termination of RFOs is sufficiently handled under §90.20. Requirements for engineer seals and certifications will be required on a case-by-case basis as appropriate to the request being considered.

TERMINOLOGY

The TABCC and Brown McCarroll expressed reservations about the use of the word "exemption" in §90.10(b)(1) and §90.16(a), and suggested that a more accurate word or phrase be used to describe this alternative method of compliance. Brown McCarroll suggested that the term "exemption" be dropped and the term "alternative compliance method" be substituted to reflect the fact that the applicant does not seek an exemption from compliance, but rather a different method of compliance.

The commission acknowledges the concern, but the term "exemption" is taken verbatim from the statutory language of Texas Water Code, §5.123. If granted, an RFO would provide an exemption from a requirement of a statute or commission rule regarding the control or abatement of pollution, and not an exemption from regulatory compliance.

Brown McCarroll commented that the phrase "incurring a judgment" is overly broad and could be construed to include agreed settlements.

The commission disagrees, and believes that the term "judgment" does not encompass agreed administrative settlements. A judgment in the context of these rules includes only final actions of a court of law as a result of a referral to the Texas or United States attorneys general.

FEES

The TCC commented that the preamble discussion of §90.12, which states that additional fees may be assessed if the application requires a permit amendment, is unclear and a separate and additional amendment should not be required.

The commission agrees. The language in the preamble and rule have been modified to simplify the fee structure. Specifically, §90.12(a) has been deleted from the rule.

RENEWAL

The TCC commented that RFOs should not require renewal unless they necessitate changes to a permit.

The commission disagrees. Because of the innovative nature of the Regulatory Flexibility Program, the commission believes that it is appropriate and prudent to review RFOs on a periodic basis. Renewal of RFOs will be considered on a case-by-case basis with factors including, but not limited to, compliance with original RFO, demonstration that the alternative is at least as protective of the environment and public health, and the expiration date of any underlying permit or authorization, as applicable.

TERMINATION

The TCC commented that the commission should terminate an RFO only if there is a substantial violation of the order or subchapter.

The commission disagrees. In the event an RFO holder disagrees with a commission initiated termination, the RFO holder may request a show cause hearing before the commission, as provided in newly revised §90.20(b).

Henry, Lowerre commented that the rules provide for renewal of RFOs, but not for a termination or life of such RFO. In addition, it commented that RFOs which allow for changes to the operation of a facility that is authorized by a permit or other commission authorization should expire with the permit or authorization.

The commission acknowledges Henry, Lowerre's comment concerning termination dates. The commission intends to review each application on a case-by-case basis and establish a termination date based on the issue or request. Each order will establish a termination date as appropriate. In the event an RFO allows for changes to the operation of a facility that is authorized by a permit or other commission authorization, that order shall include a termination date which does not extend past the termination date of such permit or authorization unless such permit or authorization is renewed.

Brown McCarroll suggested providing some mechanism of notice and comment opportunity to the RFO holder prior to the termination of the RFO.

The commission agrees, and has modified the provisions of §90.20(b)(1) to give notice of intent to terminate and give the holder of the RFO an opportunity to request a show cause hearing before the commission.

SCOPE OF FLEXIBILITY

The EPA submitted several comments addressing the scope of the Regulatory Flexibility Program. Specifically, the EPA expressed concerns regarding the use of the Regulatory Flexibility Program to vary federal requirements or state requirements which implement federal program requirements, and the phrase "not inconsistent with federal law," which, according to the EPA, could be interpreted to allow the commission to vary federally approved programs without EPA approval. The commenter recommended a language change to §90.2(a) similar to language in the national pollutant discharge elimination system (NPDES) Memorandum of Agreement to clarify this issue. In addition, EPA recommended language referring applicants seeking a variance to federal requirements to federal reinvention mechanisms.

The commission acknowledges EPA's comments and reiterates that orders entered under the authorizing statute, Water Code, §5.123, and this rule will not conflict with legal requirements for federally delegated or authorized programs. Neither the authorizing statute nor this rule authorizes the commission to grant an exemption that is inconsistent with the requirements for a federally approved program. The attorney general of Texas has so informed EPA, in his letter dated March 13, 1998, concerning the commission's application for NPDES authorization. As EPA points out in its comment, to vary the required elements of a federally authorized program without federal approval would violate (that is, be inconsistent with) federal law. As the attorney general noted, the authorizing statute does not authorize this. The sentence from the proposed NPDES Memorandum of Agreement cited by EPA is a restatement of the law; it neither narrows nor expands the authority granted by Texas Water Code, §5.123. Except as specified in other interagency agreements, applications received by the commission which affect federally authorized or

delegated programs will be forwarded to EPA for a consistency review in accordance with the terms of Texas Water Code, §5.123.

Henry, Lowerre commented that the commission should initially limit the scope of the rules and provide flexibility only through the permit process. The commenter suggested that the commission could gain experience with the process before it receives a flood of applications for which, according to them, there are no clear rules.

The commission acknowledges Henry, Lowerre's comments concerning the scope of flexibility. The commission's intent is to address a variety of issues consistent with SB 1591, which relate to environmental regulation, and to promote improvement of the environment. The commission believes it was the legislature's intent to implement a broad-based regulatory flexibility program.

Henry, Lowerre commented that an RFO issued to a facility operating under a standard air exemption, general water permit, permit-by-rule, production area authorization, or any other exception to individual permits would violate the rule establishing the exception and disqualify the facility from the rule. To change a specific requirement with an RFO would eliminate the use of the general permit and require an individual permit. The commenter stated that the rules should specifically exclude these types of authorizations.

The commission acknowledges Henry, Lowerre's concern; however, it also reiterates its intent to implement a broad-based regulatory flexibility program in accordance with the language in SB 1591. The commission emphasizes that each application will be reviewed on a case-by-case basis to ensure that it is at least as protective of the environment and not inconsistent with federal law.

Henry, Lowerre commented that the Regulatory Flexibility Program should exclude requirements under the Texas Audit Privilege Law, recordkeeping or reporting requirements, water quality standards, and minimum technology requirements.

The commission disagrees. The rulemaking provides for the use of innovative methods of compliance that could potentially result in greater environmental performance. Therefore, except for compliance history reasons, the commission has not restricted the activities which could be subject to an RFO. In addition, water quality standards and some minimum technology requirements are federally-based. The statute provides that an exemption not be inconsistent with federal law, and the rules provide that a demonstration be made in the application that an exemption will not be inconsistent with federal law, including any requirement for a federally-approved or authorized program. Each application will be reviewed and judged on a case-by-case basis.

PROCEDURES

Henry, Lowerre commented that the rules do not contain guidance on commission approval of applications. Specifically, it commented that §90.14(a) references 30 TAC §50.17, which does not provide actual procedures for approval or denial of RFO applications. Additionally, it commented that the rule lacked a provision specifying when motions for rehearing or motions for reconsideration are required.

The commission acknowledges Henry, Lowerre's concerns. Each application will be processed in accordance with the provisions set forth in Chapter 50, Subchapter B of the commission rules, as applicable.

Henry, Lowerre commented that although §90.14(b) allows the commission to consider compliance history in its decision to approve or deny an application, it does not indicate how compliance history will be provided to the commission, or what that compliance history would include.

The commission acknowledges Henry, Lowerre's comments. The commission has procedures in place for compiling compliance histories and will use that protocol. Each application will be considered on a case-by-case basis. Compliance history will be one factor for the commission to consider in weighing the advantages against the risks of each proposal. The commission also has the ability to request compliance history information under §90.10(b)(7).

Henry, Lowerre commented that the rules need to provide for compliance and enforcement by requiring easy access to the RFO, provisions for self-reporting of violations, and routine compliance inspections by commission inspectors.

The commission acknowledges Henry, Lowerre's concerns, but it intends for RFOs to be maintained in the same way as all permits, copies of which are located in the Central Office of the agency, as well as in the regional office where the facility is located. This procedure is already in practice, and does not need to be established by rule. RFOs meet the definition of permit and are subject to self-reporting and compliance requirements applicable to all permits.

Henry, Lowerre commented that the commission should not allow the use of the Regulatory Flexibility Program to avoid repeat violations. The commenter suggested that requirements for which a notice of violation was issued should not be eligible for regulatory flexibility.

The commission acknowledges Henry, Lowerre's concern, but expects to receive innovative, pilot project-type applications that could potentially result in greater compliance and environmental improvement. The commission does not envision, nor intend to allow, RFOs to be used as a means merely to circumvent enforcement.

ELIGIBILITY

Brown McCarroll commented that not all misdemeanor convictions of environmental laws should be grounds for automatic ineligibility under the rules. The commenter suggested, instead, that only willful or knowing criminal offenses should trigger automatic ineligibility.

The commission agrees, and has modified the language in §90.2 to provide for knowing or willful violations of environmental law. Evidence of negligent or reckless violations of environmental laws will be considered by the commission under §90.14(b) when deciding whether to issue an RFO.

STATUTORY AUTHORITY

The new sections are adopted under Texas Water Code, §5.123, which authorizes the commission to exempt an applicant from a requirement of a statute or commission rule regarding the control or abatement of pollution if the applicant proposes to control or abate pollution by an alternative method or by applying an alternative standard that is at least as protective of the environment and the public health and is not inconsistent with federal law. Texas Water Code, §5.123, requires the com-

mission to adopt rules specifying the procedure for obtaining an exemption and requires that the rules provide for public notice and public participation.

§ 90.2. Applicability and Eligibility.

(a) This chapter applies to any statute or commission rule regarding the control or abatement of pollution, except that it does not apply to requirements for storing, handling, processing, or disposing of low-level radioactive materials.

(b) Any person subject to any statute or commission rule regarding the control or abatement of pollution may be eligible to receive a Regulatory Flexibility Order, except that:

(1) a person who has been referred to the Texas or United States attorney general, and has incurred a judgment, is ineligible for a period of three years from the date the judgment was final;

(2) a person who has been convicted of willfully or knowingly committing an environmental crime in this state or any other state is ineligible for a period of three years from the date of the conviction.

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 August 31, 1998.

TRD-9813783
Margaret Hoffman
Environmental Law Division
Texas Natural Resource Conservation Commission
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For further information, please call: (512) 239–1966

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Subchapter B. General Provisions

30 TAC §§90.10, 90.12, 90.14, 90.16, 90.18, 90.20

STATUTORY AUTHORITY

The new sections are adopted under Texas Water Code, §5.123, which authorizes the Texas Natural Resource Conservation Commission (commission) to exempt an applicant from a requirement of a statute or commission rule regarding the control or abatement of pollution if the applicant proposes to control or abate pollution by an alternative method or by applying an alternative standard that is at least as protective of the environment and the public health and is not inconsistent with federal law. Texas Water Code, §5.123, requires the commission to adopt rules specifying the procedure for obtaining an exemption and requires that the rules provide for public notice and public participation.

§ 90.10. Application for a Regulatory Flexibility Order.

(a) An application for a Regulatory Flexibility Order (RFO) must be submitted to the executive director.

(b) The application must, at a minimum, include:

(1) a narrative summary of the proposal, including the specific statutes or commission rules for which an exemption is being sought;

(2) a detailed explanation, including a demonstration as appropriate, that the proposed alternative is:

(A) at least as protective of the environment and the public health as the method or standard prescribed by the statute or commission rule that would otherwise apply; and

(B) not inconsistent with federal law, including any requirement for a federally approved or authorized program;

(3) an implementation schedule which includes a proposal for monitoring, recordkeeping, and/or reporting, where appropriate, of environmental performance and compliance under the RFO;

(4) an identification, if applicable, of any proposed transfers of pollutants between media;

(5) a description of efforts made or proposed to involve the local community and to achieve local community support;

(6) an application fee of $250; and

(7) any other information requested from the applicant by the executive director during the application review period.

(c) The application must be signed by the applicant or its duly authorized agent and must certify that all information is true, accurate, and complete to the best of that person's knowledge.

(d) The applicant shall submit an original and two copies of the signed application to the executive director for review, and shall send one additional copy to the commission's regional office for the region in which the facility is located. 90.12. Additional Fees; Cost Recovery.

§90.12. Additional Fees; Cost Recovery.

(a) The executive director may determine that the application for a Regulatory Flexibility Order constitutes a significant and complex application for which the recovery of all reasonable costs for review and approval by the commission is appropriate. Upon notice to the applicant of such finding, the applicant shall execute a cost recovery agreement in a form approved by the executive director.

(b) Final consideration of an application by the commission is contingent on the applicant's agreement to pay the reasonable costs of review, as determined by the executive director.

(c) If an application is withdrawn prior to the commission's consideration of the application, the executive director may void the cost recovery agreement and retain the initial application fee.

(d) The executive director shall determine the commission's costs to administer this chapter, establish rates to recover those costs, and publish the rates in the *Texas Register*. The rates established under this section shall not exceed the rates established by the commission under Health and Safety Code, §361.613 or Chapter 333 of this title (relating to Voluntary Cleanup Programs).

§90.14. Commission Action on Application.

(a) Commission action on an application under this chapter shall be consistent with the provisions set forth in Chapter 50, Subchapter B of this title (relating to Action by the Commission), as applicable.

(b) The commission may consider in its decision, among other factors, the applicant's compliance history and efforts made to involve the local community and achieve local community support.

§90.16. Public Notice, Comment, and Hearing.

(a) The applicant shall comply with all public notice, comment, and hearing requirements associated with the statute or commission rule for which the applicant is seeking an exemption, except as provided in subsection (b) or (c) of this section.

(b) If the statute or commission rule for which an applicant is seeking flexibility does not require public notice, or an opportunity for comment or hearing, the following requirements shall apply.

(1) The applicant shall publish notice at least once in a newspaper of general circulation in the county in which the facility is located or proposed to be located. The notice shall be published within 30 days after submittal of the application. Notice under this section shall not be smaller than that normally used in the newspaper's classified advertising section.

(2) The commission shall accept public comment for 30 days after the last publication of the notice of application.

(c) Alternative public notice.

(1) An applicant may request to provide public notice and an opportunity for comment or hearing in an alternative manner to the requirements of subsection (a) or (b) of this section.

(2) The executive director may authorize alternative public notice and participation opportunities if he determines that the alternative is reasonably likely to provide greater public notice and opportunity for participation than subsection (a) or (b) of this section.

(d) Notice under this section shall, at a minimum, include:

(1) a brief description of the proposal and of the business conducted at the facility or activity described in the application;

(2) the name and address of the applicant and, if different, the location of the facility for which regulatory flexibility is sought;

(3) the name and address of the commission;

(4) the name, address, and telephone number of a commission contact person from whom interested persons may obtain further information;

(5) a brief description of the public comment procedures, and the time and place of any public meeting or public hearing; and

(6) the date by which comments or requests for hearing must be received by the commission.

§90.20. Termination.

(a) By the recipient.

(1) A recipient of a Regulatory Flexibility Order (RFO) may terminate the RFO at any time by sending a notice of termination to the executive director by certified mail.

(2) The recipient must be in compliance with all existing statutes or commission rules at the time of termination.

(b) By the commission.

(1) Noncompliance with the terms and conditions of an RFO, Texas Water Code, §5.123, or any provision of this chapter, may result in the RFO being voided, except that the recipient of the RFO shall be given written notice of the noncompliance and provided an opportunity not less than 30 days from the date the notice was mailed to show cause why the RFO should not be voided. Procedures for requesting a show cause hearing before the commission shall be included in the written notice.

(2) In the event an RFO becomes void, the executive director may specify an appropriate and reasonable transition period to allow the recipient to come into full compliance with all existing commission requirements, including time to apply for any necessary agency permits or other authorizations.

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 321. Control of Certain Activities By Rule

Subchapter B. Concentrated Animal Feeding Operations

30 TAC §§321.31–321.46

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts amendments to §§321.31-321.46, concerning the updating of technical requirements and simplifying administrative procedures related to authorizations of concentrated animal feeding operations (CAFOs). Sections 321.31-321.37, 321.39-321.42, 321.44 and 321.46 are adopted with changes to the proposed text as published in the March 6, 1998, issue of the *Texas Register* (23 TexReg 2230). Sections 321.38, 321.43 and 321.45 are adopted without changes and will not be republished.

The purpose for adopting the amendments to these rules is to create, together with a new general permit currently proposed and under consideration, a variety of vehicles available for the regulation and authorization of air emissions and water discharges by CAFOs, tailored according to regulatory needs including the sizes and natures of the facilities and their discharges, statutory requirements, and the necessary administrative burdens both on the commission and on the dischargers. As adopted, the amendments to this subchapter offer or require, as appropriate, authorization by individual permit or by registration under a permit by rule. In combination with the new proposed general permit, these regulatory options provide a full spectrum of options for the commission to regulate CAFOs by suitable and efficient means.

The commission has taken into consideration the following state and federal actions in adopting these amendments to Subchapter B:

1) Senate Bill 2, 72nd Texas Legislature, First Called Session (1991): Consolidation of the Texas Air Control Board, Texas Water Well Drillers Board, Texas Board of Irrigators, Texas Water Commission and selected programs from the Texas Health Department into the TNRCC with the express purpose and instruction that the new TNRCC streamline permit procedures and promote more comprehensive and more expeditious review of proposed facilities.

2) Senate Bill 503, 73rd Texas Legislature (1993), that allows the Texas State Soil and Water Conservation Board to assist small agricultural and silvicultural facilities in meeting water

quality requirements in the state through financial assistance and the development of certified water quality management plans.

3) The United States Environmental Protection Agency (EPA) Region VI General Permit for CAFOs (March, 1993), which establishes technical and procedural requirements substantially identical to those contained in these adopted amendments for CAFOs to meet in order to receive federal authorization to discharge under the National Pollutant Discharge Elimination System (NPDES).

4) Section 26.040 of the Texas Water Code, under which Subchapter B was originally adopted and which regulate and set requirements and conditions for discharges of waste. As amended, §26.040 allows the commission to amend rules it promulgated thereunder prior to its amendment.

5) House Bill 1542, 75th Texas Legislature (1997), which amended §26.040 of the Texas Water Code to allow the TNRCC to authorize the discharge of wastewaters through the issuance of general permits. Discharges under such general permits are limited to no more than 500,000 gallons in a 24-hour period. This bill further specifies that all current rules adopted by the TNRCC under §26.040 as it read prior to the effective date of the HB 1542 should remain in effect, as they may be amended by the commission from time to time as appropriate, and provides that the commission's authority for subsequent amendments or modifications is not affected by the changes made by the bill.

6) The General Appropriation Acts of 73rd, 74th and 75th Sessions of the Texas Legislature which have limited the number of employees and funds allocated to the various programs of the TNRCC.

The commission has applied for authorization under Section 402(b) of the federal Clean Water Act to administer the NPDES in Texas. The EPA has informed the commission that its application is complete. Under the terms of the application and federal law, the commission must regulate CAFOs in conformity with federal requirements, either by rule, general permit or individual permit. Currently, the EPA regulates all CAFOs in Region VI under its jurisdiction by general permit. One reason for the adoption of these amendments and the proposed general permit is to enable the commission to perform this task efficiently through the use of permits by rule and a general permit that are consistent with the federal NPDES general permit. TNRCC recognizes that additional amendments may be necessary if NPDES authorization becomes effective. The amendments adopted today are, however, generally equivalent to the EPA Region VI general CAFO permit. Thus by adopting these amendments, the commission fulfills the requirements for NPDES authorization and also avoids the inefficiency and duplication of permitting each CAFO operation individually, but all with the same NPDES standards. The nature of CAFOs is such that uniform standards of performance and management, as reflected in the EPA Region VI general permit and in these rules, are sufficient to carry out the state and federal regulatory mandates and provide ample protection of the state's air and water resources.

Under this adoption of amendments to Subchapter B, the commission changed the existing technical and procedural requirements for some CAFOs. The permitting procedure as it operated prior to these adopted amendments required the agency to invest significant resources and manpower performing repetitive technical reviews and evaluations in order to develop individual draft permits for all CAFOs, even though federal and state experience establishes that permits for most CAFO facilities should contain basically uniform technical requirements. The agency was criticized by applicants, local economic development organizations, agricultural commodity groups, local chambers of commerce, and legislators for taking too long to process applications under the previous Subchapter B. Such criticism indicated that the long timeframe for processing applications under the previous Subchapter B, and the differing technical requirements from the existing EPA Region VI general permit, were combining to force potential CAFO facilities to locate in other states, depriving our state of economic development opportunities and made it difficult and burdensome to obtain the necessary state and federal authorizations. Partially in response to these expressions of concern, the TNRCC adopted Subchapter K. By judgement rendered in ACCORD Agriculture, Inc. v TNRCC (Cause Number 96-00159), 353rd Judical District of Travis County (*Accord*) in May 1998, Subchapter K was set aside due to procedural defects in its adoption. These amendments to Subchapter B have been developed and adopted both to address the substantive problems Subchapter K was created to ameliorate and to correct the defects in the adoption of Subchapter K cited by the court.

The commission and other state agencies have been required through the appropriations process in the last several legislative sessions to reduce the number of their employees and overall costs of conducting their various programs. Since its consolidation in 1993, the commission has continued to evaluate its programs to find ways to reduce its overall human resources costs and associated expenses, while providing for the continued protection of the quality of the state's resources under its jurisdiction. The commission identified CAFOs as one of the number of types of facilities for which it is appropriate to modify the commission's authorization procedure from entirely an individual permitting process to one that partly utilizes permits-by-rule, so as to provide a performance-based system with a less time-consuming and labor-intensive administrative process while maintaining a high level of protection for the environment.

To permit each facility individually would lead to a backlog of such permitting actions, similar to occurrences before the implementation of permits by rule through the former Subchapter K. Of the 46 major amendment applications received between 1992 and 1994, 21 applications exceeded a technical review time of 180 days and thus considered in backlog. Of the 119 new applications received between 1992 and 1994, 41 applications exceeded a technical review time of 180 days and thus considered in backlog. Overall, there was a 38% backlog of new and major amendment applications received between 1992 and 1994. The commission believes its resources would be better spent conducting full individual permitting procedures mostly for those facilities that regularly discharge waste into surface waters, and thereby have a greater potential for pollution, while regulating by uniform rule or general permit most facilities that are not allowed to discharge into a stream or water body unless there is a rainfall greater than a 25-year, 24-hour event. Such action is consistent with the provisions and philosophy of the EPA Region VI General Permit for CAFOs. The adopted amendments to Subchapter B together with the new general permit will provide a process of gaining authorization similar in nature and structure to that used by EPA Region VI. They also bring the technical requirements of the state program up to the those of the federal program, allowing the CAFOs in the state to achieve a single set of standards and providing the basis for

the state to quickly and efficiently assume administration of the NPDES CAFO program upon authorization of the program from EPA.

In addition to the previous provisions of Subchapter B, an applicant wanting to construct a new CAFO facility or amend or renew an authorization for an existing facility was required to obtain a separate air quality authorization from the Commission through a separate and distinct process under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification). The adopted amendments to Subchapter B are consistent with the provisions of the EPA Region VI General Permit for CAFOs and go even further by including additional requirements which address the commission's concerns and responsibilities for protection of both groundwater resources and of air quality.

The adopted amendments to Subchapter B provides a process under which CAFOs will gain coverage or authorization fully protective of both air and water quality through a single process. This will give commission the ability to combine processes and save limited resources and manpower. Amendments to Subchapter B are being adopted, in part, to replace the judicially nullified Subchapter K and to make state requirements for new facilities consistent with existing federal EPA requirements contained in 40 CFR Part 122, relating to concentrated animal feeding operations. In addition to providing more consistency with the federal permit, the adopted amendments to this subchapter will enable the commission to regulate these facilities in a manner that conserves scarce resources, and will relieve burdens on the commission and the CAFOs by consolidating air and water quality authorization requirements into a single process.

The adopted amendments to Subchapter B allow a CAFO to obtain an air quality standard permit through the procedures identified in this amended subchapter, regardless of whether its water quality authorization takes the form of an individual permit, registration under the permit by rule or coverage under the proposed general permit. Section 382.0518(a) of the Texas Clean Air Act (TCAA) states that a permit is required to construct a new facility or to modify an existing facility that may emit air contaminants. As authorized by TCAA §382.051(b)(3), the standard permit under this subchapter satisfies the TCAA requirements for these facilities, that would otherwise be subject to §382.0518, so that a separate air quality authorization will not be necessary. The CAFO standard permit is not a new requirement, but provides an alternative to the New Source Review permit process of Chapter 116, Subchapter B. The standard permit alternative specifies design, location, operational, and maintenance requirements that are typically included in an air quality permit under Chapter 116 and are adequate to protect the public's health, safety, and use of physical property. The air quality requirements of this subchapter essentially reflect the control technology that would be required as BACT for a facility applying for an individual permit, including the requirement to develop and operate under a pollution prevention plan, design criteria for lagoons, operational requirements for single and multi-stage lagoon systems, requirements for wastewater irrigation practices and waste application practices, maintenance scheduling and reporting requirements for solids removal from lagoons, requirements for manure stockpiling, minimum buffer distance for nighttime application of liquid and solid waste, flushing and scraping schedules for manure, maintenance and design of earthen pens, operational requirements for settling basins, dead animal disposal limitations, and inspection requirements. Many of these requirements affect both air and water quality, and are required regardless of whether an owner/operator seeks separate air authorization. Those that are required only when seeking air authorization are identified as "(Air quality only)" in this subchapter. In addition, §321.46 outlines minimum buffer distances and the requirement to submit an odor control plan for certain CAFOs. As adopted, §321.46 states that a CAFO is entitled to an air quality standard permit authorization in lieu of the requirement to obtain a separate air quality authorization under Chapter 116 (relating to Control of Air Pollution by Permits for New Construction or Modification) if it either (1) meets all of the requirements for registration or individual permit outlined in this subchapter, or (2) meets all of the requirements for operating under a CAFO general permit and satisfies all the applicable air quality only requirements including any applicable buffer distances and the odor control plan. If an applicant cannot meet the air quality criteria of this amended subchapter, or if the CAFO is a major source or major modification as defined in Chapter 116 of this title, then a separate air quality permit will be required.

The amended registration or permit by rule process will relieve the commission of the unproductive burden of processing individual permit applications for those CAFOs that either do not qualify for, or choose not to be, covered by an adopted general permit, but are nevertheless appropriately regulated if they comply with the requirements of the permit by rule. These adopted amendments also preserve the commission's flexibility to require any facility to apply for and obtain an individual permit, for any reason that within the commission's judgment makes it necessary or appropriate that they do so. In this way, the commission will be able to use its resources efficiently to concentrate individual attention more directly where it is needed. This type of efficiency is possible in the regulation of CAFOs because, as reflected in this amended permit by rule, most CAFOs, if designed and operated properly in conformity with uniform standards, will avoid discharging into surface water except under exceptional circumstances. Those that fall outside of that group will still receive individually tailored permits and provisions.

For registrations, these amendments adopt a public participation procedure similar to that used by the commission for registrations under Chapter 312 of this title, (relating to Sludge Use, Disposal and Transportation). These include notice of technically complete applications both published in the locality of the proposed operation and mailed to potentially affected landowners and other interested persons and governmental authorities, opportunity for public comment, consideration by the executive director of such comment timely received, and procedures for commenters or the applicant to ask the commission for reconsideration of the executive director's action on a registration application. For those who have exhausted their administrative remedies and otherwise have standing, there is then the ability to appeal the commission's final decision to state district court under Texas Water Code, §5.351. Thus, these amendments provide for full public notice, scrutiny and input, as well as commission and judicial review, while reserving for those cases where an individual permit is appropriate the full contested case hearing provided for under §26.028 of the Water Code. Mindful that even the most simple contested case hearing costs the agency several thousand dollars in staff time alone, the commission has adopted these amendments, in part, as a way to devote such resources only to those cases where cir-

cumstances make an individual permit necessary for effective regulation.

EXPLANATION OF ADOPTED RULE

As adopted §321.31, Waste and Wastewater Discharge and Air Emission Limitations, provides the general restrictions or limitations to the discharge of wastewater from a CAFO. These limitations are consistent with existing federal requirements for CAFOs. The adopted rule also provides that facilities must be operated in such a manner as to prevent a nuisance or a condition of air pollution as provided by Texas Health and Safety Code, Chapters 341 and 382.

As amended §321.32, Definitions, reflects a significant number of additional terms being defined, a small number being deleted and a few existing definitions being modified to reflect the consistency between state and federal programs.

As adopted §321.33, Applicability, provides that any existing CAFO holding an individual permit issued either under Subchapter B or under other authority prior to the effective date of these amendments shall continue to be regulated under such individual permit. It also provides that any animal feeding operation may be required by the executive director to file an application to obtain an individual permit under circumstances identified in this amended section. Any CAFO which does not gain coverage under an adopted CAFO general permit or does not hold an existing individual permit or other currently valid TNRCC authorization must file an application for registration in accordance with the provisions of §321.35 of this title, (relating to Procedures for Making Application for Registration). CAFOs in the Dairy Outreach Program Areas having greater than or equal to 300 animal units but less than 1,000 animal units are required to file an application for registration under this subchapter and meet the education requirements of §321.41 of this title, (relating to Other Requirements). Any CAFO which is not required to file an application for registration or an individual permit under the provisions of this subchapter shall comply with all the requirements under §§321.38-321.42 of this title, (relating to Proper CAFO Operation and Maintenance, Pollution Prevention Plans, Best Management Practices, Other Requirements, and Monitoring and Reporting Requirements).

This amended section also prohibits new facilities on the Edward's Aquifer recharge zone.

The changes also allow certain CAFOs to obtain an air quality standard permit authorization by meeting air quality criteria contained in this amended subchapter. Qualification for the air quality standard permit authorization will be determined in the consolidated review and authorization process provided by §321.34, Procedures for Making Application for an Individual Permit or §321.35, Procedures for Making Application for Registration. However, certain CAFOs are prohibited from using the standard permit authorization and must obtain a separate air quality permit. Any CAFO which cannot meet the air quality criteria in this amended subchapter must obtain a separate air quality authorization under Chapter 116 of this title. Any CAFO which is a new major source or major modification as defined in Chapter 116 of this title must obtain an air quality permit under Chapter 116 of this title. Additionally, animal feeding operations that are not required to obtain a CAFO permit under this amended subchapter may be required to obtain air quality authorization under Chapter 116 of this title (certain operations may qualify for an exemption from air quality permitting requirements).

Regardless of any authorization granted pursuant to this amended subchapter, CAFOs must comply with any applicable federal air quality regulations including, but not limited to, National Emission Standards for Hazardous Air Pollutants ("NESHAPs") or New Source Performance Standards ("NSPS"). Additionally, any CAFO that constitutes a major source as defined in Chapter 122 of this title must obtain a federal operating permit under that chapter.

The adopted changes also exempt from this amended subchapter any existing AFO which is operating under a certified water quality management plan or any facility which qualifies and obtains such a plan from the Texas State Soil and Water Conservation Board, unless the AFO or facility is referred by the Board to the commission for non-compliance pursuant to Texas Agriculture Code §201.026.

This section also creates a mechanism for transition to coverage under Subchapter B for facilities that obtained authorization under Subchapter K and whose authorizations were not terminated by the judgement in *Accord*. Provided they are in good standing with regard to compliance with the technical requirements of Subchapter K, these facilities may transfer their Subchapter K registration to a Subchapter B registration without reapplying. A Subchapter K facility seeking such a transfer must file a request with the Executive Director. The Commission will notify those persons who would be entitled to receive mailed notice of an application by the facility for registration under §321.35 of this title (relating to Procedures for Making Application for Registration). If no objection is received from anyone entitled to the notice, the transfer will be granted.

Finally, changes to this section provide that by written request of the owner/operator a facility currently authorized by an individual permit may request a transfer of authorization from an individual permit to a registration. Such a request and application will be processed in accordance with the provisions of §321.35 of this title, (relating to Procedures for Making Application for Registration).

As adopted Section 321.34, Procedures for Making Application for an Individual Permit, provides application content requirements and associated fees. Applications filed under this section will be processed in accordance with the applicable provisions of Chapter 305 of this title (relating to Consolidated Permits), unless specified otherwise in this amended section. Individual permits issued under this amended subchapter shall not exceed a term of five years.

In accordance with Texas Water Code §26.028(e), §321.34, Procedures for Making Application for an Individual Permit, provides that an application to renew a permit for a confined animal feeding operation which was issued between July 1, 1974, and December 31, 1977, may be renewed by the commission at a regular meeting without holding a public hearing if the applicant does not seek to discharge into or adjacent to waters in the state and does not seek to change materially the pattern or place of disposal. In accordance with Texas Water Code §26.028(a), §321.34 also reflects the commission's judgment that no person will be affected by the renewal of a permit if no major amendment is proposed to the permit provisions and if the permittee has operated in compliance with its permit conditions throughout the term of the expiring permit.

In addition, the changes to this section require that an application for renewal of an individual permit be filed not later than

the 180th day prior to the date the permit is to expire. The section also includes content requirements and associated fees. Finally, an application for renewal for an individual permit may be granted without a public notice if no change to the facility is being proposed and no formal enforcement action has been brought against the facility during the previous 36-month period. In order to qualify for the renewal process identified in the previous sentence and in addition to the provisions described in this paragraph, for renewal of an individual permit within a Dairy Outreach Program Area, an annual compliance inspection must have been completed within 12 months of the date the executive director declares the application for permit renewal administratively complete. An application for renewal of an individual permit failing to meet the above provisions will be processed as a new application.

As adopted, the changes to §321.35, Procedures for Making Application for Registration, set out application content requirements and associated fees. Registrations authorized under this amended subchapter shall not exceed a term of five years.

In addition, under the changes to this section an application for renewal of a registration must be filed not later than the 180th day prior to the date the authorization is to expire. This section also provides content requirements and associated fees for the renewal process. Finally, an application for renewal of a registration may be granted without a public notice if no change to the facility is being proposed and no formal enforcement action has been brought against the facility during the previous 36-month period. To qualify for this renewal process for renewal of an existing registration within a Dairy Outreach Program Area also requires that an annual compliance inspection has been completed within 12 months of the date the executive director declares the application for renewal administratively complete. Any application for renewal of a registration failing to meet the above provisions will be processed as a new application.

As adopted changes to §321.36, Notice of Application for Registration, require applications for registration to be reviewed by the executive director for administrative and technical completeness within 30 working days of receipt. If the application is not complete, the executive director must notify the applicant within this review period and allow the applicant a maximum 30-day period to provide the necessary information. If the applicant does not timely submit such information, the application shall be returned.

This section also provides notice content requirements, a 30-day public comment period, notice published in a local newspaper and mailed notice to persons, including adjoining landowners, county judges, river authorities in the Dairy Outreach Program Areas, and where applicable, groundwater districts. These provisions are consistent with those for other types of applications covered by Chapter 305 of this title.

As amended, §321.37, Action on Applications for Registration, provides that any person may comment to the executive director within 30 days of the mailed notice. Comments will be considered by the executive director in determining whether the application meets the requirements of the rules and should be granted. The executive director may grant or deny the application, in whole or in part, deny with prejudice, suspend an activity or modify a proposed activity requested by the applicant. The executive director will provide a copy of the determination in writing to the applicant and to any persons timely submitting written information on the application. Finally, this amended section provides that persons submitting timely written comments or the applicant may file a motion with the chief clerk requesting the commission to reconsider the final determination of the executive director. For efficiency of procedures, the commission will use and has cross-referenced the procedures in §50.39 (b-f) of this title (relating to Motions for Reconsideration) for the processing of such motions under this subchapter.

As amended, §321.38, Proper CAFO Operation and Maintenance, requires the owner/operator of any CAFO authorized by this subchapter to implement and document best management practices set out in §321.40 of this title as well as other necessary measures contained in the facility's pollution prevention plan as required by §321.39 of this title or a Natural Resources Conservation Service (NRCS) plan, whichever is applicable. Copies of records and plans shall be provided to the executive director upon request.

As amended §321.39, Pollution Prevention Plans, requires each facility, authorized under this amended subchapter, to develop and implement a Pollution Prevention Plan (PPP) providing pollution prevention and abatement measures as specified in the rule. Provisions contained in a NRCS plan may be adopted by reference in the PPP.

As amended §321.40, Best Management Practices, provides a list of best management practices that must be utilized by all CAFOs authorized under this amended subchapter, where reasonable and appropriate, and based upon existing physical conditions. Where provisions in a NRCS plan are equivalent to or more protective than those provided by this amended section, such provisions may be substituted.

In accordance with §26.048 of the Texas Water Code, a CAFO authorized to discharge agricultural waste into a playa or to use a playa as a wastewater retention facility for agricultural waste before the effective date of §26.048 may continue such discharge provided water samples from wells at the site are tested for chlorides and nitrates. If the test results indicate a significant increase in the levels of these contaminants, the commission shall investigate the cause and require necessary corrective action. Amended §321.41, Other Requirements, contains the additional conditions for authorizations and individual permits including education and training (Dairy Outreach Program Areas only), inspections and recordkeeping, internal reporting procedures, and visual and site inspections. The owners/operators of CAFOs with greater than or equal to 300 animal units in the Dairy Outreach Program Areas and that are covered by this amended subchapter are required to: 1) within 12 months of becoming subject to the this amended subchapter, complete an eight hour course in animal waste management; and 2) complete an additional eight hours of continuing animal waste management education within each 24 month period after the initial course.

As amended §321.42, Monitoring and Reporting Requirements, requires the owner or operator of a facility authorized under this amended subchapter to report to the executive director any discharge from the CAFO to or adjacent to waters in the state. Such report must be made orally within 24 hours and in writing within five working days of the discharge. These provisions are consistent with those contained in Chapter 305 of this title. In addition, the section prescribes the data and information that shall be maintained on-site and/ or submitted to the executive director.

As amended §321.43, Notification, requires all new animal feeding operations which plan or propose to confine more than 300 animal units or more than 300 head of any species not specifically listed under the definition of a CAFO in this amended subchapter to notify the executive director of the location and size of their operation. No fees will be imposed as the result of this notification. Facilities that have no potential to discharge into waters in the state are not required to notify the executive director.

As amended §321.44, Dairy Outreach Program Areas, designates those counties in the state which are involved in the Dairy Outreach Program as of the effective date of these rules. The areas include all of the following counties: Erath, Bosque, Hamilton, Comanche, Johnson, Hopkins, Wood and Rains. Such areas must be delineated by rule. This section of the rules shall be reviewed by the commission on at least a triennial basis to determine whether counties should be added or deleted from designation.

As amended §321.45, Effect of Conflict or Invalidity of Rule, contains a standard severability clause providing that the invalidity of any one provision shall not affect the validity of any of the remaining provisions. Additionally, to the extent of any irreconcilable conflict between the provisions of this amended subchapter and those outside the subchapter, the former shall control.

As amended §321.46, Air Standard Permit Authorization provides that a facility that locates and is managed in compliance with an authorization under a CAFO general permit, registration, or individual permit, and operates in compliance with all of the "(Air Quality Only)" requirements of this subchapter, is entitled to an air quality standard permit in lieu of the requirement to obtain an air quality permit under Chapter 116. As adopted, for new CAFOs and expansions of new CAFOs, the applicant must submit evidence, at the time of the initial application, of either a minimum air quality buffer of one-quarter mile and an odor control plan, or a minimum air quality buffer of one-half mile from any occupied residence or business structure, school (and associated recreational areas), church, or public park unless the owner of such property gives written consent, in order to qualify for consolidated air quality standard permit and a water quality authorization (individual permit or application for registration). For expansion projects at existing CAFOs or at AFOs proposing to become CAFOs, the applicant must provide a minimum air quality buffer of one-quarter mile or an odor control plan.

FINAL REGULATORY IMPACT ASSESSMENT

The commission has reviewed the rulemaking in light of the regulatory analysis requirement of Texas Government Code §2001.0225 and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the act. Although the intent of the rule is to protect the environment and to reduce risks to human health, this rule affects an industry and the individual facilities that are already regulated in substantially similar manner to that described in the rule. As set out in the fiscal note accompanying the proposal of these amendments, this rule will not have an adverse economic effect on small business. This is because potential cost increases to existing businesses will be mitigated by the cost savings realized due to the elimination of requirements associated with application for separate water quality and air quality authorizations, and because most of the cost increase that may result is attributable to the federal requirement to comply with the EPA general permit for concentrated animal feeding operations, and would occur regardless of these amendments. Also, these rules provide an exception for most small facilities, which are eligible to operate under a certified water quality management plan from the Texas State Soil and Water Conservation Board. Therefore, this rule will have no material adverse effect on the economy, productivity, competition, jobs, the environment or the public health and safety of the state or a sector of the state. Further, this rule does not meet any of the four applicability requirements listed in §2001.0225(a). It does not exceed a standard set by federal law or an express requirement of state law, since standards for CAFO authorizations are required, but not set, by federal and state law; nor does it exceed a requirement of a delegation agreement or contract between the state and the federal government. There is currently no such agreement, and these rules do not exceed any requirement in the program. Finally, these rules are adopted under the specific authority of Water Code Section 26.040 and Health and Safety Code Sections 382.011, 382.012 and 382.051, as well as the general authority of Water Code Section 5.103 and Health and Safety Code §382.017.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these rules pursuant to Texas Government Code Annotated, §2007.043. The following is a summary of that Assessment. The specific purpose of the proposed amendments is to create, together with the proposed general permit, a variety of vehicles available for the regulation and authorization of air emissions and wastewater discharges by CAFOs, tailored according to regulatory needs including the sizes and natures of the facilities and their discharges, statutory requirements and the burdens both on the commission and on the discharges. Promulgation and enforcement of these adopted amendments will not affect private real property which is the subject of the rules.

COASTAL MANAGEMENT PLAN (CMP)

Under 31 TAC §505.11, permits for a new CAFO within one mile of a Coastal Natural Resource Area (CNRA) must be consistent with the applicable goals and polices of the CMP contained in Chapter 501, Subchapter B of Title 31. These amended rules would specifically require CAFOs within one mile of a CNRA to obtain an individual permit for the specific purpose of ensuring consistency with applicable CMP goals and policies.

The commission has reviewed this rulemaking for consistency with the CMP goals and policies in accordance with regulations of the Coastal Coordination Council and has determined that the rulemaking is consistent with the applicable CMP goals and policies. The following is a summary of that determination. CMP goals applicable to the amended rules include the protection, restoration and enhancement of the diversity, quality, quantity, functions and values of CNRA and to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone. CMP policies applicable to the amended rules include the following: 1) discharges shall comply with water-quality-based effluent limits; 2) discharges that increase pollutant loadings to coastal waters shall not impair designated uses of coastal waters and shall not significantly degrade coastal water quality unless necessary for important economic or social development; and 3) to the greatest extent practicable, new wastewater outfalls shall be located where they will not adversely affect critical

areas. Promulgation and enforcement of these amended rules will not violate (exceed) any standards identified in the applicable CMP goals and policies because any new proposed CAFO located within one mile of a CNRA will be required to pursue an individual permit which will allow the commission to consider the effects of such a facility on the CNRA, establish effluent limits, if necessary, on any discharges from the proposed facility to maintain applicable water quality standards and allow opportunity for notice, public comment and public hearing.

HEARINGS AND COMMENTERS

A public hearing was held on April 7, 1998. Oral testimony was received from thirty-one persons representing the following: Representative Warren Chisum (District 88); Representative David Swinford (District 87); ACCORD Agriculture, Inc.; North Plain Ground Water Conservation District; Greenbelt Municipal and Industrial Water Authority; City of Crowell; City of Childress; Childress Chamber of Commerce; Childress Economic Development Corporation.; County of Childress; City of Clarendon; Agri-Waste Technology, Inc.; Texas Poultry Federation; Texas Farms, Inc.; Dairy Farmers of America; Red River Authority; Texas Pork Producers Association; Texas Cattle Feeders Association; three individuals representing themselves as farmers/ranchers in Ochiltree County and one attorney representing several landowners and former city officials in Johnson and Ochiltree Counties. Oral comments provided by the Greenbelt Municipal and Industrial Water Authority; City of Crowell; City of Childress; Childress Chamber of Commerce; Childress Economic Development Corporation; County of Childress; and the City of Clarendon are listed in the analysis of testimony and comments under the name of Greenbelt Municipal and Industrial Water Authority.

The public comment period closed on April 13, 1998. One hundred-thirty two commenters submitted written comments. The Texas Pork Producers Association, Dairy Farmers of America, ProAg, and the Texas Poultry Federation either supported the rules as written or generally supported the rules with suggested changes. ACCORD Agriculture, Inc.; ACAFO; Lone Star Chapter of the Sierra Club; Henry, Lowerre, Johnson, Hess and Frederick; City of Quanah, Childress County; Greenbelt Municipal and Industrial Water Authority; Red River Authority; Brazos River Authority; and 48 individuals from the Panhandle area of the state either opposed the rules as written or generally opposed the rules and recommended changes be made to the rules as proposed. Texas Farm Bureau; Texas Association of Dairymen; Farm Credit Bank; Continental Grain Company; Maddox and Sons; Agri-Waste Technology, Inc.; Rice Construction; Murphy Family Farms; DeKalb Swine Breeders, Inc.; Texas Cattle Feeders Association; Hereford Feed Yards, Inc.; Jennings Land and Cattle, Inc.; Perry Feeders, Inc.; Benzer Beef; Coyote Lake Feedyard; Dimmitt Feed Yard, Inc.; Morris Stock Farm; Tri-State Cattle Feeders; Canadian Feedyards, Inc.; Comstock Cattle Corp.; Farwell Feed Yards; Perryton Feeders, Inc.; Bartlett Cattle Co., L.P.; Stratford Feedyard; Sugarland Feed Yards, Inc.; McLean Feedyards, Inc.; Live Oak Feedlot, Inc.; Frontier Feedyards, Inc.; Bar-G Feedyard; Koch Beef Co. (Hale Center); Koch Beef Co. (Lubbock); Veribest Cattle Feeders, Inc.; Perryton Economic Development Corporation; Wrangler Feedyard; Jade Cattle Feeders; Pilgrim's Pride Corporation; Mahard Egg Farms, Inc.; North Plains Ground Water Conservation District No. Two; United States Department of Agriculture; NRCS; United States Department of Interior, Fish and Wildlife Service; Mayor, City of Perryton; Texas Agricultural Extension Service "TAEX"(College Station); Texas Agricultural Extension Service "TAEX" (Amarillo) and an attorney representing landowners in Johnson and Ochiltree Counties did not generally support or oppose the rulemaking, but suggested changes to the rules as proposed. Written comments provided by the ACCORD Agriculture, Inc.; ACAFO; Lone Star Chapter of the Sierra Club and Henry, Lowerre, Johnson, Hess and Frederick are listed in the analysis of testimony and comments under the name of ACCORD Agriculture, Inc.

A second public hearing on the air quality components of the rules was held on June 25, 1998, in order to fulfill the requirement of §382.017(b) of the Texas Health and Safety Code. Oral testimony was received from two organizations and one individual from Ochiltree County. The organizations represented ProAg, who supported adoption of the rules; and ACCORD Agriculture, Inc., who generally opposed the rules and recommended changes be made to the rules as proposed. The individual opposed adoption of the rules as proposed.

Nineteen additional written public comments were received in response to notice of the June 25, 1998, hearing, all of which were either opposed to the rules or generally opposed the rules and recommended changes be made. Many of these individuals had previously submitted comments, some of which, were reiterated in these comments.

ANALYSIS OF TESTIMONY AND COMMENTS

§321.31 Waste and Wastewater Discharge and Air Emissions Limitations

Texas Cattle Feeders Association suggested that in the last sentence of subsection (b), "process wastewaters" should be replaced with "process generated wastewaters" because "process wastewater" is the sum of "process generated wastewater" and the volume of runoff from precipitation.

The commission agrees that modification of the language in the subsection is appropriate for clarification purposes, and has changed the language of the last sentence as follows: "Retention structures shall be designed in accordance with §321.39 of this title." In addition, the terms "process generated wastewater" and "process wastewater" will be redefined to maintain consistency with EPA.

Fifty individuals in the Panhandle area of the state, JRG Farms, Inc., J.R. Stump Family Trusts A&B, and ACCORD Agriculture, Inc., ACAFO, Lone Star Chapter of the Sierra Club; Henry, Lowerre, Johnson, Hess and Frederick recommended that all or some of the following changes be made to the proposed rules: Add a requirement that owner/operator has to provide filters on fans in hog operating barns to prevent the emissions of odors and hydrogen sulfide; add standards for reducing the odors from lagoons; BACT should be a priority in the new rules; and swine CAFOs should be required to use dry waste disposal methods or use BMPs to be sure the waste and air emitted is safely treated.

The commission disagrees that the rules should be modified to require that filters be added to hog barns because this technology has not been established as Best Available Control Technology (BACT), and would not be required of a facility seeking an individual permit under §382.0518. However, the rules do not prohibit the use of filters or other controls to help control odors including hydrogen sulfide. The commission also believes that the design and operational requirements such as the weekly flush schedule requirement in §321.39(f)(24)(J), and

the ASAE design criteria for single and two stage lagoons in §321.39(f) (7) and (13) would be required of swine operations seeking individual permits under §382.0518. In addition, §321.46 outlines minimum buffer distances and the requirement to submit an odor control plan for certain CAFOs. It should also be pointed out that CAFOs, like all facilities, remain subject to property line standards for hydrogen sulfide in Chapter 112 of this title (relating to Sulphur Compounds). The commission agrees that anaerobic lagoons or innovative technologies are allowed under the air quality standard permit provided they are designed and constructed in accordance with proper engineering practices. The commission disagrees that BACT or any state or federal standard can be prioritized in the rulemaking process. The rule contains air pollution requirements that are substantially equivalent to BACT. The commission agrees that odors from swine operations are often perceived to be different than odors from cattle operations by off-site receptors and can have a different make-up of compounds that collectively form "odors" from waste handling operations. The use of dry waste disposal methods is not prohibited in the rules, however, this technology has not been established as BACT, and would not typically be required of a facility seeking an individual permit under §382.0518. In addition, the requirements outside of Texas referenced in the comments were not submitted for review by the commission. With the buffer requirements, odor control plan and design criteria in the rules, it is believed that air contaminants from animal confinement operations can be safely emitted without additional treatment or mandatory dry waste handling.

An individual from the Panhandle area requested that the commission inform him of the amount of chemicals being emitted, the amount of small particles from barns, and the effects that these have on his and nearby residences.

The commission responds that there is not sufficient or reliable data to calculate and report the expected amounts of the many compounds that may be emitted from CAFOs. In addition, there is not a clear correlation between the detection of these compounds and the expected off-site odor detection level.

An individual from the Panhandle area recommended that these rules require no odors from CAFOs.

The commission disagrees with the presumed opinion that these regulations should allow "no odors." The Health and Safety Code §382.085 allows for air contaminants to be emitted, but only at levels that do not cause or contribute to a condition of "air pollution." In addition, the design criteria and buffer requirements in these rules along with good management practices will help to minimize odors for CAFOs operating under this subchapter.

USFWS recommended that more stringent standards be applied to facilities located in watersheds which contain multiple CAFOs, and that wastewater retention systems should be designed to contain a 50 to 100-year, 24-hour event.

The commission responds that as to potential cumulative impacts from multiple CAFOs within the same watershed, the agency has designated Dairy Outreach Program Areas (DOPA) in eight counties of the state. This designation was based on documented water quality problems that were being experienced in the Bosque and Lake Fork watersheds in the designated counties. Facilities located within these eight counties are required to meet more stringent requirements such as filing for registration for facilities with between 300 animal units and 1,000 animal units, and obtaining training and education credits for owners/operators every two years. Implementing a requirement for retention systems to be designed to contain a 50 to 100 year, 24-hour event would be more stringent than the standards and requirements of the EPA or other states.

§321.32. Definitions.

TAEX (College Station) recommended that the definition of agronomic rates be changed by replacing the word "needed" with "required."

The commission responds that the recommended modification would not change the interpretation or implication of the provision. If a recommendation for an application rate has been made, then that information must be used in the land application of the waste.

ACCORD Agriculture, Inc., ACAFO, Lone Star Chapter of the Sierra Club and Henry, Lowerre, Johnson, Hess and Frederick (ACCORD) recommends that the definition for AFO should be expanded to ensure that confinement areas that do not sustain vegetative growth throughout virtually the entire area are included in the definition. It is unclear what associated areas, in addition to the actual confinement area, fall within this definition.

The commission responds that the current definition of Animal Feeding Operation is consistent with the federal definition found at 40 CFR §122.23. This federal definition is applicable to state NPDES programs, therefore the commission declines to change this definition. The commission believes the definition of AFO as written is comprehensive enough in providing the agency staff with the necessary elements in determining whether an individual facility is an AFO rather than a open-range type operation.

Greenbelt Municipal and Industrial Water Authority recommends that the definition of AFO be revised to clarify its applicability to facilities that feed individual animals for only a short period of time before moving them on to other locations.

The commission has reviewed the definition and determined that changes are not necessary to the definition. The commission interprets that the criteria used in determining whether a facility is an AFO or not as being based on the total number of animals in confinement for the time specified, regardless of whether the individual animals remain in confinement for a few hours or 365 days.

USFWS recommended that swine nursery facilities housing immature swine (less than 55 lbs) be defined as CAFOs and covered by this rule. Thirty-eight individuals from the Panhandle area, JRG Farms, Inc., J.R. Stump Family Trusts A&B, and ACCORD Agriculture, Inc. recommended that swine under 55 lbs should be covered by this regulation. Texas Pork Producers Association recommended that the definition for animal unit be modified to add a multiplier for weaned pigs weighing less than 55 pounds of 0.1.

The commission believes that the requested change would be a substantive change from the rules as proposed. However, due to the interest shown in this issue the commission is directing the executive director to study this and other identified issues related to CAFOs and provide the commission with recommendations on suggested rules changes after the adoption date of these amendments.

TAEX (College Station) recommended that the definition for Best Management Practices be modified by adding "and conservation" after "management."

The commission agrees that conservation practices are a necessary part of any BMP utilized by the agricultural community, including CAFOs and has made the corresponding changes to the definition.

ACCORD Agriculture, Inc. recommended that the rules include a procedure and criteria for designating AFOs as significant contributors of pollution and a mechanism for adversely affected persons to initiate the process.

The commission responds that such a procedure already exists. Any person who believes they are adversely affected by the operation of an AFO may contact one of the commission's field offices to initiate a complaint. If the commission determines that an AFO is a significant contributor of pollution, the executive director will designate that facility as a CAFO. The commission believes that these rules and other rules and policies of the agency already provide well defined mechanisms for determining compliance with state rules and initiating procedures to obtain corrective action whether by issuance of a notice of violation (NOV) or by formal enforcement action. Such procedures and criteria are not amenable to the exact definition required by rulemaking. Rather they should be flexible enough to accommodate the many different situations that will be encountered. The agency has traditionally responded and will continue to respond to legitimate complaints questioning whether a particular facility is compliant with the provisions of this subchapter or other applicable rules and regulations of the commission. The commission believes that this is the most appropriate process for making such determinations within existing fiscal and staffing constraints.

Agri-Waste Technology, Inc. recommended that facility size should not be a criteria for varying degrees of regulation. The TNRCC should adopt defined criteria that apply to all sizes of CAFOs.

The commission has developed performance related criteria in these adopted rules to apply uniformly to all animal feeding operations. All animal feeding operations must locate, construct and manage waste control facilities and land application areas in accordance with the technical requirements of §§321.38-321.40 of the title. Larger facilities are required under these rules to obtain authorization prior to operation due to their potential to discharge larger quantities of wastewater.

Texas Farm Bureau and Continental Grain Company recommended that Part C of the CAFO definition should include the opening sentence: "Provided, however, that no AFO is a CAFO as defined above if such AFO discharges only in the event of a 25-year, 24-hour storm event."

The commission responds that the suggested additional sentence would be contradictory to the intent of the rules to regulate all facilities above a certain size.

Texas Cattle Feeders Association recommended that the definition Control Facility be modified by deleting the words "collection and" from the second sentence.

The commission feels that the language provides sufficient clarification. The term "control facility" is meant to be a general term intended to cover all the facilities used in controlling manure and wastewater at the CAFO. The recommended change would significantly change the meaning and intent of this term as it is used in these rules.

Texas Farm Bureau and Continental Grain Company recommended that the definition Feedlot should be deleted since there is a definition for CAFOs.

The commission agrees this term is no longer necessary for these rules as amended.

Brazos River Authority recommended that the definition for *Land Application* should be revised to "....distribution and incorporation into the soil..."

The commission responds that it is not practical to require that in every case waste be incorporated into the soil, such as beneficial application on pasture land. The commission believes it is not necessary to limit the beneficial use of manure on a statewide basis to incorporation into the soil. It can be beneficially used on pasture land with minimum effects, if it is properly applied and managed.

Texas Cattle Feeders Association recommended that the definition for New Concentrated Animal Feeding Operations does not recognize valid authorizations that were issued under Subchapter K. The CAFOs under these valid permits should not be considered "new CAFOs."

These rules do not address retroactive application of the court's invalidation of Subchapter K in Accord. The judge rendering that decision indicated the court "expresses no opinion on the validity of permits issued to others not before the Court." No other court has expressed an opinion on the status of the Subchapter K authorizations that were not specifically nullified in the Accord judgement, and that decision itself is still on appeal. The intent of these rules is to require that all CAFOs that do not have currently valid authorizations shall, and in combination with the proposed general permit, if adopted, will have an avenue to, obtain TNRCC authorization for properly conducted operations. To clarify this, §§321.32(21), 321.33, 321.34 and 321.35 have been modified from the proposal. The definition of "New Concentrated Animal Feeding Operation" has been modified as follows: "A concentrated animal feeding operation which was not authorized under a rule, order or permit of the commission in effect at the time of the adoption of these amended rules." The commission believes that its responsibility to maintain effective and efficient regulation of the industry will best be served if those facilities that held unexpired, uncancelled Subchapter K authorizations are encouraged to convert expeditiously into Subchapter B. To that end, the proposed rules have been modified to allow most facilities that have operated in compliance with and in reliance on Subchapter K to transfer to Subchapter B registrations through an expedited process.

Texas Cattle Feeders Association and Continental Grain Company recommended that the definition No Discharge should be applicable only to point sources; land application sites should be exempt from this definition.

The commission responds that Chapter 26 of the Texas Water Code prohibits any discharge of waste into or adjacent to waters in the state regardless of source, unless authorized by rule, permit or order of the commission.

Texas Farm Bureau recommended that the definition of Permittee should be modified to read: "any person issued an indi-

vidual permit or order, permit-by-rule or granted authorization under the requirements of this subchapter."

The commission agrees with the comment and has modified the final rules to reflect the change. The commission has made the recommended changes plus additional clarifying language to provide a better description of all types of authorizations which have been or will be granted or recognized under this subchapter.

Texas Farm Bureau recommended that the definition for Process Generated Wastewater be changed to "processed wastewater."

The commission agrees with the comment and has modified the definition accordingly to maintain consistency with EPA. To clarify the use of the two terms as they are used in these adopted rules, the commission is adding the following definition for process-generated wastewater. *Process-generated wastewater - Any water directly or indirectly used in the operation of a CAFO (such as spillage or overflow from animal or poultry watering systems which comes in contact with waste; washing, cleaning or flushing pens, barns, manure pits, direct contact swimming, washing, or spray cooling of animals; and dust control) which is produced as wastewater.*

Farm Bureau recommended that the definition for Recharge Feature be changed to the one used under the original Subchapter K.

The commission responds that the Subchapter K definition has been modified to provide greater scope in the evaluation. Artificial features have been added to the definition to recognize the potential of recharge by way of various man-made conduits such as wells. Also, the term hydrologic connection has been replaced in the definition because it only refers to potential recharge from surface impoundments or retention structures.

North Plains Ground Water Conservation District No. Two recommended that the definition for Recharge Feature be reworded as follows: replace "where" with "which"; add "their existence" after "due to" delete "artificial means or surface and/or geologic features"; add "provide or create" before "a significant pathway"; delete "exists"; and delete "active, abandoned, or dry" at the end of the last sentence.

The commission agrees that the recommended changes makes this definition more precise and has made the changes to the rules accordingly.

Greenbelt Municipal and Industrial Water Authority recommended that the definition for *Qualified groundwater scientist* should be revised to ensure that non-engineers are not authorized to engage in the practice of engineering.

The commission responds that these amended rules do not authorize non-engineers to practice engineering. However, there are certain non-engineering activities under these rules that may be performed by a qualified groundwater scientist.

North Plains Ground Water Conservation District No. Two recommended that the definition for *Qualified groundwater scientist* be clarified to make it clear that it would include an engineer or scientist who has received the appropriate education, training and experience.

The commission agrees that the commenter's interpretation is correct, but believes that the current language of the definition already provides for the necessary education, training and experience of a scientist or engineer. No alternative language was suggested in the comment.

Thirty-eight individuals from the Panhandle area, JRG Farms, Inc., J.R. Stump Family Trusts A&B, and ACCORD Agriculture, Inc. recommended that the definition Waters in the state be modified to require that all penetrations on a piece of land be properly plugged.

The commission believes that all penetrations that are a potential conduit for contamination must either be properly plugged or protected from allowing any contaminated wastewater to reach a groundwater resource. The commission responds that the definition of *recharge feature* has been expanded under these adopted rules to include a reference to artificial penetrations and therefore need not be included in this definition.

Continental Grain Company recommended that the definition for Well should be modified to clarify that the definition would only cover penetrations into the ground surface that would create a significant hydrologic connection.

The commission responds that the proposed change would limit its evaluation to only those penetrations which would cause a hydrologic connection with surface waters only. The commission's intent in adding this definition is to make it clear that any penetrations through the earth's surface which would create a conduit to groundwater or surface water must be addressed in the manner identified under these rules.

North Plains Ground Water Conservation District No. Two recommended that the definition for *Well* be reworded as follows: "Any artificial excavation into and/or below the surface of the earth whether in use, unused, abandoned, capped or plugged that may be further described as one or more of the following: 1) Excavation designed to explore for, produce, capture, recharge or recover water, any mineral, compound, gas, or oil from beneath the land surface; 2) Excavation designed for the purpose of monitoring any of the physical or chemical properties of water, minerals, geology, or geothermal properties that exist or may exist below the land surface; 3) Excavation designed to inject or place any liquid, solid, gas, vapor, or any combination of liquid, solid, gas or vapor into any soil or geologic formation below the land surface; or 4) Excavation designed to lower a water or liquid surface either temporarily or permanently for any reason."

The commission agrees with the recommended changes and adopts the suggested language with minor changes. The recommended changes provide a more simplified definition of the term.

§321.33. Applicability.

Texas Cattle Feeders Association recommended that this section should recognize the validity of final permit authorizations issued under Subchapter K and applications for Subchapter B permits submitted prior to the effective date of these rules.

These rules do not address retroactive application of the court's invalidation of Subchapter K in *Accord*. The judge rendering that decision indicated the court "expresses no opinion on the validity of permits issued to others not before the Court." No other court has expressed an opinion on the status of the Subchapter K authorizations that were not specifically nullified in the *Accord* judgement, and that decision itself is still on appeal. The intent of these rules is to require that all CAFOs that do not have currently valid authorizations shall, and in

combination with the general permit, will have an avenue to, obtain TNRCC authorization for properly conducted operations. To clarify, this intent §§321.32(21), 321.33, 321.34 and 321.35 have been modified from the proposal. The first sentence of subsection (a) has been modified as follows: "A CAFO operating under a currently valid authorization granted prior to the effective date of these amended rules shall continue to be authorized and regulated in accordance with the terms of its existing authorization. Any application... (no change)." The commission agrees with the recommended changes and adopts the suggested language.

ACCORD Agriculture, Inc. recommended that the term "existing feedlot" in subsection (a) is not a defined term and should be eliminated.

The commission agrees that this term is no longer necessary, and has replaced it with "CAFO."

Texas Farm Bureau and Continental Grain Company commented that the language of the second sentence of subsection (a) is unclear as to whether additional requirements will be placed on existing permitted CAFOs following renewal, amendment or transfer. Suggest a third sentence as follows: "No new conditions, provisions or requirements will be placed upon existing CAFO that submits an application for renewal, amendment or transfer, if the existing CAFO was authorized under this subchapter prior to the effective date of these rules.

The commission responds that its intent in this subsection is to require all facilities to meet the basic technical requirements of these rules. This includes existing facilities renewing their existing permit and/or expanding their operations in the future. However, it is not the intent of the commission to require existing facilities to modify their existing control facilities, unless they expand or are ordered to do so through an enforcement action of the agency. The commission believes that its regulation of CAFOs in the state should be consistent for all facilities similar in nature to the EPA Region VI CAFO NPDES general permitting program since the agency is in the process of obtaining authorization to administer the NPDES program. One reason the state is seeking NPDES delegation is to end the duplicative and burdensome "dual permitting" situation in which Texas dischargers must seek and comply with both a state and a federal authorization for the same operation. It would be counter-productive for these rules to be substantially different from the federal NPDES requirements.

Texas Cattle Feeders Association recommended that in subsection (b)(2) the term "fresh water" should be replaced with "waters in the state"; and ACCORD Agriculture, Inc. recommended that this same standard should not be limited to protection of fresh water. Salt water also should be protected from pollution that would result in adverse effects.

The commission agrees with both comments and will modify language of subsection (b)(2) to replace "fresh water" with "waters in the state." The change will maintain consistency with Chapter 26 of the TWC.

ACCORD Agriculture, Inc. commented that subsection (d) does not appear to provide any limit on facilities that legally could be covered by a "certified water quality management plan." This exemption is not authorized by statute. Section 26.121 exempts from regulation only discharges of "other wastes."

The commission responds that this provision recognizes a Memorandum of Understanding (MOU) developed between the commission and the Texas State Soil and Water Conservation Board (TSSWCB) memorialized in 30 TAC 7.102. The MOU specifies which facilities the TSSWCB can work with to provide technical and financial assistance. In addition, the MOU and statutes are clear that the commission has the authority to enforce against any animal feeding facility which does not maintain compliance with a certified water quality management plan approved by the TSSWCB. This provision is authorized by §201.026 of the Texas Agriculture Code and §26.1311 of the Texas Water Code.

ACCORD Agriculture, Inc. commented that proposed language of subsection (f) seems to preclude a CAFO owner or operator from applying for an individual permit. That option should still be available.

The commission agrees that a CAFO should not be precluded from applying for an individual permit. The commission has added language to the subsection to enact that intent.

ACCORD Agriculture, Inc. recommended that the language in subsection (g) be revised to clarify as follows: change "or" after "general permit" to "nor," insert the word "which" before the phrase "is located in," and substitute the word "which" for the word "that" before the phrase "is designed to stable..."

The commission agrees with this comment and has made the suggested changes for the purpose of clarification.

ACCORD Agriculture, Inc. recommended that the language in subsection (h) should require a PPP for an AFO in a DOPA.

The commission disagrees with the comment. The commission has defined any AFO with more than 300 animal units in a DOPA as being a CAFO and therefore subject to the requirements of this subsection as adopted. This is a more stringent requirement than that imposed by the current EPA Region VI CAFO General Permit. The commission feels that these rules articulate in subsection (e) that all AFOs are required to "locate, construct and manage waste control facilities" in accordance with the standard and technical requirements in these rules. This subsection does not require AFO operators to actually develop a PPP, but it does hold them to the general standards for waste discharge and air emissions required under §321.31 of this title (relating to Waste and Wastewater Discharge and Air Emissions Limitations) of facilities authorized in this subchapter.

ACCORD Agriculture, Inc. recommended that the language in subsection (i) be amended because it is inconsistent with §382.0518 of the Health and Safety Code.

The commission disagrees that §382.0518 is applicable for air standard permit authorization. However, the commission feels that prior authorization is needed and the final rules have incorporated changes to subsection (i) to require written authorization prior to construction for those CAFOs seeking the air quality standard permit under this subchapter.

ACCORD Agriculture, Inc. recommended that the language in subsection (j) be changed to read simply that a CAFO having an existing, valid air emissions permit need not obtain other authorization.

The commission responds that the intent of the opening sentence in (j) is to clarify that the air quality standard permit contained under this subchapter is an optional authorization in lieu of obtaining traditional air authorization (such as an individual air quality permit under Chapter 116), and that the design, location, and operational requirements that make up the standard

permit are not applicable if the facility currently holds a Chapter 116 authorization. The statement "...does not have to meet the air quality criteria of this subchapter" is not intended to suggest that certain CAFOs are exempt from the prohibition against creating a nuisance in §321.31(c), since that prohibition would also be required by §101.4 of the TNRCC General Rules. In addition, the commission does not agree that "valid air emissions permits" adequately describes the various types of air authorizations that are available to operators (for example: exemptions, standard exemptions, special exemptions, other standard permits, and "grandfathered" facilities as defined in Chapter 116).

Continental Grain Company recommended that subsection (j) should be amended to allow existing CAFOs to obtain air quality standard permit authorization under this subchapter, suggesting adding the words "or existing" in the second sentence, between words, "new" and "CAFO."

The commission agrees with this recommended change and has deleted the term "new" to remove the implied limitation. It is not the commission's intent to prohibit existing CAFOs either with or without Chapter 116 authorizations from voiding their existing air authorizations and substituting combined air and water authorizations under this subchapter.

Dekalb Swine Breeders, Inc., Pilgrim's Pride, Inc., Texas Poultry Federation, Wrangler Feedyards, Jade Cattle Feeders, Koch Beef Company, Veribest Cattle Feeders, Inc., Bar G Feedyard, Frontier Feedyards, Inc., Coyote Lake Feedyard, Live Oak Feedlot, Inc., McLean Feedyard, Inc., Sugarland Feed Yards, Inc., Stratford Feedyard, Bartlett Cattle Company, L.P., Perryton Feeders, Inc., Bezner Beef, Jennings Land and Cattle, Inc., Canadian Feedyards, Inc., Comstock Cattle Corp., Tri-State Cattle Feeders, Dimmitt Feed Yard, LLC. and Texas Cattle Feeders Association recommended that under subsection (j) the commission issue a combined water and air quality authorization. Creating a separated air permit would be an unnecessary bureaucratic addition to the system.

The commission disagrees that separate air quality permits for certain facilities which cannot meet the air quality criteria of this subchapter are unnecessarily burdensome on the regulated community. The air quality standard permit in Chapter 321 is intended to authorize only those facilities that meet predetermined design, location, and operational requirements considered standard for the industry, as identified in these rules. Those operations that cannot satisfy these requirements can apply for case-by-case permit authorization under Chapter 116. Prohibiting this avenue for individual permit authorization would be an unreasonable limitation on the commission's ability to tailor the type of regulation to the circumstances of a particular situation.

Continental Grain Company and Texas Cattle Feeders Association recommended that the language of subsection (k) be clarified so a that "major modification" does not result in a CAFO losing coverage under the air provision of this subchapter and require a Chapter 116 permit. What is the difference in "major modification" and "major amendment" as used in this subsection?

The commission disagrees that a "major modification" should be allowed under Chapter 321. A "major modification", defined in Chapter 116.12(11) of this title, typically means any new construction or modification to an existing facility which results in emissions increases above the significant levels as defined in federal rules (i.e., Prevention of Significant Deterioration (PSD), Nonattainment (NA), Maximum Achievable Control Technology (MACT)...). The commission believes that all "major sources" are significant and should be reviewed under the case-by-case permit application process in Chapter 116. The terms "major modification" and "major amendment" are not synonymous within the context of this subsection. This subsection covers only air quality related changes and not those associated with the water quality aspects of the facility."Major amendment" is defined in §305.62 of this title as an amendment that changes a substantive term, provision, requirement, or limiting parameter of a permit. A major amendment to a permit does not necessarily require a Chapter 116 permit.

ACCORD Agriculture, Inc. commented that subsection (l) offers no justification for waiving the requirements of these rules for facilities that are transferred in from individual authorizations, suggesting that facilities may not be authorized by these rules unless they meet the requirements of the rules, both for air and water quality purposes.

The commission believes that for facilities with prior water and/or air quality authorization applying for transfer into this subchapter, it is reasonable to waive certain requirements. The commission further believes that requiring operators to retrofit existing facilities by making structural changes and/or acquiring additional buffer distances would be cost prohibitive and/or could force some existing owners/operators to go out of business. However, as stated in subsection (l), any transfers that would not otherwise satisfy this amended subchapter would include all special conditions/provisions from the existing permit.

Brazos River Authority recommended that subsection (l) should recognize compliance history and siting conditions in respect to surface and groundwater as factors in allowing transfers.

The commission does not agree the proposed change is necessary because the rule currently gives the commission the flexibility to consider compliance issues. The rule allows the commission to impose additional conditions on facilities previously authorized under this subchapter that wish to transfer from an individual permit to a registration if there is substantial modification to the facility or to address compliance problems with the facility.

Texas Farm Bureau and Continental Grain Company recommended that subsection (l) should allow transfers without hearing and notice. In addition, this subsection should not require the implementation of §§321.39(f)(1)(B) and 321.39(f)(32) of this subchapter.

The commission disagrees that transfers should be allowed under these rules without hearing and notice. The commission's view is that such transfers must meet the basic procedural and technical requirements in order to gain coverage under these amended provisions. This transfer provision is at the election of the permittee. If the permittee wishes to remain under their existing authorization, they may do so until the permit is up for renewal. In addition, the commission responds that its intent in this subsection is to require all facilities who transfer their existing authorization to meet the basic technical requirements of these rules. This would include existing facilities that renew their existing permit and/or expand their operation (without the need to construct additional control facilities). However, it is not the intent of the commission to require physical changes to the facility if it was properly constructed according to the rules in place at the time of construction, unless ordered to do so through an enforcement action of the agency or

required to do so because of a proposed expansion which would require additional or new construction. The commission believes that its regulation of CAFOs should be consistent for all facilities, similar in nature to the EPA Region VI CAFO NPDES general permitting program since the agency is in the process of obtaining authorization to administer NPDES. A CAFO covered under an EPA NPDES CAFO General Permit is required to develop and implement a PPP similar to what is required under these rules. The two provisions for which an exemption is requested are not included in the EPA General Permit because it does not cover air quality or protection of groundwater. The commission agrees that facilities with prior authorization under this subchapter which hold an existing Chapter 116 permit and request to transfer authorization under this amended subchapter should not be required to submit an odor control plan required in §321.46 unless the project includes an expansion of the facility. As adopted, the requirements to submit an odor control plan (previously termed odor abatement plan) are listed in §321.46.

Brazos River Authority recommended that subsection (n) be modified to require CAFOs located within a DOPA to meet the same stricter standards as being located within one mile of Coastal Natural Resource Area.

The commission responds that facilities located within the DOPA are required to meet stringent requirements such as filing for registration between 300 animal units and 1,000 animal units, and obtaining training and education credits for owners/operators every two years. New CAFOs within one mile of a Coastal Natural Resource Area are required to obtain an individual permit because under the CMP any such facility which discharges must have effluent limitations established through an individual permitting process.

Greenbelt Municipal and Industrial Water Authority proposed adding a new subsection (o) establishing a water quality buffer zone to protect surface water bodies used for municipal water supply. In addition, it suggested that any new or expanding CAFO must be located at a distance greater than 10 miles upstream from the conservation level of the surface water body. Also proposed a reduction in the total number of animals allowed at a CAFO qualifying for the streamlined process. Red River Authority and Greenbelt Municipal and Industrial Water Authority proposed adding a new subsection (o) which would require any CAFO located within the drainage area 10 miles upstream of reservoir used to store municipal water supply shall only apply for and obtain an individual permit and may not commence physical construction and/or operation of any waste management facilities w/o first obtaining a final effective permit. Texas Cattle Feeders Association recommended that in reference to a comment at the public hearing asking for the TNRCC to set a 10 mile buffer zone around municipal surface water impoundments, no concept for such a setback requirement was published in the proposed rules and therefore should not be considered in the final rules. Significant study of this important issue is needed before establishing policy and permit requirements.

The commission believes that to add such a provision as requested to the rules would constitute such a substantial change to the proposed rules as to make it necessary to repropose them before adoption. The commission is interested in this issue and will direct the executive director to study the recommended actions and provide a recommendation to the commission after the adoption of these rules.

Greenbelt Municipal and Industrial Water Authority proposed that new subsections be added which would prohibit CAFOs if: 1) any CAFO levee would put one person at risk; 2) embankment materials used for the levee are dispersive soil or contain sufficient quantities of soluble gypsum; and 3) the pond or levee is situated in a 100-year floodplain.

The commission responds that under these rules CAFO facilities must be constructed with good engineering practices; facilities located within the 100-year floodplain must meet the National Flood Insurance Program requirements for participating communities and must be protected from inundation by the 100-year flood. Any structures, located in the floodplain must be certified by a licensed Professional Engineer as designed appropriately and adequate to protect the facility from damage and failure.

Agri-Waste Technology, Inc., Pilgrim's Pride Corp., Texas Poultry Federation, Wrangler Feedyards, Bezner Beef, and Coyote Feedyard recommended that the commission allow existing Subchapter K permits to continue in effect until such permits are amended or expire; or in the alternative that current holders of Subchapter K permits be allowed to operate under the new revised Subchapter B permit, without submitting any additional documentation.

These rules do not address retroactive application of the court's invalidation of Subchapter K in Accord. The judge rendering that decision indicated the court "expresses no opinion on the validity of permits issued to others not before the Court." No other court has expressed an opinion on the status of the Subchapter K authorizations that were not specifically nullified in the Accord judgement, and that decision itself is still on appeal. The intent of these rules is to require that all CAFOs that do not have currently valid authorizations shall, and in combination with the general permit, will have an avenue to, obtain TNRCC authorization for properly conducted operations. To clarify, this intent §§321.32(21), 321.33, 321.34 and 321.35 have been modified as follows: "A CAFO that was not authorized under a rule, order or permit of the commission in effect at the time of the adoption of these amended rules."

An individual from the Panhandle area recommended that a distinction should be made between swine, cattle, and other animals regulated by these rules. Odors from a swine CAFO is of a different kind and intensity than other CAFOs.

The commission disagrees that swine operations should be regulated differently because they produce "different" odors. However, these rules do contain conditions that will routinely apply only to swine operations due to differences in design technology typically associated with swine operations (such as weekly scraping of pens and weekly flushing of pits). These rules utilize ASAE standards, which were intended for use nationwide, for designing anaerobic treatment lagoons to minimize odors. These standards do take into account species-specific factors for manure production and the number of confinement hours per day in calculating the total daily waste generated, and calculate the necessary treatment volume based on geographic factors. For example, a hog operation and a dairy farm with the same number of head, utilizing the same technology and located in the same area of the state, would likely result in differently sized treatment ponds for the two facilities. Where common technologies such as the anaerobic treatment lagoons described above are utilized, the commission

believes that common design criteria should be used for a given amount of waste, regardless of species type.

An attorney representing landowners in Johnson and Ochiltree Counties recommended that the rules be modified such that the following feedlots/CAFOs facilities would be not eligible for application for registration: A facility that is subject of an unexpired enforcement order or other order issued by the commission in response to an alleged violation; a facility that is subject to an unresolved notice of violation (NOV), a pending enforcement referral, a pending executive director's report and petition, or other formal enforcement action involving the actual or potential release of discharge of pollutants; a facility that has been constructed and operated without prior written authorization of the commission (including an operation that has maintained more animals than authorized); a facility deemed by the executive director to be in substantial noncompliance; a facility that has been the subject of two or more enforcement or remedial commission orders at any time or the subject of an enforcement referral to the Office of the Attorney General; a facility whose operations have resulted in the unauthorized release or discharge of pollutants onto the property of another in the last five years; or a facility whose operation have resulted in the pollution of groundwater or surface water during the past five years or whose continued operation are likely to result in the pollution of surface or ground waters. An attorney representing landowners in Johnson and Ochiltree Counties recommended that the rules be modified such that the following owners/ operators of feedlots/CAFO facilities are ineligible for coverage for an application for registration: An owner/operator who has been the subject of two or more enforcement referrals from the TNRCC regional offices during the past 36 months; An owner/operator whose operations in the state during the past five years have been subject to two or more enforcement or referral commission orders or whose operations have been the subject of an enforcement referral to the Office of the Attorney General; An owner/operator whose operations have resulted in the unauthorized release or discharge of pollutants onto the property of another in the past thirty-six months; or a facility whose operation have resulted in the pollution of groundwater or surface water during the past thirty-six months.

The commission does not agree with these comments and has not changed the rule. As adopted, these rules give the executive director the discretion to require an individual permit application from owners/operators with a poor compliance history. These rules are intended to complement the proposed general permit, the availability of which is proposed to be more limited. This rule is designed to provide the executive director with more flexibility to determine the type of authorization a particular facility will be required to seek. The commission does not believe that the executive director should be limited by the suggestions provided by the commenter.

§321.34. Procedures for Making Application for an Individual Permit.

Brazos River Authority proposed that subsection (a) be amended to add specific criteria whereby the commission may extend the permit term.

The commission agrees that the section needs clarification and has removed "unless stated otherwise in the permit or extended by order of the commission" to provide for such clarification.

ACCORD Agriculture, Inc. recommended that subsection (a) in its reference to any "person" should be clarified as referring to any owner or operator of a CAFO.

The commission does not agree with this comment and has made no change to this comment. The commission believes the term "person" is reasonably interpreted to include owners and operators of CAFO's. The commission's definition of the term "person" in Chapter 3 of this title (relating to Definitions) would provide further clarification of the use of this term.

Texas Farm Bureau proposed under subsection (a) that the commission's recognition of an applicant's permit under Subchapter K should be recognized and application under Subchapter B should be transferred with the least amount of technical review.

These rules do not address retroactive application of the court's invalidation of Subchapter K in Accord. The judge rendering that decision indicated the court "expresses no opinion on the validity of permits issued to others not before the Court." No other court has expressed an opinion on the status of the Subchapter K authorizations that were not specifically nullified in the Accord judgement, and that decision itself is still on appeal. The intent of these rules is to require that all CAFOs that do not have currently valid authorizations shall, and in combination with the general permit, will have an avenue to, obtain TNRCC authorization for properly conducted operations. To clarify, this intent §§321.32(21), 321.33, 321.34 and 321.35 have been modified as follows: "A CAFO that was not authorized under a rule, order or permit of the commission in effect at the time of the adoption of these amended rules."

It was the commission intent to include the reference to all applicable fees for CAFOs in this subchapter for easy reference in subsection (a) of this section. CAFOs are subject to a Clean Rivers Program fee.

The commission has added language to subsection (a) to clarify that CAFO obtaining authorization under this section will be subject to a fee under §220.21 of this title (relating to Water Quality Assessment Fees).

Brazos River Authority recommended that language in subsection (b) be modified from "major enforcement actions" to "no major violations."

The commission does not agree with this comment and has made no change to the rule. The commission believes that the term "major enforcement actions" is more specific and applicable than the term "major violations" which is a very broad term susceptible to a variety of subjective interpretations. This term is consistent with the commission's recent adoption of rules in Chapter 205 of this title (related to General Permits for Waste Discharges).

ACCORD Agriculture, Inc. recommended that subsection (b)(2) must be amended to address compliance history for other violations of air requirements such as property line standards for dust regardless of whether the violation is considered to constitute a nuisance. In addition, some form of public participation process is needed for renewals of permits.

Although emissions from CAFOs have been historically compared to the nuisance rule to determine compliance with applicable standards, the commission agrees that any violation of an applicable property line standard or nuisance should be considered a violation subject to major enforcement action when

renewing a permit under this subchapter. The adopted version of the rule has been modified to reference nuisance and "any violation of a state property line standard or federal ambient air quality standard." The commission does not believe that additional public participation is required for renewals of individual permits in which there are no changes in terms and which are not under enforcement by the commission. The renewal procedures for CAFO's are similar to existing procedures and criteria for renewals of other water quality permits issued by the commission.

Texas Farm Bureau and Continental Grain Company recommended that language in subsection (b)(2) be amended by changing the words "any other changes" in the first sentence to read: "any other major change or modifications."

The commission responds by clarifying the language as follows: "any changes which constitute a major amendment as defined in Chapter 305 of this title or major source or major modification as defined in Chapter 116 of this title."

Texas Cattle Feeders Association proposed that subsection (f) be modified to require that the notice of expiration should be sent by certified mail-return receipt requested.

The commission agrees with this comment, and has changed the rule accordingly.

Texas Cattle Feeders Association recommended that language in subsection (g) be amended as follows: the phrase "which is not authorized by an individual permit according to this section" should be added between the words "operator" and "shall"

The commission agrees in part with the comment and has clarified the language of subsection (g) by changing "that a permit is required" to "that an individual permit is required."

Continental Grain Company proposed that a new subsection be added which states that a major amendment of an individual permit authorized by this permit shall also constitute a renewal of the individual permit. The amended permit should not have to be renewed for 5 years. Texas Cattle Feeders Association proposed adding new subsections (h-k) as follows:

(h) If an application for renewal requests a major amendment, as defined by 305.62 of this title (relating to Amendment), of the existing individual permit, an application shall be filed in accordance with subsection (a) of this title.

The commission agrees that major amendments can be authorized for an additional five years, in accordance with §305.62(h) of this title, because a thorough review takes place prior to issuance of the amendment and the applicant has paid the appropriate fee. This has been the policy of the commission under the previous Subchapters B & K.

(i) If renewal procedures have been initiated before the individual permit expiration date, the existing individual permit will remain in full force and effect and will not expire until action on the application for renewal is final.

The commission agrees with this comment, this change will be made for the purpose of clarification.

(j) The Executive Director may deny an application for renewal for the grounds set forth in §305.66 of this title (relating to Revocation and Suspension).

The commission responds that a application for renewal may be denied for a variety of reasons, including but not exclusively of the grounds set forth in §305.66 of this title.

(k) A major amendment or transfer of an individual or permit by registration authorized under this subchapter shall also constitute a renewal of the individual or permit by registration. This will ensure that permits are reauthorized for five years when major amendments or transfers are approved.

The commission agrees that major amendments can be authorized for an additional five years because full application procedures, including public notice and comment, are required and the applicant has paid the appropriate fee. The commission disagrees that a transfer should allow the expiration date to be changed, since full application procedures are not required.

The Mayor of the City of Perryton recommended that local groundwater districts should receive a complete copy of the application for review and comment. The groundwater district and TNRCC regional office should visually inspect the proposed site prior to, during and after completion of construction. Operations should not begin prior to the TNRCC's and the groundwater district's final inspection.

The commission does not agree with this comment and has made no change to the rule. The rules currently require operations located within the jurisdiction of a groundwater district to mail notice of application to that district. The commission does not have the authority to require a local groundwater district to visually inspect a proposed site prior to, during and after completion of construction.

Greenbelt Municipal and Industrial Water Authority recommended that additional technical requirements mandatory liners, underground monitoring devices, annual sampling (sample taken on same day each year and results reported to TNRCC)of lagoons should be required of any CAFO locating within a water quality buffer zone to prevent releases or minimize the impact of releases.

The commission does not agree with this comment and has made no change to the rule. The commission believes that the requirements in these rules for liners, monitoring and sampling are equal to or more stringent than existing federal requirements and are protective of surface and groundwater quality. The commission is interested in the concept of a water quality buffer zone and will direct the executive director to study the need for such and provide a recommendation to the commission in the future.

§321.35. Procedures for Making Application for Registration.

ACCORD Agriculture, Inc. recommended that language in subsection (a) should be amended to refer to any owner or operator of a CAFO. Current language improperly fails to provide the option for CAFOs to be regulated by individual permit.

The commission does not agree with this comment and has made no change to the rule. The commission believes the term "person" is reasonably interpreted to include owners and operators of CAFO's. In addition, the commission believes the rules are clear that a CAFO may be required or choose to obtain an individual permit.

Texas Farm Bureau and Texas Cattle Feeders Association suggests that current language of subsection (a) does not recognize current permit by rule authorizations under Subchapter K.

These rules do not address retroactive application of the court's invalidation of Subchapter K in *Accord*. The judge rendering that decision indicated the court "expresses no opinion on the validity of permits issued to others not before the Court." No other court has expressed an opinion on the status of the Subchapter K authorizations that were not specifically nullified in the Accord judgement, and that decision itself is still on appeal. The intent of these rules is to require that all CAFOs that do not have currently valid authorizations shall, and in combination with the general permit, will have an avenue to, obtain TNRCC authorization for properly conducted operations. To clarify, this intent §§321.32(21), 321.33, 321.34 and 321.35 have been modified as follows: "A CAFO that was not authorized under a rule, order or permit of the commission in effect at the time of the adoption of these amended rules."

Texas Cattle Feeders Association suggests that subsection (c) be modified by deleting the requirement of providing the TNRCC regional office with "one additional copy of the application with attachments to the appropriate..." To what extent does the regional office utilize the complete application? Would the time and resources of the regional office staff, permittee and engineering consultant be better served if a complete copy of the application was not sent to the regional office since it is available at a location for public review?

The commission responds that regions offices utilize the document in any communication with the Agriculture Section during the authorization process, during any inspection or complaint and having the document available for public review. No change was made in response to this comment.

An attorney representing landowners in Johnson and Ochiltree Counties recommended that subsection (c) be amended to add the following: Each groundwater district, river authority, and city/county government shall be provided a complete copy of the application by the applicant (proof of service required) no later that the date of filing with the executive director. The applicant shall allow the groundwater district, river authority and city/county government to inspect the propose site during normal business hours or as otherwise agreed. The groundwater district, river authority, city/county government should be allowed to submit written comments, including any objections and formal recommendations to the executive director (with a copy to the applicant). The executive director shall respond in writing to any objections and recommendations prior to the executive director's final decision. The groundwater district shall be notified in writing at least 48 hours prior to the plugging of any artificial penetration and may inspect and oversee such activity. The facility shall comply with all applicable rules and other requirements of the groundwater district concerning plugging and the protection of groundwater.

The commission does not agree with this comment. The commission does not believe it is efficient to require applicants to submit copies of the application to groundwater districts, river authorities, and city and county governments. Instead, the commission rules require that notice of application be mailed to city and county governments, river authorities (for those applications in the Dairy Outreach Program) and groundwater districts (for applications located in an area within the jurisdiction of such a district). Notice of application will allow river authorities, local governments, and water districts to make a determination whether they wish to obtain a copy of an application. This commission has no authority to grant any entity the authority to enter onto a facility covered by these rules.

An attorney representing landowners in Johnson and Ochiltree Counties further recommended that subsection (c) be amended to add the following: The appropriate regional office shall be provided a complete copy of the application no later than the date of filing with the executive director. The regional office shall conduct an inspection of the proposed site to confirm general accuracy and completeness of the information provided in the application. A permit can not be approved until such inspection has occurred. The regional office shall be notified in writing at least 48 hours prior to the plugging of any artificial penetration and may inspect such activity. The facility shall comply with all applicable rules and other requirements of the TNRCC concerning plugging and the protection of groundwater.

The commission agrees that the regional office should be sent a copy of the application at the time of filing with the executive director and this is already a part of the requirements under this section. However, the commission does not believe that it is necessary for these rules to require the regional office to inspect a facility prior to an authorization being approved. Such inspections will be left to the discretion of the executive director based upon a case-by-case review and the availability of manpower in a regional office to perform such functions. These rules require that the applicant locate all artificial penetrations at the site and submit a plan to address how the applicant will address the protection of the associated groundwater resource. The commission believes this sufficient notification of what the applicant will do to protect the groundwater resources. Any facility under these rules is already required to comply with the TNRCC regulations for plugging and the protection of groundwater.

ACCORD Agriculture, Inc. suggested that language in subsection (c)(5) does not make clear, what is intended by "land operated or controlled by the applicant."Needs further definition. The rules should make clear that storage areas for all wastes must be included in the site plan. Information on adjacent landowners falling within the appropriate buffer zone should be included in order to assess buffer zone compliance.

The commission disagrees with the comment and believes that "land operated or controlled by the applicant" clearly refers to land owned or leased by the applicant and used as part of the CAFO. The subsection requires all types of control or retention facilities to be included in the site plan including storage areas. For air quality applications, §321.35(c)(12) requires submittal of an area land use map identifying residences, animal feeding operations, businesses or occupied structures within a mile of the permanent odor sources. The buffer zone requirement in §321.46 is modified to apply to air authorizations only.

Texas Cattle Feeders Association recommended that language in subsection (c)(5) needed further clarification. A "final" site plan cannot be submitted with confidence. The word "final" should be replaced with the word "proposed" because the construction of a facility has not yet begun and may be many months from "final." A facility certification is submitted by a professional engineer upon completion of construction, and as such can reflect any changes to the proposed site plan and can verify the proposed site plan as final.

The commission agrees in part and has changed the language to add the word "proposed" to assure there is no confusion on what is required from the applicant.

ACCORD Agriculture, Inc. recommended that additional language be added to subsection (c)(7) which would require that

additional information should be provided for areas downstream of any part of the facility where waste materials are, or may be, present. One mile is not an appropriate cut-off for larger facilities. They have a greater potential to cause significant problems for many miles downstream.

The commission responds that the one mile distance is an appropriate cut-off for facilities designed for no discharge and the requirements for these facilities are the same as other no-discharge municipal and industrial wastewater facilities.

ACCORD Agriculture, Inc. recommended that the second sentence in subsection (c)(9) should be rephrased. It needs to say that the requirement does not apply to land not owned, operated or controlled by the applicant that is used solely for the off-site application of manure that has been sold or given to others for beneficial use, provided the owner/operator is not involved in the application of the manure.

The commission agrees with the comment and has adopted the following language "....beneficial use, provided the owner/operator of the CAFO is not involved in the application of the manure." The language provides clarification to prevent misunderstanding of this provision.

An attorney representing landowners in Johnson and Ochiltree Counties proposed that subsection (c)(10) be amended to include that all potential recharge features existing on and within a 500 foot radius of the proposed site be plotted on a grid map, visually inspected by a registered professional engineer, assigned an identifying number and properly evaluated by providing a specific list of technical information related to ten specified items.

The commission responds that the rules require that any recharge features located on the CAFO property must be identified on the site plan. This commission has no authority to require an adjoining landowner to allow an applicant access to their property to perform a visual inspection. A visual inspection or research of all available records may still not locate all features at a proposed site, especially those hidden just below the surface of the earth. A plan to prevent impacts from any recharge feature located on the site must be prepared and submitted by the applicant for each identified feature, even if these features are identified after construction begins. The requirements provide for a thorough evaluation of the site. Plus, any discharges of waste or wastewater onto a neighbor's property would violate the authorization and be subject to enforcement.

Texas Cattle Feeders Association proposes that a new subparagraph (A) be added to subsection (c)(10) as follows: "The following records and/or maps shall be reviewed to locate artificial recharge features (abandoned wells): (1) Railroad Commission, (2) Groundwater Conservation District, if site is within a district, (3) Water Well Drillers Board, (4) Farm Service Agency and (5) Engineer site inspection." Dekalb Swine Breeders, Inc., Agri-Waste Technology, Inc. and Texas Poultry Federation recommended that the rules be modified to specifically define the sources of that discovery so it is clear when the search and discovery procedure is adequately completed.

The commission agrees in part with the comments and has modified the suggested revision and added it to the final rules as follows: "At a minimum, the records and/or maps of the following entities/agencies shall be reviewed to locate any artificial recharge features: (1) Railroad Commission; (2) Groundwater District, if applicable; (3) Texas Water Development Board; (4) TNRCC; (5) Natural Resource Conservation Service; (6) previous owner of site, if available, and (7) on-site inspection of site with a NRCS engineer, licensed professional engineer or qualified groundwater scientist. This modified provision will provide a basis by which a certification can be developed to determine whether a recharge feature exists on the site proposed under an application.

North Plains Ground Water Conservation District No. Two proposed deleting subsection (c)(10) and rewording subsection (c)(11) as follows: "The applicant shall document the presence or absence of recharge features on the tracts for which an application is being filed. The final site plan shall also indicate the specific location of recharge features that have been documented and/or located on any property owned, operated or controlled by the applicant and utilized under the application as certified by a NRCS engineer, licensed professional engineer, or qualified groundwater scientist. Documentation, by the certifying party shall identify the sources and/or methods used to identify presence or absence of recharge features. The applicant shall also submit a plan, developed by a NRCS engineer or licensed professional engineer, to prevent impacts on any located recharge feature and associated groundwater formation which may include the following: (A) Installation of the necessary and appropriate protective measures for each located recharge feature such as impervious cover, berms or other equivalent protective measures; or (B) no change; or (c) Any other similar method or approach demonstrated by the applicant to be protective of any associated recharge feature; and (D) Any method or approach to be used by the applicant to identify previously unidentified and/or undocumented recharge features that may be discovered during the time of construction."

The commission agrees in part with the recommendation. The commission has modified the existing language of subsection (c)(10) and (11) to reflect the substance of the changes recommended by the commenter. Such changes further clarify the intent of the commission to assure the recharge features are properly located at the time of application or during construction and that the appropriate plans are developed and implemented to assure that such features do not become conduits to the underlying groundwater resources. Appropriate changes have been made to the subsection.

ACCORD Agriculture, Inc. recommended that language in both subsections (c)(11)(B) and (c)(11)(C) be modified as follows: monitoring should be required in addition to the installation of appropriate control measures not as an alternative to use of such measures; and language is too broad, there needs to be some standard to measure protectiveness against.

Monitoring of groundwater may be an appropriate practice in a plan to protect recharge features. However, we disagree that in all cases, monitoring is necessary to protect recharge features. A licensed professional engineer will determine the elements of each plan on a case-by-case basis.

ACCORD Agriculture, Inc. recommended in subsection (c)(12) that the use of "should" rather than "shall" is inappropriate. A one-mile radius is not adequate for considering air impacts. Parks and other recreational areas need to be included.

The commission agrees with the proposed language change and has modified (c)(12) to reflect the use of the word "shall" instead of "should." The commission, however, disagrees that the "1 mile" reference needs to be increased when the air quality

buffer requirements in §321.46 is less than one mile. The 1 mile radius referenced in this paragraph was not intended for use in considering air impacts; rather, as a tool to ensure compliance with any applicable buffer requirements in §321.46. Requiring a land use map with a 1 mile radius is believed to be sufficient for determining compliance with the requirements in §321.46. The commission also agrees that the language should be modified to include "public park" to be consistent with the requirements in §321.46. The commission does not agree that "other recreational areas" needs to added because this term is considered too broad and difficult to define. In addition, this subsection has been modified by adding the phrase "to show compliance with §321.46" to the end of first sentence to clarify the intent of this requirement.

ACCORD Agriculture, Inc. recommended in subsection (c)(13) that a copy of the application should always be available at a local library or other public site in the county where the CAFO is located. Interested persons must be allowed to examine and copy an application in relative privacy.

The commission agrees that interested persons should have the opportunity to review a copy of an application in relative privacy. The commission has changed the rule in response to this comment.

North Plains Ground Water Conservation District No. Two recommended in subsection (c)(13) to replace "regular" with "normal" in second sentence, and add the following new sentence between the second and third: " For the purposes of this section, normal business hours shall be at a minimum of: from 9:00 a.m. to noon and from 1:00 p.m. to 5:00 p.m., Monday through Friday allowing for the observance of state and/or federal holidays."

The commission agrees with this comment and has changed the rule accordingly.

It was the commission intent to include the reference to all applicable fees for CAFOs in this subchapter for easy reference in subsection (d) of this section. CAFOs are subject to a Clean Rivers Program fee.

The commission has added language to subsection (d) to clarify that CAFO obtaining authorization under this section will be subject to a fee under §220.21 of this title (relating to Water Quality Assessment Fees).

ACCORD Agriculture, Inc. recommended in subsection (f) the basis that would be considered appropriate for extending effectiveness of a registration beyond five years should be provided.

The commission agrees with this comment and has changed the rule for the purpose of clarity by removing the language related to extension.

ACCORD Agriculture, Inc. recommended in subsection (g) The structure of this provision is unclear. A one-size fits all approach simply is not appropriate. Although « mile may be adequate for small facilities, very large facilities will require buffer zones of several miles. The term "public recreation area (e.g., golf course)" should be substituted for public park. It is not clear in measuring buffer zones if playgrounds and outdoor sports facilities at schools are appropriately considered. A buffer zone must be determined based on the odor potential of the individual facility.

As adopted, §321.46 outlines buffer requirements and odor control plans required for new CAFOs and expansion of existing CAFOs. The commission believes that a « mile separation distance or 1/4 mile separation with an odor control plan for new CAFOs is reasonable and intends it to be the minimum distance required. Likewise, the commission believes it is appropriate for expansion of existing CAFOs to either submit an odor control plan or provide a 1/4 mile separation distance. In addition to these requirements, the proposed rules contain several provisions which aid in minimizing odors such as pond sizing, application limitations, manure scraping schedules, and manure handling requirements. It would be difficult to establish a relationship between herd size and needed buffer zones for different animal species and different waste management designs. The compliance history established by the TNRCC (and TACB) on existing animal feeding operations does not support different buffer zone distances for different herd sizes. Regardless of buffer distances, operators are still required to adhere to the general prohibition against "nuisance."

The commission disagrees that the term "public recreation area" should be substituted for the term "public park," because it is too broad. Section 321.46 has been modified to clarify that recreational areas associated with a school will be considered along with schools in the list of included items. In the commentor's example, a golf course would be considered either a public park or a business, depending on whether it is open to members of the general public. In addition, the requirements under this subsection, as proposed, has been moved to §321.46 to clarify that this requirement is only applicable to applications seeking both air and water authorization.

Farm Credit Bank of Texas suggested in subsection (g) that the « mile buffer requirement will adversely effect the ability of financial institutions to extend credit to CAFOs because compliance with this regulation will require a disproportionate amount of capital investment relative to expected return.

After review of the comments submitted regarding buffer zones, the commission has modified the language of §321.46 to state that new CAFOs shall provide either a half-mile air quality buffer; or shall provide a quarter-mile air quality buffer and submit an odor control plan. For expansion of existing CAFOs, §321.46 has been modified to require either a quarter-mile buffer or an odor control plan. The commission agrees that requiring a « mile buffer zone for all facilities could add a financial burden on the owner/operator of the facility; however, the rules do not specify that the buffer zone be owned by the owner/operator of the facility. The applicant also retains the option of 116 authorization which has no established minimum buffer distance.

Greenbelt Municipal and Industrial Water Authority suggested in subsection (g) for reasons of law and policy, the TNRCC should not allow individuals to "consent" to violations of the public rights created by the TCAA.

The commission disagrees that allowing land owners to consent to CAFOs, regarding siting criteria, is a violation of any rights created by the TCAA. The commission believes that under some circumstances, with input from adjacent land owners, the buffer requirements should be optional.

Fifty individuals in the Panhandle area of the state, JRG Farms, Inc., J.R. Stump Family Trusts A&B, and ACCORD Agriculture, Inc. recommended that all or some of the following changes be made to the buffer zone requirements: increase the buffer

anywhere from two to five miles; two miles is the requirement set by recent Oklahoma and Kansas legislation, and this is much more reasonable; set the distance for hog operations, which emit more hydrogen sulfide and odors than other CAFOs at two miles unless landowner affected gives written consent. An individual in the Panhandle area suggested in subsection (g) the setback requirements should be much greater, more in accordance with other states. Feel that a setback of even 5 miles from any residence or state park or church from a facility of 50,000, 100,000 or even 300,000 is completely inadequate. The odor from these facilities are intensive, travel far and affect a wide area.

The commission is aware of recent legislation passed in the states of Oklahoma and Kansas that would require up to a 2 mile buffer zone for certain CAFOs. However, the commission does not believe it would be appropriate or necessary to require a 2 mile buffer zone for Texas CAFOs, based solely on species type. A buffer zone of this magnitude would severely limit where CAFOs could locate in the state. The commission believes that design and operational requirements outlined in these rules combined with smaller buffer zones and/or odor control plans, when applicable, will adequately protect the health and welfare of the public.

An individual in the Panhandle area requested that in subsection (g) the buffer zone between a feedlot and a home on adjoining land be « mile. An individual in the Panhandle area suggested in subsection (g) that one mile is too close to be healthy. The commenter lives one mile from a Texas Farm facility and the odor is too strong. Sixteen individuals from the Panhandle reported experiencing odors at their residences, which are located between « and five miles away from nearby CAFOs. Nine individuals from the Panhandle area state concerns regarding health effects associated with CAFO emissions.

The commission believes that the buffer distances established in this rule, when applicable, are reasonable for properly designed and operated CAFO facilities seeking air authorization under this subchapter. Regardless of the manner in which air authorization is obtained, the §101.4 Nuisance rule is applicable and anyone adversely affected by emissions from a facility should report the conditions to the TNRCC regional office in their area. The commission believes that facilities constructed and operated in accordance with the rules as adopted will not adversely affect human health or welfare at offsite receptors. Although odors will be experienced at times by individuals living in close proximity to certain CAFOs, these odors are not expected to be of such concentration and such duration as to adversely affect human health or welfare.

Wrangler Feedyards, Jade Cattle Feeders, Koch Beef Company, Veribest Cattle Feeders, Inc., Bar G Feedyard, Frontier Feedyards, Inc., Coyote Lake Feedyard, Live Oak Feedlot, Inc., McLean Feedyard, Inc., Sugarland Feed Yards, Inc., Stratford Feedyard, Bartlett Cattle Company, L.P., Perryton Feeders, Inc., Bezner Beef, Jennings Land and Cattle, Inc., Canadian Feedyards, Inc., Comstock Cattle Corp., Tri-State Cattle Feeders, Farwell Feed Yards, Perry Feeders, Inc., Dekalb Swine Breeders, Inc. and Texas Cattle Feeders Association suggested in subsection (g) the $\frac{1}{2}$ mile buffer distance is acceptable, but should not be made retroactive to units built prior to the requirement. Texas Farm Bureau suggests in subsection (g) the $\frac{1}{2}$ mile separation distance is acceptable. An individual in the Panhandle area suggested in subsection (g) that the rule should be adopted. It is unjust for existing landowners and homeowners to be subjected to a feedlot within $\frac{1}{2}$ mile of their homestead. TAEX (Amarillo) suggested in subsection (g) the change to $\frac{1}{2}$ mile separation distance is an improvement. It could be increased to a greater distance in site specific circumstances at the discretion of the TNRCC. However, it is not practicable or desirable to apply this subsection to expansions of existing operations.

The commission agrees that it is reasonable to distinguish between new, existing, and expanding facilities when establishing buffer zone requirements. The adopted rules require that new CAFOs either satisfy the « mile buffer requirement, or satisfy a 1/4 mile buffer requirement and submit an odor control plan. For existing CAFOs with previous air authorization obtained under Subchapter K or through an individual air quality permit under Chapter 116, authorization may be transferred into this subchapter without acquiring additional buffer and without making structural changes to the site. However, owners and operators utilizing this option will be required to operate under the special provisions/conditions of their previous authorization being transferred. For facilities that can satisfy the buffer requirements in this subchapter, the special provisions/conditions of their previous authorization do not have to be met, and instead, such facilities may operate under the provisions of this subchapter similar to a new facility. For expansion of existing CAFOs, the adopted §321.46 requires either a 1/4 mile buffer or submittal of an odor control plan. Expansion of new CAFOs would have the same requirements as a new CAFO in §321.46.

Rice Construction suggested in subsection (g) that the 1/4 mile set back is sufficient for CAFOs. The Phillips refinery in Borger does not have such requirements. Approximately 25% of the population (12,000) of Borger is closer than $\frac{1}{2}$ mile to the refinery. Believe « mile is unnecessary, and would have the effect of excluding reasonable sites from registration. Mahard Egg Farms, Inc., Pilgrim's Pride, Inc. and Texas Poultry Federation urged TNRCC to adopt 1/4 mile requirement as previously established.

The commission does not believe that it is appropriate to compare the nuisance potential of a CAFO and a refinery and to establish a buffer zone for CAFOs based on that comparison. The types of air contaminants expected from these two industries are different, and the manner in which climatic conditions affect CAFO emissions do not support common regulatory requirements However, the commission agrees that the 1/4 mile buffer for some facilities is appropriate. As adopted, §321.46 outlines various options for buffer zone requirements and/or the submittal of an odor control plan. See comments above.

Texas Association of Dairymen and Dairy Farmers of America suggested in subsection (g) with respect to the expansion of existing facilities, TNRCC should eliminate the $\frac{1}{2}$ mile buffer zone requirement and reduce the requirement to 1/4 mile with respect to construction of new facilities. Twenty-seven poultry producers are opposed to $\frac{1}{2}$ mile air quality buffer. Odors can be alleviated when producers incorporate BMPs.

As stated earlier, the commission agrees that it is reasonable to consider expansion of existing CAFOs differently than new CAFOs or expansion of new CAFOs in determining buffer zone requirements. The adopted version of the rule reduces requirements for expansions of existing facilities (see responses to related comments above). In addition, the commission agrees that for new, CAFOs when an odor control plan is submitted,

which encompass BMP's, the buffer zone requirement will be reduced to 1/4 mile.

Brazos River Authority recommended that in subsection (h) in reference to renewal occurring without public notice, if the facility has had no "major enforcement actions" this should be changed to "no major violations."

Reviewing the referenced language, the commission determined that it should emphasize and more precisely describe the types of compliance problems that will prevent automatic renewals. The rule has been changed from the proposal to do so. In the commission's view the term "formal enforcement action," coupled with a description of the exact subject matter and procedural status of such an action, is more specific than either "major enforcement actions" or "major violations."

ACCORD Agriculture, Inc. recommended in subsection (h)(1) other violations of air requirements such as property line standards for dust must be addressed with respect to compliance history regardless of whether the violation is considered to constitute a nuisance. Some form of public participation process is needed for renewals of permits.

Although emissions from CAFOs have been historically compared to the nuisance rule to determine compliance with applicable standards, the commission agrees that any violation of an applicable property line standard or nuisance should be considered a major violation when renewing a permit under this subchapter. The adopted version of the rule has been modified to clarify that any violation of a state property line standard under this title, or federal ambient air quality standard shall be considered a major enforcement action in addition to violations of the nuisance rule.

On the issue of public participation, the commission feels that once an applicant has gone through either the initial individual permit or application for registration procedure, which includes public participation through notice, comment and either a contested case or motion for reconsideration process, they should be given an incentive to remain in compliance with their authorization. These amendments provide a more streamlined renewal process for facilities that do not have any major enforcement actions over the past 36 months and do not plan any changes to the facility. The commission notes that this is an issue that may require reexamination after assumption of the federal NPDES program.

Texas Farm Bureau, Continental Grain Company and Texas Cattle Feeders Association recommended that in subsection (h)(1) the end of the first sentence should be clarified as follows " granted by the executive director without public notice, comment or a public hearing."

The commission responds that the rule is clear and does not need to be changed. Registration renewals which propose no changes to the existing authorization and where there has been no related formal major enforcement action against the facility during the last 36 months may be granted by the executive director without public notice. However, if the executive director receives information, via a comment or otherwise, indicating that the facility does not quality for renewal under this provision (e.g., changes have occurred at the facility which are inconsistent with the existing authorization), the executive director may consider this information and act accordingly.

ACCORD Agriculture, Inc. recommended that in subsection (h)(3) renewals should never be automatic. The executive director should have the discretion to require an individual permit, if determined to be appropriate.

The commission responds that the rule is clear that renewal will not be automatic in all cases. The executive director has the authority under these rules to require a facility to submit an application for an individual permit. However, if a facility is compliant with the provisions of these rules and is not making substantial changes, an expedited process is sufficient for renewal since the applicant went through a more thorough review at the time of the original application.

ACCORD Agriculture, Inc. recommended that in subsection (h)(5) the language should make it clear that the failure of the executive director to provide notice does not excuse the registrant's obligation to submit a timely application. Applications should never be allowed to be submitted less than at least one month before the expiration date. Texas Cattle Feeders Association recommended in subsection (h)(5) that the notice of expiration should be sent by certified mail, return receipt requested.

The commission believes that registrants are responsible for timely submitting an application for renewal. The commission agrees that the notice of expiration should be sent by certified mail, return receipt requested, and has changed the rule accordingly.

Greenbelt Municipal and Industrial Water Authority proposes a reduction (to 300 animal units) in the total number of animals allowed at a CAFO qualifying for the registration process.

The commission disagrees that an individual permit is required for all facilities which have more than 300 animal units. There are certain situations which do require an individual permit. The commission has seen no link through it enforcement processes in the number of animals confined to the number of violations for a particular size facility. The registration process gives the public opportunity to comment on the application. The commission believes that these rules are consistent with similar provisions of the EPA Region VI General Permit for CAFOs.

Greenbelt Municipal and Industrial Water Authority suggested that TNRCC should revise its proposal to prevent installation of multiple CAFOs in a given area under the authority of the registration process.

The commission does not agree with this comment and has made no change to the rule. The commission does not believe that it is necessary, for the purposes of environmental protection, to restrict the number of CAFOs in a given area provided that the CAFOs are being operated in a manner consistent with these rules. Further, the commission does not have any statutory authority to limit land use development except through its authority to limit discharges in accordance with state law.

An individual in the Panhandle area recommended that all soil penetrations should be identified and plugged before any construction begins.

The commission responds that the applicant is required under these rules to identify all artificial wells, excavations, and penetrations located on the site in the recharge feature evaluation. If features are identified, a plan to protect the feature must be prepared and submitted by an engineer. In addition, if any recharge features are found during the construction process, the applicant is responsible for having the feature located and a plan prepared and submitted by an engineer on how it will

be addressed and not become a conduit for any pollutants to groundwater or surface water.

The Mayor of the City of Perryton proposed that the applicant should be required to formally locate and identify on the initial application all active, abandoned and inoperative wells, oil and gas wells and any other artificial penetrations as determined by the TNRCC within « mile of the boundaries of the proposed facility in addition to the site itself.

The commission disagrees with the comment and believes that the requirements for identification of wells, penetrations, etc. under the adopted rules are comprehensive and protective and also maintain consistency with other current commission rules. The regulations require that the applicant identify all private water wells (abandoned or in use) and public wells located within 500 feet of the land application areas, open lots and control facilities whether or not the wells are located on the property. The applicant is required to identify all wells and excavations located on the property in the recharge feature evaluation.

Agri-Waste Technology, Inc. recommended that all penetrations that may be identified during construction should be appropriately plugged by licensed professionals. Any changes to the site plan due to identification of penetrations discovered during construction should be reported to the TNRCC by the applicant.

The commission responds that the applicant is required under these rules to identify all artificial wells, excavations, and penetrations located on the site in the recharge feature evaluation. If features are identified, a plan to protect the feature must be prepared and submitted in accordance with §321.35(c)(11). In addition, if any recharge features are found during the construction process, the applicant is responsible for having the feature located and a plan prepared and submitted in accordance with the above referenced subsection on how it will be addressed and not become a conduit for any pollutants to the groundwater or surface water.

The Mayor of the City of Perryton recommended that the rules be modified to require the applicant to locate playa lakes and recharge features in the initial application.

The commission agrees with the comment and would note that the applicant is required under §321.35 of these rules to identify and locate all playa lakes on the USGS topographic map(s) and all recharge features located on the site in the recharge feature evaluation.

The Mayor of the City of Perryton recommended that the rules be modified to require the applicant to locate any municipal and public water supply sources within one mile of the proposed facility. Facilities near water supply sources should have to meet a higher design standard.

The commission is interested in this issue and will direct the executive director to study the recommended action and provide a recommendation to the commission.

The Mayor of the City of Perryton suggested that TNRCC should ask Texas A&M University or another research center to conduct a study on the possible adverse effects on the Ogallala from the existence of numerous artificial penetrations. The focus of such study should be on the increased potential for migration of contaminants from large-scale swine production facilities.

The commission responds that the initiation of a study is beyond the scope of these rules.

The Mayor of the City of Perryton proposed that the rules be modified to require applicants to fully uncover and disclose all material facts in their applications. The burden of proof must rest with the applicant not the adjacent landowners. Applicants are not penalized for submitting incomplete or inaccurate applications. Applicants are allowed to fix discrepancies. Applications should be correct and properly certified when submitted.

The commission responds that an application will not be declared administratively and technically complete until all required information is submitted by the applicant. If an application is not complete, a letter of deficiency will be sent to the applicant requesting additional information. Any registration which was approved based on incorrect information is subject to review, and possible revocation, by the commission. The commission agrees that applications must be accurate. The applicant is required to certify to the accuracy of the application in accordance with 30 TAC 305.44 of this title. Penalties may be assessed for knowingly submitting false information.

Agri-Waste Technology, Inc. recommended that the rules be modified to specify amounts of time that can be taken by the executive director to review and comment on application materials.

The commission notes that applications under this subchapter will be processed in accordance with the provisions herein and Chapters 281 and 305 of this title. Chapter 281 specifically references timeframes for processing applications.

An attorney representing landowners in Johnson and Ochiltree Counties recommended that the following be added to this section: For facilities utilizing synthetic liners with leak detection and/or groundwater monitoring capability: a waste management unit at a feedlot shall not be located within 500 feet of any existing public water supply source nor within 150 feet of a private water source without the written consent of the property owner; or a waste management unit at a CAFO shall not be located within 1,000 feet of any existing public water supply source nor within 500 feet of a private water source without the written consent of the property owner. For facilities utilizing in situ or compacted clay liners without leak detection and/or groundwater monitoring capability: a waste management unit at a feedlot shall not be located within 1,000 feet of any existing public water supply source nor within 500 feet of a private water source without the written consent of the property owner; a waste management unit at a CAFO shall not be located within 2000 feet of any existing public water supply source nor within 1,000 feet of a private water source without the written consent of the property owner; or the application shall be accompanied with a professional determination and engineering certification the liners are sufficient to protect the quality of any existing public water supply located within « miles radius and any private water supply within 1/4 mile radius of the facility.

The commission agrees that buffer zones between potential pollutant sources and water wells are necessary. The buffer zones are protective and consistent with other state requirements. The regulations require a 150-foot buffer zone for private water wells and a 500-foot buffer zone for public water supply wells. All retention structures constructed with a liner must have engineer certification submitted prior to utilization of the facilities to ensure that the facilities are properly constructed.

§321.36. Notice of Application for Registration.

An attorney representing landowners in Johnson and Ochiltree Counties recommended that subsection (a) amended to add the following: the executive director may deny coverage under the application for registration and require the applicant to pursue an individual permit, if the applicant fails to submit an administratively and technically complete application. Definition for administratively complete application: " is one that contains all of the items required by the commission's rules to be included with the application. Inadvertent omission that are remedied through the submission of previously developed information(e.g. a missing attachment) within one week following a request by the executive director shall not render an application administratively incomplete." A technically complete application is one that is administratively complete and which reasonably demonstrates that the proposed facility will be sited, designed, constructed and operated in accordance with the commission's rules. The failure to address a material issue in the siting, design, construction or operation of the proposed facility will render the application technically incomplete, if the applicant either knew or reasonably should have known about the issue (e.g. material omission or misrepresentation of a material fact). The submission of an administratively or technically incomplete application and the failure to timely correct such deficiency shall result in a denial of coverage. The executive director determination of administrative or technical completeness establishes a rebuttable presumption that the application is administratively or technically complete and may be challenged during the applicable comment period.

The commission responds that these rules allow the executive director to require any animal feeding operation to obtain an individual permit under §321.33 (b). These rules give the executive director some discretion in determining which facilities should be required to obtain an individual permit. The commission believes this is preferable to adopting rules which require facilities to obtain an individual permit regardless of the circumstances.

ACCORD Agriculture, Inc. proposed that subsection (b) be amended to require that the notice must always include the proposed size of the facility as well as a description of the receiving waters for any discharge.

The commission agrees that notice should include the proposed size of the facility and has changed the rule to include the requested additional information in the notice. This information will be useful for those individuals who receive notice of application and will assist those individuals who intend to submit comments to the commission.

Continental Grain Company and Texas Cattle Feeders Association recommended that the language in subsection (b)(7) be clarified as follows: The words "not" and "less than" should be deleted to avoid confusion about the length of the comment period.

The commission agrees with this comment and has changed the rule accordingly. This change provides clarity and a better description of the commission's intent on this provision.

ACCORD Agriculture, Inc. recommended that subsection (e) be modified to include the following: mailed notice should be provided to any owners or operators of any public drinking water source located within five miles of the proposed facility. The county judge and health officials of the county immediately downstream should also be notified. River authorities should always receive notice. The rules should provide that a registration will not be granted if notice requirements have not been met.

The purpose of the notice requirements is to notify those individuals who are most likely to be affected by a facility. The commission does not believe that owners or operators of public drinking water facilities are likely to be affected. However, the rule provides that notice may be sent to persons who may be affected in the judgement of the executive director. Similarly, persons who request to be on the mailing list will be sent notice. The rules require that notice be sent to the county judge and the health officials of the county in which the facility is located or in which waste will be disposed of. The commission does not believe it is also necessary to notify the county judge and health officials of any counties downstream, as they are less likely to be affected by a facility. §321.37. Actions on Applications for Registration.

ACCORD Agriculture, Inc. recommended that the rules be modified to require the executive director to provide a written response to all significant comments received.

The commission agrees with this comment, and has made the change.

Dekalb Swine Breeders, Inc. recommended that the rules be modified to require that the application process should limit a motion for reconsideration to those who originally supplied public comment and the applicant and the commission should set a time limit on this motion and on action to be taken by the executive director.

The commission agrees generally that motions for reconsideration should only be available to those individuals who have originally supplied public comment to the executive director. However, an exception should be made in the case where an individual who should have been sent notice was not noticed. Under §50.39 of the commission's rules, the commission must take action on a motion for reconsideration within ninety days. As to establishing a time limit on the executive director's response to comments, the commission feels that it is not appropriate at this time to establish a hard time limit since it is difficult to project how many comments will be submitted and how much time the executive director will need to evaluate such comments, perform any research or collect information and whether an investigation would be necessary to render a complete and accurate decision.

Agri-Waste Technology, Inc., Texas Poultry Federation, Wrangler Feedyards, Jade Cattle Feeders, Koch Beef Company, Veribest Cattle Feeders, Inc., Bar G Feedyard, Frontier Feedyards, Inc., Coyote Lake Feedyard, Live Oak Feedlot, Inc., McLean Feedyard, Inc., Sugarland Feed Yards, Inc., Stratford Feedyard, Bartlett Cattle Company, L.P., Perryton Feeders, Inc., Bezner Beef, Jennings Land and Cattle, Inc., Canadian Feedyards, Inc., Comstock Cattle Corp., Tri-State Cattle Feeders, Farwell Feed Yard and Perry Feeders, Inc. proposed that the rules be modified to clearly identify who should be considered as an affected party and what time lines for which comments can be received by the agency. In addition, the issues that the TNRCC should consider from affected parties should be clearly defined.

Other current rules (Chapter 55 of this title relating to Request for Contested Case Hearings; Public Comment) define how the commission will determine whether someone is an affected person for hearing purposes. Affected person status is not

a prerequisite for eligibility to comment on an issue to the commission.

Pilgrim's Pride, Inc. requested that the commission assure that the final administrative process requirements are fair to all parties.

The commission believes that these rules will provide a fair and equitable process for all parties and will be protective of the environment.

Continental Grain Company suggested that the following sentence in subsection (a) "Only written comment received within the 30 day period are considered timely" is ambiguous because there is no explanation of how timely comments will be handled differently than untimely comments. The word "are" should be changed to "will be" and the word "timely" should be deleted.

The commission agrees with this comment and will make this change to provide clarification of its intent under this provision.

Continental Grain Company and Texas Cattle Feeders Association recommended that subsection (c) modified as follows: the word "timely" should be deleted and the words "received within the 30 day comment period "added after the word "comments."

The commission agrees that subsection needed clarification. This subsection has been modified and expanded to further define and clarify the requirements and process for a motions for reconsideration.

Brazos River Authority suggested that in the proposed language motions for reconsideration provide little procedural protection for protestants because the executive director makes both the initial decision and decides the appeal.

The commission responds that the Motions for Reconsideration, which are filed pursuant to these rules, are not considered by the executive director. The commission has delegated this responsibility to the general counsel of the commission. Once a Motion for Reconsideration has been filed on an executive director's action, the general counsel's office determines whether to set an item on the commission's agenda or let the Motion For Reconsideration expire as a matter of law. Motions For Reconsideration are an effective means for protestants to state their objections to an executive director's action.

An attorney representing landowners in Johnson and Ochiltree Counties recommended that this section be modified to add that the executive director may deny a request for coverage or revoke under the application for registration on the basis of a determination of good cause, which is to include the criteria suggested for addition in the Applicability section. Anyone denied coverage shall apply for and obtain a final individual permit prior to beginning operation of the facility. Anyone whose coverage has been revoked for reasons other than the actual or likely release or discharge of pollutants or the actual or likely pollution of surface or ground water sources may continue to operate until such time as a final decision is rendered by the commission and such application is filed within sixty days following notification of revocation of coverage.

The commission responds that the proposed change is not necessary because the executive director may approve or deny an application for a registration in whole or in part, deny with prejudice and suspend a registration under §321.35 (e). An applicant who is denied coverage always has the option to apply for an individual permit under these rules.

An attorney representing landowners in Johnson and Ochiltree Counties recommended that the language in this section be modified to add that any affected person may file a complaint and petition with the executive director citing good cause to deny or revoke coverage under the application for registration. The executive director shall respond in writing to the petition within thirty days with a preliminary determination. Final action shall be completed by the executive director within sixty days with written notice provided to the petitioner and the facility operator. The executive director decision to deny or revoke coverage under an application for registration is not subject to a contested case proceeding but is reviewable upon the filing of a motion for reconsideration, however, this shall not extend any proposed applicable deadlines for the filing of an individual permit application.

The commission responds that the §321.37 (a) allows a person to provide the commission with written comments on any applications for registrations for which notice was issued. This rule states that the executive director shall review any written comments when they are received within 30 days of mailing the notice. The commission agrees that the executive director should respond in writing and has changed the rule in response to this comment. The commission agrees that the executive director's decision is reviewable upon the filing of a motion for reconsideration, and this is reflected in §321.37 (c).

An attorney representing landowners in Johnson and Ochiltree Counties recommended that the language in this section be modified to add that a facility owner/operator that has been denied coverage or had his coverage revoked for a general permit may make an application for registration unless the basis for denial or revocation was due to: the issuance of multiple enforcement/remedial orders; the unauthorized release or discharge of pollutants onto the property of another person within the recommended time frame state above; or it resulted from the actual or the potential pollution of surface or ground water.

The commission does not agree with this comment. The commission does not believe it should limit the ability of an applicant to be eligible for a registration because an applicant was not eligible for a general permit. The level of review is higher for a registration than for a general permit, and the commission has the discretion to require an applicant with a poor compliance history to apply for an individual permit.

§321.38. Proper CAFO Operation and Maintenance.

The Mayor of the City of Perryton recommended that in this section engineering certification requirements for permit applications be expanded to include post construction statements that the facility has been constructed in strict accordance with the approved application and permit, the engineer has personally inspected all waste management facilities and that the facility is in full compliance and ready for operation.

The commission responds that the recommendation would constitute a substantive change to the rules. The additional requirements are beyond the scope of the rules as proposed. The commission notes that it may in response to an inspection of the facility or complaint investigation determine compliance with the provisions of the rules.

ACCORD Agriculture, Inc. recommended that the commission needs to make a determination about the adequacy of NRCS management plans. The rules must provide a process and the

standards against which those plans will be measured. Further, ACCORD Agriculture, Inc. recommended that in §321.39 (b) the commission may not simply delegate its responsibilities to another agency. The discussion of what plans NRCS " considers" to be adequate is meaningless. The permit must establish explicit, enforceable requirements. It is not acceptable for TNRCC to say it will base its regulatory decisions on what another agency "considers" adequate.

The commission disagrees with this comment. The commission believes that this provision is sufficiently clear that NRCS animal waste management plans may be submitted for the BMPs and PPP requirements as long as the NRCS plan has applicable and equivalent measures. These rules further specify that the executive director can request a copy of a PPP, evaluate such PPP and require the owner to change such plan if the executive director determines that such plan does meet the requirements of these rules. The commission by adoption of these rules has determined that NRCS management plans are adequate in accordance with provisions of §321.39(b) and is consistent with the current Region VI CAFO General Permit.

TAEX (College Station) recommended that BMPs should retain the same definition as they suggested it be redefined in the definitions section of the rules.

The term "BMPs" as utilized in this section is defined in §321.32 "Definitions." The definition of "BMPs" in §321.32 has been modified in response to the commenter's suggestion and applies throughout the subchapter.

§321.39. Pollution Prevention Plans.

TAEX (College Station) suggested that the terms Pesticide Use be deleted in title.

The commission agrees that these terms should be deleted. The Texas Register uses brackets in its publications to indicate all text that will be deleted.

Thirty-eight individuals from the Panhandle area, JRG Farms, Inc., J.R. Stump Family Trusts A&B, and ACCORD Agriculture, Inc. recommended that the language in subsection (a) be modified to address the following: The statement "should include measures necessary to prevent...." does not require anything. This statement must be changed in order to protect the waters of the state and to prevent nuisance and odor conditions to read: "PPPs shall be prepared in accordance with good engineering practices and must include measures necessary to prevent the discharge of pollutants to waters in the state and nuisance conditions and minimize odor conditions. This plan must be approved by the TNRCC and by an independent engineer before the permit can be allowed. Greenbelt Municipal and Industrial Water Authority recommended that subsection (a) be modified to require the PPP to be prepared and sealed by a licensed professional engineer.

The commission agrees in part on the first issue that measures are required, therefore the word "should" has been replaced with "shall." However, the commission does not believe that the plan must be approved by a professional engineer. Certain components of the plan which directly involve engineering are required to be sealed by an engineer, but the plan includes many components which are not engineering-related.

ACCORD Agriculture, Inc. recommended that subsection (a) be modified as follows: the use of the verb "should" in the last sentence of this subsection is inappropriate, it needs to be changed to "shall" to avoid enforceability issues.

The commission agrees and has changed the rules accordingly to provide enforceability.

ACCORD Agriculture, Inc. suggested in subsection (d) it is not clear how PPP reviews relate to actions on registration applications. Registration applications without adequate PPPs will be denied. The executive director should have authority to require changes more quickly than 90 days if the risks are significant enough to support it.

The commission responds that a PPP which is considered adequate at the time of application may become inadequate at a later date because of a number of reasons such as substantial changes to the facility. This provision allows the executive director authority at any time, such as during an inspection, to notify the permittee of deficiencies in the plan. The provision does not restrict the executive director authority to request that changes be submitted during a time frame other than 90 days.

ACCORD Agriculture, Inc. proposes that the current language of subsection (e) suggests that the general objectives of the PPP include creating nuisance conditions rather than avoiding them.

The requirement to submit an odor control plan has been relocated to §321.46, therefore the reference to nuisance conditions has been deleted from the adopted subsection (e). However, the intent of the proposed language was to ensure that the PPP include provisions to prevent nuisances not "create" nuisances.

Five individuals from the Panhandle commented that the commission's complaint and investigation procedures are not adequate in protecting citizens against nuisance conditions. Their comments suggest that complaints are not responded to quickly enough to enable the investigator to document nuisance conditions, and therefore, odor problems are not resolved. Three commenters do not believe it is appropriate that only odors at a house can be reported, and assert that this removes the right of adjacent landowners who do not have a house at their property to report nuisance conditions.

The commission responds that in certain cases it may not be possible for a TNRCC investigator to travel to the area being complained of in time to document the complaint. This is an unfortunate reality that results from the extremely large area of our state, rapid changes in climatic conditions that affect the dispersion of air contaminants, and the agency's limited resources. However, TNRCC regional offices are diligent with regard to complaint responses, and investigators make every effort to respond to complaints in a timely manner.

The general prohibition against nuisance does not require that the complaint be generated from a house or other permanent structure. As the term "nuisance" is defined in the TNRCC Rules, consideration must be given to the ways in which the normal use and enjoyment of property is being affected. The issue of whether a permanent dwelling is present is typically considered in determining whether an individual's property rights have been interfered with, as opposed to brief exposures to odor conditions that may occur in public places such as roads, undeveloped property such as farm land, and facilities with similar emissions. It should also be noted that the intent of these rules is not to establish new procedures for complaint investigations, but to provide an alternative means

of authorization for certain CAFOs. Facilities that construct and operate pursuant to these rules continue to be subject to the general prohibition against nuisance and the public is urged to continue to report any nuisance odor conditions to the appropriate regional office.

ACCORD Agriculture, Inc. suggests that the second sentence of subsection (f)(1) is too vague to be useful. The rule should establish at least a nonexclusive list of activities that are known to be potential sources. The term "should" is not adequately enforceable.

The commission responds that the subsection already includes a nonexclusive list of activities that are known to be potential sources. However, the commission does agree that the word "should" should be replaced with the word "shall" and has made the change accordingly.

Continental Grain Company and Texas Cattle Feeders Association recommended that in subsection (f)(1) the word "significant" should be inserted in the first sentence before the word "potential." In addition, a sentence should be added between the first and second sentences which states: "A list of significant materials that are used, stored or disposed of at the CAFO should be included in the PPP. Everything following the sentence "An evaluation of potential pollutant..." should be deleted because it creates more confusion than clarity.

The commission responds that changes are necessary since potential pollutant sources are defined in the next sentence. The commission further believes that the recommended additional language is confusing and that the current language clarifies the process and requirements for evaluating pollution sources.

Texas Farm Bureau recommended that subsection (f)(1) adds excessive details that are unnecessary, prefer old Subchapter K language.

The commission responds that the excessive details as indicated by the commenter are necessary and that these details clarify the process and requirements for evaluating pollution sources.

Continental Grain Company and Texas Cattle Feeders Association recommended that in subsection (f)(1)(A) the site plan/map should be limited to the CAFO property. Insert the word "CAFO" before "property."

The commission agrees in part that the site plan/map should be limited to the property related to the operation; however, size should not be a factor. The commission believes that the language in this section already provides for that requirement.

Texas Cattle Feeders Association recommended that in subsection (f)(1)(A) the words "beneficial utilization on land owned, operated or controlled by the CAFO" should be substituted for "disposal activities of the concentrated animal feeding area." Animal manure and wastewater are fertilizers and soil amendments which are beneficially used for crop production, not "disposed" of as waste with no value.

The commission agrees that "disposal" is not an appropriate term and has replaced "disposal" with "utilization" which better describes the intent of the provision.

ACCORD Agriculture, Inc. recommended that in subsection (f)(1)(C) the reference to the effective date of these rules is unclear. Does it refer to the initial rules or these amendments. A facility should be required to maintain a list of all spills occurring since the facility was subject to regulation.

The commission responds that it would be unreasonable to require a facility which began operation in "1990" to maintain records from that date when the rules were not effective until 1998.

ACCORD Agriculture, Inc. recommended that in subsection (f)(2) the reference to identified sources of nuisance is unclear. How is the decision made regarding what management controls are "appropriate for the facility"? This sentence is so vague and ambiguous that is virtually meaningless. The rules should at least require that controls be included to address all sources of pollutants and air emission at the CAFO.

As previously stated, the requirement to address air quality issues through an odor control plan has been relocated to §321.46. Due to this relocation, any references to nuisance in subsection (f)(2) have been deleted. However, the commission believes that the language regarding appropriateness of controls is not meaningless. Permittees must develop management controls which are appropriate for each site. TNRCC staff can evaluate each plan to determine if controls are appropriate and adequate. The intent of the second sentence in subsection (f)(2) was to ensure that the PPP include control strategies for both water pollutants and air contaminants specific to the facility. As adopted, only those CAFOs which apply for air quality authorization and are subject to submitting an odor control plan are required to submit information on "sources of air contaminants."

ACCORD Agriculture, Inc. recommended that in subsection (f)(3) the term "structural control" needs to be defined. Who must perform this inspection? Unless the inspection is performed by a knowledgeable person, it would serve no useful function.

The commission responds that the term structural control does not need defining. This term is a commonly used term throughout this industry and others. The commission does agree that clarification on who can inspect structural controls for integrity and maintenance is needed. The commission will require that the individuals responsible for inspection should be those identified in the PPP as responsible for development, implementation, maintenance, and revisions of the plan.

ACCORD Agriculture, Inc. recommended that in subsection (f)(4) there should be a standard identified in the permit to measure the analysis against. Can anyone perform a "hydrologic needs analysis" or is an engineer required?

The commission responds that an engineering degree is not needed to perform a hydrologic needs analysis. The commission believes that the minimum components required in a hydrologic needs analysis are included in this section.

ACCORD Agriculture, Inc. recommended that in subsection (f)(5) and (6) the use of "should" rather than "shall" is not acceptable.

The commission agrees that the word "should" should be replaced with the word "shall" the corresponding changes have been made.

Greenbelt Municipal and Industrial Water Authority recommended that in subsection (f)(6) be revised with regard to the minimum freeboard requirements, to account for settlement and slope stability and require initial freeboard to exceed two feet

and include a 10-foot minimum width at top of levee with a slope no less than 3:1.

The commission agrees with the comment in part and has added the following language: "not less than" was added prior to "two feet" and "and in no case less than one foot" was deleted. A second sentence was added "Freeboard shall account for settlement and slope stability of the materials used at the time of design and construction." These additional requirements will only apply to new facilities constructed after the effective date of the rules. The commission responds that the recommendation to include limits on the levee width and slope would constitute a substantive change to the rules. The additional requirements are beyond the scope of the rules as proposed.

ACCORD Agriculture, Inc. recommended that in subsection (f)(7) the inclusion of the option to use "other site-specific data" does not establish an enforceable standard.

The commission responds that site-specific data provide for greater accuracy in designing treatment lagoons. Any site-specific data used in the development of the PPP is subject to review by the executive director at any time. If the review reveals that such data does not meet the minimum requirements of this subchapter, the owner/operator must amend the plan.

Five individuals from the Panhandle recommended additional requirements for ponds and methods for waste treatment, including covering lagoons to recapture gasses for use at the operation, using aerobic lagoons, and using lagoon additives.

The commission responds that the rules do not preclude CAFOs from utilizing innovative technologies that go beyond the requirements of the rule. As adopted, the rules already contain design and operational criteria for anaerobic and evaporative pond systems, which are the most common methods for treatment of waste at Texas CAFOs. The use of aerobic ponds, covered ponds with vapor recovery systems, and the utilization of additives in pond systems have not been established as BACT and absent additional scientific data it would be considered unreasonable to require these measures for all CAFOs, or certain CAFOs based solely on species type.

ACCORD Agriculture, Inc. recommended that in subsection (f)(8) there is not an adequate standard for the hydrologic needs analysis.

The commission believes that the minimum components required in a hydrologic needs analysis are included in this section.

ACCORD Agriculture, Inc. recommended that in subsection (f)(9) the use of the word "should" is inappropriate. The general types of site specific information to be used must be specified.

The commission disagrees with the comment and responds that the existing language allows the applicant to utilize best available information when site-specific information is not available.

Greenbelt Municipal and Industrial Water Authority recommended that subsection (f)(10) should be revised to require that embankments be designed in accordance with NRCS, Corps of Engineers, Bureau of Reclamation and ASCE requirements. Greenbelt Municipal and Industrial Water Authority further recommended that subsection (f)(10)(C) clarify that required certification include: use of proper testing methods; determination that compaction of the embankment was done in accordance with design standards; and that the certifying engineer was on site and witnessed the testing.

The commission responds that embankment design and construction should be in accordance with appropriate engineering standards as specified in the rules. The commission will add language to include engineer certification of embankment design in accordance with NRCS, Corps of Engineers, Bureau of Reclamation or American Society of Civil Engineers (ASCE) requirements and post-construction certification of compaction testing with accompanying test results and documentation. Such language will be added in subsection (f)(10)(C) by removing "Site specific variation in" and by replacing "certification by a licensed professional engineer, or" with "and."

ACCORD Agriculture, Inc. recommended that in subsection (f)(11) the requirement that dewatering equipment must be available whenever needed is inadequate as an enforceable standard. The rules should require the dewatering equipment to be there to avoid a violation. The rules should establish a deadline for restoring capacity after rainfall events.

The commission responds that the provision is enforceable and disagrees that equipment must be on-site to provide adequate environmental protection. The commission responds that the recommendation to establish a deadline would constitute a substantive change to the rules. The additional requirements are beyond the scope of the rules as proposed. The commission notes that it may in response to an inspection of the facility or a complaint investigation determine compliance with the provisions of the rules.

ACCORD Agriculture, Inc. recommended that in subsection (f)(12) the use of the term "impracticable" is too vague to establish an enforceable requirement.

The commission agrees that the term "impractical" may be vague and will amend the language as follows: "...periods where the net effect of evaporation and rainfall would require the addition of fresh water to maintain the treatment volume."

Continental Grain Company and Texas Cattle Feeders Association recommended that in subsection (f)(12) it is unnecessary for a CAFO that is operated by means of a total evaporation system to maintain and record the level(s) in retention facilities. Instead they suggested adding a sentence to this subsection which states: "A permanent marker (measuring device) is not required for a CAFO that has been properly designed, constructed and maintained as total evaporation only."

The commission responds that monitoring the level of wastewater is a necessary management tool that should be used by the owner/operator of any retention facility.

ACCORD Agriculture, Inc. recommended that in subsection (f)(14) the permit should provide that the frequency of monitoring and log recordation must be no less than every 24 hours.

The commission responds that 24-hour monitoring of rainfall is necessary to meet the intent of the provision. However, the commission feels that it is overly burdensome to require that the facility operator record a non-event in their on-site records. This provision does clearly make it a requirement that any rainfall event occurring at the facility must be recorded.

ACCORD Agriculture, Inc. recommended that in subsection (f)(16) the term "significant amounts of pollutants" should be defined. Without a definition, the certification requirement is not very meaningful.

The commission believes that the existing language is not consistent with provisions in §321.31 and will amend the

language as follows: replacing "leakage of significant amounts of pollutants into" with "a significant hydrologic connection between the contained wastewater and."

ACCORD Agriculture, Inc. recommended that in subsection (f)(17) the rules need to require certification of construction in compliance with these requirements. The use of the term "should" is inappropriate.

The commission agrees with the comment in part and will replace "should" with "shall." The commission disagrees with the recommendation to require a construction certification. The commission feels this is an unnecessary expense since these rules require that the facilities be designed and constructed in accordance with good engineering practices and the facilities are subject to the inspection of the executive director at any time. If any discrepancies are found, the owner/operator is subject to enforcement, penalties and the appropriate repairs to the facility to achieve compliance.

During the pendency of this rulemaking, it came to the commission's attention that the NRCS technical reference in subsection (f)(17) to SCS Technical Note 716 has been replaced with an updated technical document known as Appendix 10d of the NRCS Agricultural Waste Management Handbook. The rules as published made reference to the old standard yet indicating that if a more current standard existed it would apply.

The commission changed the reference from "SCS Technical Note 716" to "Appendix 10d of the NRCS Agricultural Waste Management Handbook."

Thirty-nine individuals in the Panhandle area of the state, JRG Farms, Inc., J.R. Stump Family Trusts A&B, and ACCORD Agriculture, Inc. recommended that in subsection (f)(18) all new operations be required to use plastic liners in addition to tamped clay liners in their lagoons.

The commission disagrees that synthetic liners should be required for all facilities. The rules require the applicant to certify lack of hydrologic connection for each retention structure. Lack of hydrologic connection can be achieved by utilizing in-situ materials, or the placement of a liner. Liners may be constructed of earthen materials or may be composed of synthetic material. The licensed professional engineer will determine the appropriate construction methods on a case-by-case basis.

Rice Construction recommended that in subsection (f)(18) the construction requirements and specifications for the waste lagoons of the CAFOs are equally as stringent as those we construct for hazardous chemicals. They suggested the agency not promulgate regulations which will impose a higher burden on this agricultural industry than is reasonable.

The commission believes that the construction and liner requirements are reasonable and adequate for the type of waste and wastewater that is being generated at CAFOs.

Agri-Waste Technology, Inc. suggested that in subsection (f)(18) liner criteria for many states are less than what TNRCC has had in place. The criteria proposed by TNRCC meets or exceeds that found in EPA Region VI General Permit for CAFOs.

The commission agrees that the criteria in these rules meet and/or exceed that found in EPA Region VI General Permit for CAFOs and most other states.

An individual in the Panhandle area recommended that in subsection (f)(18) facilities should be inspected during and after construction by an independent engineer. Under no circumstances should the engineer who constructed the site be named in the PPP.

The commission feels this is an unnecessary expense since these rules require that the facilities be designed and constructed in accordance with good engineering practices and the facilities are subject to the inspection of the executive director at any time. If any discrepancies are found, the owner/operator is subject to enforcement, penalties and the appropriate repairs to the facility to achieve compliance.

Thirty-nine individuals in the Panhandle area of the state, JRG Farms, Inc., J.R. Stump Family Trusts A&B, and ACCORD Agriculture, Inc. recommended that subsection (f)(18) be amended to include under lagoon monitoring systems, which represent a very minor cost and insure that lagoon leaks can be identified quickly before underground water is affected.

The commission responds that leak detection systems are not appropriate for all retention structures. If a significant potential exists for the contamination of waters in the state or drinking water, leak detection systems or other monitoring systems may be required.

An individual for the Panhandle area recommended that subsection (f)(18) be amended to require installation of leak detectors under the lagoons and inspection of lagoons before and after they are built and to require some means of clean-up after the owners/operators have finished using the lagoons.

The commission responds that leak detection systems are not appropriate for all retention structures. If a significant potential exists for the contamination of waters in the state or drinking water, leak detection systems or other monitoring systems may be required. In response to lagoon clean-up, the commission requires the removal and proper disposal of all solids, sludges, manure and other pollutants as a Best Management Practice under §321.40 and also requires the submission of a plan under §321.42 when ceasing all operations after loss of control or ownership.

ACCORD Agriculture, Inc. recommended that in subsection (f)(18) the term "shall" needs to be substituted for "will" to make clear that a mandatory requirement is being imposed. The use of the first year's monitoring data for establishing a baseline does not make sense if monitoring has not been required for a facility since it was first constructed. If monitoring wells are not established until the groundwater already has been polluted, baseline values must be determined in another location unaffected by pollution.

The commission agrees and has replaced the word "will" with "shall." The commission agrees in part that in certain circumstances, the first year's sampling may not be an appropriate baseline to use for comparisons and has revised the language to include "unless otherwise provided by the executive director" at the end of the provision.

ACCORD Agriculture, Inc. recommended that in subsection (f)(19)(A) it is not clear what "discharge or drainage of irrigated wastewater" is referring to. Does this language mean that irrigated wastewater may be allowed to drain off of an irrigated field even if drainage is adjacent to waters in the state as long as it does not run directly into waters in the state. Irrigated

wastewater simply should not be allowed to discharge or drain from an irrigated field.

The commission agrees that clarification of the provision is necessary to remain consistent with §321.31 of this title and Section 26.121 of the Texas Water Code. The phrase "of pollutants into or adjacent" has been added after "will result in a discharge."

ACCORD Agriculture, Inc. recommended that in subsection (f)(19)(B) phosphorus levels should be measured periodically regardless of known water quality issues. The frequency of such monitoring should be increased when phosphorus is a known water quality risk.

The commission responds that as required in §321.39(f)(28)(F), phosphorus is analyzed on an annual basis regardless of any known water quality problems and that under these rules the commission has the authority to establish through a public hearing process any greater frequency or sampling analysis.

TAEX (College Station) recommended that in subsection (f)(19)(B) delete "needed" should be deleted and after crop uptake the following should be added: ", based upon crop and realistic yield goal."

The commission agrees with the comment and has made the recommended revisions. This revision will clarify the intent of the rules.

ACCORD Agriculture, Inc. recommended that in subsection (f)(19)(D) irrigation practices should be required to avoid, rather than just reduce or minimize, contamination of waters in the state or nuisance conditions. Such contamination and nuisance conditions must be prohibited.

The intent of this paragraph was to insure that nuisance conditions be prevented while irrigating. The commission agrees with this comment and has clarified the language by adding the word "prevents" before the phrase "...the occurrence of nuisance conditions" and changing the term "contamination" to "pollution" which is a defined term.

Dairy Farmers of America recommended that in subsection (f)(20) the notice of solids removal from the treatment lagoon is unnecessary.

The commission disagrees with the comment. Solids removal from lagoons is not a common, routine activity. There is the potential for increased odors, improper disposal of solids and liquids, as well as pond liner damage if not done properly. Notice provides the opportunity for technical assistance to the facility owner/operator as well as for monitoring a potentially problematic activity.

ACCORD Agriculture, Inc. and Greenbelt Municipal and Industrial Water Authority recommended that in subsection (f)(21) the term "significant pollutants" needs to be defined or clarified. It is not clear whether it is intended to be a category or pollutants of a quantative limitation.

The commission agrees that the term "significant" is unclear and the language has been revised to be consistent with §321.31. The language will be revised as follows: remove "significant."

TAEX (College Station) recommended that in subsection (f)(22) the commission should change "any" to "all" ; delete "needed" and add after crop uptake ", based upon crop and realistic yield goal."

The commission agrees with the comment and has made the revisions to clarify the intent of the provision.

TAEX (College Station) recommended that in subsection (f)(23) the commission should change "any" to "all."

The commission disagrees with the comment. The commission believes the use of the term "any" in this subsection has the same meaning as "all." No change will be made.

ACCORD Agriculture, Inc. recommended that in subsection (f)(24)(A) the term "adequate" as it refers to manure storage capacity needs to be defined and that there needs to be a standard for determining what constitutes adequate berms or other structures. Land application should not be allowed in the 100-year floodplain.

The commission agrees the term "adequate" is unclear in the context of the referenced subsection and it will be removed. On the other recommendations the commission responds that adequate berms or other structures refers to protection from the 25-year, 24-hour rainfall event. There are many cases where land application of manure is beneficial within the 100-year floodplain.

TAEX (College Station) recommended that in subsection (f)(24)(A) the commission should change "agricultural" to "agronomic"

The commission agrees that the term "agronomic" better describes the intent of this paragraph and has made the revision.

ACCORD Agriculture, Inc. recommended that in subsection (f)(24)(B) the commission should require that at least at large facilities, manure stockpile areas must be lined as must areas collecting runoff from such areas.

The commission responds that if manure stockpiling is managed according to these rule requirements, downward migration of contaminants will be minimized similar to open lots.

TAEX (College Station) recommended that in subsection (f)(24)(D) the commission should add "agronomic" before "rates."

The commission agrees with the comment and has made the revision to clarify the intent of the provision.

ACCORD Agriculture, Inc. recommended that in subsection (f)(24)(F) the permit should establish some minimum width for grassed strips and for determining when land is subject to excessive erosion.

The commission responds that the recommendation to establish a minimum width for grassed strips would constitute a substantive change to the rules. The additional requirement is beyond the scope of the rules as proposed. The commission notes that the width of an edge-of-field, grassed strip shall be determined appropriately on a site-specific basis, but if the plan proves to be ineffective in controlling pollutants in discharges or preventing a nuisance condition, the commission will require amendments to the plan to achieve those objectives. The applicant is already required to identify areas which have a high potential for erosion and to submit a plan identifying measures used to limit erosion on those lands.

Two individuals from the Panhandle recommended that subsection (f)(24)(J) be modified to require daily flushing of pits.

The commission disagrees that it is necessary or reasonable to require that all buildings with flush systems be flushed on a

daily basis. The rule stipulates that buildings with flush systems be required to flush at least once per week, or as often as necessary to maintain the design efficiency. This would not preclude operators from designing a system that requires daily flushing. Daily flushing has not been established as BACT.

Greenbelt Municipal and Industrial Water Authority recommended that in subsection (f)(25) changes should be made to require that levee maintenance must be in accordance with TNRCC "Guidelines for Operation and Maintenance of Dams in Texas"

The commission disagrees with the comment. The commission does not want to limit maintenance to just the referenced document. The consulting engineer may have specific maintenance requirements that has been identified for the owner that should be adhered to based on the engineer's design criteria. The commission would certainly recommend the referenced document or other such documents provide the owner and/or consulting engineer with recommendations on how a maintenance schedule and program for their structure should be implemented.

Brazos River Authority recommended that in subsection (f)(28) it is assumed that the language "land owned or operated by permittee" would include land not owned by the permittee but that is operated by others on behalf of the permittee. If this is not the case, then this wording should be clarified.

The commission disagrees with the interpretation of the commenter. The commission interprets the language to indicate that land owned or operated by the permittee refers to land actually owned, leased or controlled in some fashion by the applicant and used as part of the CAFO.

ACCORD Agriculture, Inc. recommended that in subsection (f)(28)(C) the word "similar" be added prior to "management practices" to make clear that a separate analysis is needed for similar soils if different management practices will be used on that particular tract.

The commission generally agrees with the comment and has revised the language to add "similar" to clarify the intent of the provision.

TAEX (Amarillo) and Texas Cattle Feeders Association recommended that in subsection (f)(28)(F) the rules should not require only one selection of phosphorus extraction method. If the commission chooses to limit the extractant, they prefer Mehlich III. Dairy Farmers of America requested that in subsection (f)(28)(F) the phosphorus test be the Mehlich III or P1 Weak Bray rather than the TAMU extractant. Mahard Egg Farm, Inc., Wrangler Feedyards, Jade Cattle Feeders, Koch Beef Company, Veribest Cattle Feeders, Inc., Bar G Feedyard, Frontier Feedyards, Inc., Coyote Lake Feedyard, Live Oak Feedlot, Inc., McLean Feedyard, Inc., Sugarland Feed Yards, Inc., Stratford Feedyard, Bartlett Cattle Company, L.P., Perryton Feeders, Inc., Bezner Beef, Jennings Land and Cattle, Inc., Canadian Feedyards, Inc., Comstock Cattle Corp., Tri-State Cattle Feeders, Hereford Feed Yards Co., Farwell Feed Yards and Texas Farm Bureau recommended that in subsection (f)(28)(F)(ii) the commission state there is no technical basis for limiting analytical methods for phosphorus to the TAMU extractant. Suggest consistent use of extractant versus generalized limitation. Pilgrim's Pride, Inc. and Texas Poultry Federation suggests that the existing rule allowing use of TAMU, Bray and Mehlich should be continued until more definitive data is available to indicate which test method clearly provides the most accurate data. Agri-Waste Technology, Inc. suggested that for phosphorus testing a widely accepted testing extractant such as Bray P1 or Mehlich III should be adopted.

The commission agrees in part with the comments and has modified the language to include the Mehlich III method.

TAEX College Station recommended that in subsection (f)(28)(F)(ii) the commission add "see Section 321.39(28)(G)" after "ppm" for a table being proposed at that location and add under TAMU extractant "Bray I (soils (G)(I) below and after "Zone 1" "(0-6 inch increment or weighted average of the 0-2 and 2-6 inch increments."

The commission responds that it would like to study this issue further and will direct the executive director to meet with soil chemistry and testing experts and bring the commission a recommendation on which extractant or extractants should be used and under what conditions and limits.

Agri-Waste Technology, Inc. recommended that in subsection (f)(28)(G) any phosphorus regulation should be restricted to locations where phosphorus contamination to surface water and groundwater represents some reasonable potential. Texas Cattle Feeders Association recommended that in subsection (f)(28)(G) this paragraph should not apply to areas of the state which are not susceptible to phosphorous loading due to a lack of surface water. Where land application sites are isolated from surface waters and no potential exists for phosphorous runoff to reach any waters in the state, the soil levels of extractable phosphorous may exceed 200 ppm upon approval by the Executive Director.

The commission responds that when levels of phosphorus exceed certain thresholds in the soil, potential exists for runoff containing phosphorus to reach waters in the state. In addition, higher levels of phosphorus negatively affect most crop production rates, thereby defeating the use of the waste or wastewater as a beneficial reuse product.

Mahard Egg Farm, Inc. recommended that in subsection (f)(28)(G) additional sampling for topically applied manure is unnecessary and should not be adopted. Twenty-seven poultry producers suggested that in relation to subsection (f)(28)(G) the Texas A&M Extension Service has developed guidelines on soil sampling which recommends samples be taken at 0-6 inch depth. The scientific community and NRCS are in the process of developing guidance for phosphorus based animal waste management plans. If application limits are to be based on phosphorus, then NRCS and scientific research community should be the leaders on the issue, not a regulatory agency.

The commission responds that phosphorus movement in the soil is extremely inhibited. Without incorporation, phosphorus has a greater tendency to remain in the upper two inches, thereby increasing the potential for erosion and phosphorus loading in surface waters. Recent research has shown that there is a greater potential for topically applied manure compared to manure which is incorporated into the soil, and that a 0-2 inch soil test will better reflect whether this potential exists.

TAEX (College Station) recommended that a new table be established in subsection (f)(28)(G) setting different concentrations of phosphorus as a function of the pH of the soil and for each different extractant method. TAEX (College Station) recommended that in subsection (f)(29) the commission add "Also

copper and zinc for swine and copper, zinc and boron for poultry.

The commission responds that it would like to study this issue further and will direct the executive director to meet with soil chemistry and testing experts and bring the commission a recommendation on which extractant or extractants should be used and under what conditions and limits.

ACCORD Agriculture, Inc. recommended that in subsection (f)(31) samples should be required from all wells subject to the control or management of the owner or operator, and located within the general area of the operation, rather than just those providing water for the facility.

The commission responds that the provisions of this subsection are consistent with the requirements found in §26.048 of the Texas Water Code.

Texas Farm Bureau and Texas Cattle Feeders Association recommended that subsection (f)(31) should be modified by deleting the words: " At a minimum," at the beginning of the last sentence. Requirements in these rules should be consistent with §26.048 of the Water Code.

The commission responds that the language in question is consistent with the intent of the requirements found in §26.048 of TWC. This language only reflects that this is the minimum that is required.

ACCORD Agriculture, Inc. recommended that in subsection (f)(32) it is essential that a plan for odor abatement be developed for each facility and the requirement also must include criteria against which to measure the adequacy of such a plan. TAEX (Amarillo) recommended that in subsection (f)(32) the requirement for an odor abatement plan is not sufficiently clear and, in fact, may be off-target. You should specify "odor reduction methods" and state that these should cover such things as facility design, manure collection, manure and wastewater storage and treatment, land application, dead animal recovery/disposal and other feature that contribute to odor reductions. Pilgrim's Pride Inc. suggests that in subsection (f)(32) odors cannot be abated. Name should be changed to "Odor Control Plan."

The commission agrees that the term "odor abatement plan" does not accurately describe the intended purpose of this requirement, and has been replaced with the term "odor control plan", to be consistent with similar requirements in other states. Because the requirement to submit an odor control plan has been relocated to §321.46, (f)(32) has been deleted and the requirements contained in that subsection relocated to §321.46. As adopted, §321.46 has been modified to reflect certain items that must be addressed in the plan, when required. At a minimum, the plan would identify all maintenance and operational practices associated with storage, treatment, and land application of manure and wastewater, manure collection, dead animal handling, pen maintenance, and dust control. The commission disagrees that each facility should be required to develop an odor control plan. The commission believes odors can be adequately controlled with additional buffer requirements as outlined in §321.46.

Texas Cattle Feeders Association recommended that in subsection (f)(32) the PPP requirements in the proposed rules already contain many provisions and requirements that address management practices related to reduction of odor and nuisance conditions. The provision for an odor abatement plan should be removed.

The commission agrees that many of the provisions in this amended chapter address the control of odors, however, the requirement to provide an odor control plan is believed to be reasonable and necessary for certain facilities. Section 321.46 has outlined options for CAFOs depending on available buffer and whether they were existing prior to adoption of these amended rules. In addition, any CAFO required to submit an odor control plan under this Chapter maintains the option of obtaining air quality authorization under Chapter 116 in lieu of satisfying the air quality standard permit in this subchapter. The odor control plan is intended to allow CAFOs the flexibility to design and operate a facility that incorporates the appropriate technology to maximize the control of emissions from their facility.

Rice Construction recommended that in subsection (f)(32) the commission not institute regulations which are unreasonable and cost prohibitive in the area of odor control unless the TNRCC is prepared to implement these regulations on a statewide basis to all industries. CAFOs should not be singled out. OSHA regulations establish levels of hydrogen sulfide which are harmful based on temporary and continuous exposure. No hydrogen sulfide regulations are needed for the state.

The commission develops and enforces regulations that deal with off-property emissions as opposed to OSHA which regulates emissions on-site. These rules do not contain any new hydrogen sulfide regulations. The commission does not agree that the adopted regulations are unreasonable or cost prohibitive. Our experience suggests that odors are one of the primary concerns relating to CAFOs. These regulations do not impose additional prohibitions for CAFOs, rather it offers an alternate method for obtaining authorization. As adopted, §321.46 only requires an odor control plan for those CAFOs applying for air authorization. In addition, certain expansion projects and certain CAFOs with additional buffer distances may not be required to submit an odor control plan.

Agri-Waste Technology, Inc. recommended that in subsection (f)(32) a separate odor abatement plan is not needed. Issues surrounding odor minimization are best handled through prudent site selection, conservative lagoon/waste treatment facility design and BMP implementation. The commission should require that lagoons/waste treatment facilities be managed as designed. Wrangler Feedyards, Jade Cattle Feeders, Koch Beef Company, Veribest Cattle Feeders, Inc., Bar G Feedyard, Frontier Feedyards, Inc., Coyote Lake Feedyard, Live Oak Feedlot, Inc., McLean Feedyard, Inc., Sugarland Feed Yards, Inc., Stratford Feedyard, Bartlett Cattle Company, L.P., Perryton Feeders, Inc., Bezner Beef, Jennings Land and Cattle, Inc., Canadian Feedyards, Inc., Comstock Cattle Corp., Tri-State Cattle Feeders, Morris Stock Farm, Hereford Feed Yards Co., Dimmitt Feed Yard, LLC. and Perry Feeders, Inc. suggested that to create a separate odor abatement plan would merely mimic the requirements and BMPs in the PPP and would create an unnecessary and unjustified burden on permittees.

The commission believes that an "odor control plan" is appropriate even though the rules already contain several BMPs and design criteria aimed at reducing odors. In certain circumstances, additional measures to address the control of odors may be necessary to ensure that nuisances will not be created. It is intended that the odor control plan be more detailed and describe

the day to day operation of the facility and not merely commit to compliance with the pre-determined operational requirements in the rules. As adopted, §321.46 only requires an odor control plan for those CAFOs applying for air authorization. In addition, certain expansion projects and certain CAFOs with additional buffer distances may not be required to submit an odor control plan.

Texas Poultry Federation proposes that in relation to subsection (f)(32) the Texas Poultry Federation has BMPs currently in effect that reduce odors.

The commission commends the Poultry Federation for developing BMPs to be utilized by its constituency and recognizes that such BMPs may be appropriate for inclusion in an odor control plan. However, the commission believes that it is necessary that certain CAFOs, as required by §321.46, develop and implement a site specific odor control plan for their facility. These rules were not intended to prohibit associations or organizations from developing a recommended list of BMPs as long as those standards do not conflict with the requirements in this subchapter.

Dairy Farmers of America suggests that in subsection (f)(32) an odor abatement plan utilizing BMPs would be a sensible way to address odor concerns rather than increasing the buffer requirements.

The commission agrees that an odor control plan utilizing BMPs can help minimize odors at CAFOs, and has modified the rule to include the plan in conjunction with reduced buffer zones and certain expansion projects.

USFWS recommended that all wastewater retention systems be constructed with an appropriate exclusion methodology to prevent access to migratory avian species and any other wildlife.

The commission disagrees with the comment and responds that the suggested modification is beyond the scope of these rules and the requirements for these facilities are the same as other no-discharge municipal and industrial wastewater facilities.

§321.40. Best Management Practices.

ACCORD Agriculture, Inc. recommended that the qualification of the requirement for use of BMPs, as appropriate, based upon "existing physical and economic condition, opportunities, and constraints" makes the requirement illusory. The BMPs set out in this section are basic design and construction or operational requirements, not BMPs. These types of basic requirements may not be waived.

The commission disagrees with the comment and responds that the listed practices are recognized as Best Management Practices (BMPs). To establish new practices and standards as BMPs would constitute a substantive change to the rules and is beyond the scope of the rules as proposed.

ACCORD Agriculture, Inc. recommended that in paragraph (2) the commission should make clear that an amendment application must be submitted and approved before expansion occurs.

The commission responds that BMPs are for all facilities, regardless of whether they are operating under permit, registration, or by-rule. The commission agrees that facilities operating under permits and registrations are required to obtain approval prior to expansion.

ACCORD Agriculture, Inc. suggested that under paragraph (3) the rules need to include an additional requirement that such ditches, dikes, berms, terraces, or other structures be maintained to meet design standards.

The commission agrees with the comment and would note that this requirement is already in the pollution prevention plan requirements (see §321.39(f)(25)).

ACCORD Agriculture, Inc. recommended that in paragraph (4) no CAFO that has been built in a "stream, river, lake, wetland, or playa lake" should be authorized by any mechanism other than an individual permit, if it is authorized at all. Special conditions would be essential to provide adequate protection in such situations.

The commission disagrees with the comments. The provisions in these rules related to the location of facilities in relation to a stream, river, lake, wetland or playa lake are consistent with the requirements in the current EPA Region VI CAFO General Permit. The rules provide a distinction between existing versus new construction in a manner similar to the federal requirements.

Greenbelt Municipal and Industrial Water Authority recommended that in paragraph (4) the terms "stream, river, lake, wetland and playa lake" should be defined.

The commission disagrees that these terms should be defined in these rules. These terms are commonly used terms which are either defined in this title or by statute.

ACCORD Agriculture, Inc. recommended that in paragraph (5) the commission require facilities to be designed and located so that waters in the state do not come into contact with waste materials at a CAFO facility.

The commission agrees with the comment and believes that the regulations already provide for such design requirements and that any discharges to waters in the state can only occur in accordance with provisions described in these rules or in accordance with a general permit issued by the commission.

ACCORD Agriculture, Inc. recommended that in paragraph (6) if retention ponds are going to be allowed within the 100-year floodplain, the permit must provide specific performance standards for ensuring that failure of those structures will be prevented. A general requirement that they be protected from damage is inadequate.

The commission responds that any structures designed in the floodplain must be certified by a licensed professional engineer that the design is appropriate and adequate to protect the facility from damage and failure.

Greenbelt Municipal and Industrial Water Authority requests that in paragraph (6) the location of a levee or retention pond within a 100-year floodplain be prohibited. The term "100-year floodplain" should be defined.

The commission responds that the recommendation would constitute a substantive change to the rules. The additional limitation is beyond the scope of the rules as proposed. The commission notes that any structures designed in the floodplain must be certified by a licensed professional engineer that the design is appropriate and adequate to protect the facility from damage and failure. The commission responds that the term "100-year floodplain" is a commonly used term which is defined

under Chapter 301 of this title and is so referenced in a change to this section.

ACCORD Agriculture, Inc. recommended that in paragraph (7) the indicated proximity to water wells is inadequate to provide adequate protection and should be 1,000 feet from public water supply wells and 300 feet from private water wells. If facility seeks to locate more closely, an individual review of the potential for pollution is needed. Brazos River Authority suggests that in paragraph (7) the standard that waste management facilities be located a minimum of 150 feet from all water wells, if practicable, is weak. Other improvements to the rules would make siting of recharge facilities mandatory.

The commission responds that the buffer distances in these rules are consistent with such distances in Chapter 238 of this title (relating to Water Well Drillers Rules) and Chapter 290 of this title (relating to Water Utilities).

ACCORD Agriculture, Inc. suggests that paragraph (8) is so general as to be virtually meaningless. It fails to provide useful guidance, what state guidelines are being referred to?

The commission disagrees that this section is meaningless. It does provide general guidance to the facility owner/operator in development or utilization of any management practices. Such practices cannot create a nuisance or health hazard, result in contamination of drinking water or be in non-compliance with agency regulations. The commission does agree that the use of the term "guidelines" is not needed and has been removed.

ACCORD Agriculture, Inc. recommended that in paragraph (9) the commission define the term "significant pollutants" needs to be defined.

The commission agrees in part with the comment and will clarify the meaning by removing the "significant."

ACCORD Agriculture, Inc. recommended that in paragraph (10) the prohibition of the creation of a nuisance should include, but not be limited to, air issues. The definition of the term limits it to air issues.

The commission disagrees with the comment and responds that this nuisance prohibition was only intended to address air quality issues, since there is already a prohibition against unauthorized discharges into the waters of the state.

ACCORD Agriculture, Inc. recommended that in paragraph (11) the reference to "proper disposal" of dead animals is too general to be meaningful. The permit must set out the specific procedures to be followed for disposing of dead animals.

The commission responds that this requirement needs modification to require proper disposal within 48 hours to be consistent with air quality permitting requirements and to reduce the potential for nuisance conditions. Proper disposal may include rendering, burial, or other methods which do not cause a nuisance or detrimental impact to water quality.

ACCORD Agriculture, Inc. recommended that in paragraph (12) the reference to "recognized practices of good agricultural management" is too general to be meaningful.

The commission disagrees that the comment is not meaningful and responds that the wide scope of the provision demands a general reference to agricultural management practice.

ACCORD Agriculture, Inc. recommended that in paragraph (13) this requirement belongs in the PPP and must be reviewed as part of the approval process.

The commission responds that these requirements are best management practices and will be considered in meeting the technical and administrative requirements in the approval process.

USFWS recommend that vegetated buffer zones at least 50 meters wide be added as a BMP.

The commission responds that the recommendation to establish a minimum width would constitute a substantive change to the rules. The additional requirement is beyond the scope of the rules as proposed. The commission notes that the width of a vegetated buffer zone shall be determined appropriately on a site-specific basis, but if the plan proves to be ineffective in controlling pollutants in discharges or preventing a nuisance condition, the executive director will require amendments to the plan to achieve those objectives.

§321.41. Other Requirements.

Thirty-eight individuals from the Panhandle area, JRG Farms, Inc., J.R. Stump Family Trusts A&B, and ACCORD Agriculture, Inc. recommended that in subsection (c) the authorized person in the PPP must be a person who was not used as an engineer in building the facility nor should it be a person from the TNRCC. This independent authorized person must be able to make on-site inspections and file reports that will have weight with both the TNRCC and the owner of the operation. This would include large financial penalties which would make such inspection cost minimal. ACCORD Agriculture, Inc. recommended that in subsection (e) the report documenting inspections should be verified to make to the owner or operator the significance of falsifying any entries.

The commission responds that the agency will conduct separate inspections which may include the review of any site inspection required under these rules. The commission believes it would create an undue economic burden on the facility to require independent third party inspections.

Brazos River Authority suggests that the guidance given in this section that the permittee is responsible for determining appropriate training frequency for personnel is vague and weak. The approved PPP should determine the employees to be trained.

The commission disagrees with the comment and responds that different personnel completing different tasks at each facility will require different levels of training and at different frequencies. The owner/operator of the facility should be able to determine training frequency on a case-by-case basis. The requirements of the PPP identify those employees, responsible for work activities which relate to compliance with this subchapter, and therefore who must be trained.

§321.42. Monitoring and Reporting Requirements.

ACCORD Agriculture, Inc. recommended that in subsection (a)(4) monitoring should be required for any discharges to waters in the state from the facility regardless of whether they are from the retention facilities.

The commission disagrees with the comment. Under these rules, storm water runoff from all contaminated areas of the CAFO are required to be directed into the retention facility. Any

storm water runoff from non-contaminated areas are outside the scope of these rules, and therefore, the agency does not require CAFO operators to sample these non-contaminated storm water discharges every time it rains. This would put an undue burden on the facility operators.

ACCORD Agriculture, Inc. recommended that in subsection (a)(7) to ensure enforceability, the commission should rewrite this provision should be rewritten to require sample collection for all discharges and then create an exception for adequately documented situations where sample collection was not possible.

The commission does not agree with this comment and has not made any change to the rule. The rule requires sampling for all discharges except under conditions where the discharger is unable to collect samples due to climatic conditions which prohibit the collection of samples. The commission believes this exception is necessary to account for dangerous conditions when sampling cannot take place.

ACCORD Agriculture, Inc. recommended that in subsection (b) the commission should require discharge information to be routinely submitted to the TNRCC. If the number of discharges are so large that TNRCC cannot deal with the information then it is clear that the design and operation standards are not adequate.

The commission disagrees with the comment. This section of the rules requires that the agency is to be notified by the owner of any discharges that occur when the design capacity is exceeded. In addition, this section clearly describes when and how sampling of the discharge is to occur, and that all records and data shall be maintained at the facility. It further provides that the executive director can, at any time, require that such data and information be provided to the agency. This type of process provides the agency with the needed tools and flexibility it needs in monitoring compliance, while at the same not being overly burdensome on the TNRCC or regulated entities.

Texas Farm Bureau and Texas Cattle Feeders Association suggest that in subsection (g) the commission increase the 60 days to 120 days to prevent non-compliance by an owner/operator due to action outside of his control (e.g. backlog of samples at the laboratory).

The commission disagrees with the comment. The commission believes that a 60 day timeframe will give ample time to take samples, have them analyzed and submit the necessary reports. If the only reason for non-compliance with this provision is due to actions outside the control of the owner/operator of the facility, the executive director will exercise the necessary enforcement discretion in approaching any enforcement.

§321.43. Notification.

No comments.

§321.44. Dairy Outreach Program Areas.

ACCORD Agriculture, Inc. recommended that the statement that the DOPAs "involve" all of the listed counties is ambiguous. The provision should simply state that all portions of those counties are included. The provision should also make clear the commission can designate additional areas at any time.

The commission agrees with the comment and has modified the language to clarify that the designation includes all the area within those counties in the DOPAs. It was the clear intent under this provision that the commission at any time may through the rulemaking process add or delete areas from the DOPA designation. Language will be added to this section to make that intent clear.

Texas Association of Dairymen request the TNRCC eliminate these subjective designations. These designations were not based upon science. Dairy Farmers of America request the deletion of the DOPAs.

The commission disagrees with the comments. These areas of the state are currently being evaluated through an intensive enforcement effort and legislative directive. If after all data and information has been assimilated, evaluated and there is a determination by the commission that such a designation is no longer the needed, the commission will consider such.

§321.45. Effect of Conflict or Invalidity of Rule.

No comments.

§321.46. Air Standard Permit Authorization for a CAFO General Permit.

Greenbelt Municipal and Industrial Water Authority recommended that the proposed air quality standard permit must be published in a newspaper.

The commission agrees that Section 382.017 of the Texas Clean Air Act requires notice of a hearing on air quality rules having statewide effect to be published in at least three newspapers, the combined circulation of which will, in the commission's opinion, give reasonable circulation throughout the state. The commission published notice of the air quality portions of this subchapter as required by Section 382.017, and held another hearing on June 25, 1998, for the purpose of soliciting public comment on the air quality portions of this subchapter, in accordance with this requirement. Comments were received in response to this notice and responses have been incorporated in this adoption package.

ACCORD Agriculture, Inc. recommended that the prerequisites for an air quality standard air permit must be set out in the rules. The rules must ensure BACT and avoidance of conditions of air pollution. That requirement may not be met by reference to a general permit that will not be issued through the rulemaking process and which has not even been adopted. Section 382.051 does not authorize that.

The commission agrees that the prerequisite for obtaining an air quality standard permit in combination with either a registration or individual permit for water quality is not clear. Section 321.46 has been modified to include a statement that a CAFO is also entitled to an air quality standard permit if all of the requirements of this subchapter for registration or individual permit are met. In addition, the heading for this section has been modified by deleting the phrase "for a CAFO general permit" to clarify this point. The commission disagrees that §382.051 does not authorize the creation of an air quality standard permit such as the one in this subchapter. Section 382.051 (b)(3) authorizes the commission to create standard permits by rule for numerous similar facilities subject to §382.0518. Additionally, the commission believes that the air quality requirements of this subchapter essentially reflect what would be required of similar facilities seeking individual permits under §382.0518, and will protect the public's health and safety and use of physical property.

Eight individuals from the Panhandle commented that the rules should require best available control technology, or should require the "latest technology" to reduce odors, regardless of cost.

The commission believes that the requirements in the rule substantially reflect the application of best available control technology. The commission disagrees, however, that cost should not be a factor in determining the appropriate level of control technology. It should be pointed out that because this is a permit by rule, there will not be a case-by-case determination for BACT for each facility seeking authorization under this rule. These are minimum requirements which must be satisfied in order to obtain authorization under an air quality standard permit; if circumstances warrant, additional controls may be necessary to ensure that conditions of air pollution are avoided, and the commission encourages operators of CAFOs to implement any measures designed to control odors.

General Comments

Thirty-seven individuals from the Panhandle area, JRG Farms, Inc., J.R. Stump Family Trusts A&B, and ACCORD Agriculture, Inc. recommended that public hearings under an impartial judge be allowed, as they were in Subchapter B. Rules should be changed to "The commission must hold public hearings before an impartial judge in the county of the site listed in the permit application if objections to the permit are received." Two individuals from the Panhandle area and Brazos River Authority recommended that adjacent or affected landowners should be able to request a contested case hearing under these rules.

The commission agrees that contested case hearings should be available to affected persons who object to the issuance of an individual permit via a reasonable hearing request. However, for registrations, public participation includes mailed notice of technical completeness, opportunity for public comment, consideration by the executive director of such timely received comments and opportunity to file motions for reconsideration for those who have timely filed comments. Thus the rules provide for significant public participation while reserving for those cases where an individual permit is appropriate the opportunity for a contested case hearing provided for under §26.028 of the Water Code.

Thirty-seven individuals from the Panhandle area, Mayor of the City of Perryton, JRG Farms, Inc., J.R. Stump Family Trusts A&B, and ACCORD Agriculture, Inc. recommended the rules should require inspections on an annual or semi-annual basis of these facilities to see that the structures are properly maintained. The requirement for an annual inspection should be a minimum standard. An individual from the Panhandle area suggested that each proposed permit site be inspected before permitting is allowed by the TNRCC and adjoining landowners. What is on paper is not always how the site really is!

The commission disagrees with the comment. It is impractical for the agency to mandate annual inspections or inspections prior to authorization for CAFOs. The agency is responsible for thousands of domestic, municipal, industrial and other types of facilities across the state related to the different programs it manages. The agency will perform inspections in all its various programs as the commission determines its priorities on an annual basis and in relation to the resources that it has available.

An individual from the Panhandle area suggested that any company who comes to operate in the Panhandle be required to do their part to keep our groundwater safe and clean.

The commission agrees with this comment and believes that the rules contain many provisions which are intended to preserve groundwater quality. For example, §321.39(f)(1)(B) requires the pollution prevention plan to identify the specific location of any recharge features identified within any tracts of land that will be utilized and to locate and describe the function of all measures installed to prevent impacts to identified recharge features. Pursuant to the definition in §321.32(32), recharge features include both natural and artificial features. Section 321.39(f)(16) requires that the pollution prevention plan include documentation that the facility does not contain any significant hydrologic connection between the contained wastewater and waters in the state, which includes groundwater. If this cannot be documented the facility's ponds, lagoons, and basins of the retention facilities must have liners which will prevent the potential contamination of surface and ground waters. The specific liner requirements are set out in §321.39(f)(17). In addition, pursuant to §321.39(f)(18), the executive director may require the installation of a leak detection system or monitoring wells if significant potential exists for the contamination of drinking water or waters in the state, which includes groundwater.

An individual from the Panhandle area suggested that property owners whose land, air and water should have rights to protect their property. Even though they pay damages to the state, property owners should receive their damages too.

The commission responds that any property owners whose land, air or water is damaged by other property owners have the right to pursue legal action through the civil courts. Nothing in the commission's rules protects persons who damage another person's property interests.

An individual from the Panhandle area suggested that there should be a regulation on the number of hogs in any one county. There should be a maximum allowed.

The commission does not have the authority to enact zoning regulations which would be required to set a maximum limit. In addition, there is no evidence that a maximum limit is necessary to protect the environment.

Greenbelt Municipal and Industrial Water Authority suggests that the TNRCC has failed to cite statutory provisions adequate to authorize all portions of the proposed rules.

The commission agrees that in the rules as proposed, some of the relevant citations to the Texas Clean Air Act were omitted. In addition to citing §382.017, which contains the general rulemaking authority of the commission, the statutory authority cited should have included §382.011, which authorizes the commission to establish the level of quality to be maintained in the state's air; §382.051, which authorizes the commission to issue a standard permit developed by rule for numerous similar facilities; and §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air.

Greenbelt Municipal and Industrial Water Authority suggests that the proposed rules are a major environmental rule, which has been proposed without the required analysis.

The commission has reviewed the rulemaking in light of the regulatory analysis requirement of Texas Government Code

§2001.0225 and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the act. Although the intent of the rule is to protect the environment and to reduce risks to human health, this rule affects only an industry and the individual facilities that are already regulated in substantially similar manner to that described in the rule. Therefore, this rule will have no material adverse effect on the economy, productivity, competition, jobs, the environment or the public health and safety of the state or a sector of the state. Further, this rule does not meet any of the four applicability requirements listed in §2001.0225(a). It does not exceed a standard set by federal law or an express requirement of state law, since standards for CAFO authorizations are required, but not set, by federal and state law; nor does it exceed a requirement of a delegation agreement or contract between the state and the federal government. There is currently no such agreement, and these rules do not exceed any requirement in the program. Finally, these rules are adopted under the specific authority of Water Code Section 26.040 and Health and Safety Code Sections 382.011, 382.012 and 382.051, as well as the general authority of Water Code Section 5.103 and Health and Safety Code Section 382.017.

Greenbelt Municipal and Industrial Water Authority suggests that the proposed rules are inconsistent with applicable statutory provisions (definition of air contaminant is inconsistent with statutory definition).

The commission agrees that the definition of "air contaminant" in the rules differs from the statutory definition in that the sentence "Water vapor is not an air contaminant." has been added. This addition reflects the commission's interpretation of its legislative mandate. The commission routinely offers further definition of statutory terms to provide the regulated community and general public of a better understanding of what is and is not regulated within the context of a given statute.

Greenbelt Municipal and Industrial Water Authority suggests that there is a variance of language between preamble and rules (1/4 buffer requirement under 321.34).

The commenter is correct, there was a variance in language between the proposed preamble and rules related to the proposed air buffer requirement. The commission apologizes for any inconvenience or misunderstanding this may have caused. The referenced language has been changed in this adoption preamble and rules.

Greenbelt Municipal and Industrial Water Authority suggests that the proposal delegates (improperly) discretionary decision making authority to the executive director.

The commission disagrees with this comment. The proposed rules do not improperly delegate discretionary decision making authority to the executive director. The executive director's determination of whether to approve or deny an application for a new or amended registration is subject to review by the commission through a motion for reconsideration. Accordingly, although the determination to approve or deny an application is initially delegated to the executive director, the rules make such determination subject to review by the commission.

County of Childress recommends that the TNRCC enact whatever rules necessary to protect municipal water supplies from even a remote possibility of contamination by any type of confined livestock or poultry operation.

The commission believes that these rules do protect the municipal as well as domestic water supplies in the state. These rules provide a clear and definitive set of regulations under which a CAFO and AFO can operate in the state. If a CAFO or AFO does not comply with these requirements, the commission will use whatever enforcement powers it has at its discretion to assure that the water supplies of this state are protected.

Perryton Economic Development Corp. strongly encourages the TNRCC to adopt new rules that only considers public input that call attention to the failure of an applicant to meet the requirements of the permitting process.

The commission believes that these adopted rules do provide a streamlined process for granting an authorization to operate a CAFO which requires the executive director to evaluate the application itself and all comments received against all relevant requirements of this subchapter.

Murphy Family Farms found these rules to be consistent with other states in the region. It urges the TNRCC to work with Texas Pork Producers to understand how these rules will affect pork producers and other CAFO groups.

The commission agrees with the comment and is committed to working with both the public and livestock and poultry industry in implementing these rules.

Rice Construction suggests that Texas has some of the most stringent environmental regulations of any state in the U.S.

The commission believes that these rules are consistent with other states in the region and are protective of the state's natural resources.

Rice Construction recommended that reasonable penalties should be established to prevent abuse from the industry and from those who repeatedly file unsubstantiated complaints.

The commission responds that reasonable penalties are in place to prevent abuse from the industry and the commission does not believe it is necessary to establish penalties for individuals who file complaints. Such penalties would be extremely difficult to enforce and would discourage those individuals who wish to file bona fide complaints from doing so.

Rice Construction suggested that regulations previously implemented were more than sufficient for the CAFO industry and that new regulations be based on sound science. A permitting process that the CAFO industry can understand and which follows a reasonable schedule must be established.

The commission agrees that the rules should be easily understood and based on sound science and believes that these rules meet those requirements.

Twenty-seven poultry producers suggested that any measures developed must be supported by scientific findings. Experts such as Texas A&M Extension Service and NRCS have already developed conservation programs. These programs should be allowed to continue until new measures can be developed and implemented by all producers.

The commission believes that the measures and requirements of these rules are supported by scientific evidence and findings. The agency routinely works with the Texas A&M Extension Service and the NRCS on this and other agency programs and will continue into the future to solicit their input. For example, NRCS animal waste management plans are considered acceptable for inclusion into a PPP as long as such plan addresses the nec-

essary components specified in this subchapter. These rules reflect the commission's mandate to assure that the quality of waters in the state and the air quality are protected. In addition, the requirements set out in these rules are consistent with those established by EPA Region VI in their current CAFO General Permit.

ACCORD Agriculture, Inc. suggested that the TNRCC does not have the authority for the creation of new permits-by-rule. The "savings clause" included in the recent amendment to Section 26.040 of the Water Code does not authorize the creation of these proposed new permits-by-rule whether they are created overtly or through the artifice of a rule amendment such as that proposed here. TNRCC lacks the authority for the proposed standard air permits included in the proposed rules, and have not demonstrated that CAFOs meet the statutory prerequisites of Sections 382.051 (b)(3) and 382.0518 of the Health and Safety Code. There is no adequate mechanism for ensuring that BACT will be employed by each facility. Rules must ensure that each individual facility, as that term is defined in Section 382.003 of Health and Safety Act, making up an AFO will utilize BACT. In ensuring compliance with BACT requirements , TNRCC must demonstrate compliance with its own BACT guidance.

The commission disagrees with the comment. As the commenter points out, the savings clause continued the effectiveness of all the rules existing as of the date of the amendment, including both Subchapters K and B. The legislature unequivocally authorized the commission to continue to regulate by rule all the facilities that were so regulated prior to the amendments to §26.040. The savings clause just as clearly contemplates that the commission will continue to be able to amend its existing rules as circumstances require. Nothing in the APA or in the savings clause of §26.040 limits the agency's amendment authority as posited by the commenter. It is true that Subchapter K was judicially revoked after the effective date of the §26.040 amendments; however, the basis for that judgment was not that CAFOs could not have lawfully been the subject of permits by rule. Consequently, neither the Legislature in the savings clause nor the court in its judgment on Subchapter K refuted the commission's authority to continue to regulate CAFOs by rule and to amend the existing rules.

Even if the commenter's narrow interpretation of the savings clause were correct, it would not preclude adoption of these amendments. These amendments do not "bring whole new groupings of facilities into the permit-by-rule scheme." Subchapter B, as it read before today's amendments, provided that "all feedlot operations may be regulated by rule...provided such operations comply with §§321.35-321.39 of this title. The provisions of this subsection are applicable to all feedlot operations, either housed or open lots, including beef cattle; dairy cattle or milk production areas; swine; sheep; goats; horses; chickens, including broilers, layers and/or breeders; turkeys, including breeders and/or feeders; and auction markets" (30 TAC §321.33(a)).

Former §321.33(d) set maximum numbers of animals above which an operator was required to obtain an individual permit. The amendments adopted today alter the standard under which a facility is automatically required to obtain an individual permit from one determined by number of animals to one determined by the location of the facility or its status as a source of air emissions. However, these amendments continue the scheme of the original Subchapter B by: (1) specifying which CAFO facilities can be regulated by rule and (2) setting out uniform terms for those facilities. As amended, Subchapter B continues to regulate by rule what the original Subchapter B called "feedlots;" it amends only the terms of the permit by rule to require higher standards both for operating practices and for registration, record keeping and reporting to the TNRCC.

The commission disagrees that case-by-case BACT determinations must be conducted in standard permits-by-rule. Texas Clean Air Act (TCAA) , Texas Health and Safety Code §382.051(b)(3) states that "the commission may issue: . . .; (3) a standard permit developed by rule for numerous similar facilities subject to §382.0518." The only reasonable interpretation of the language "subject to §382.0518" is that standard permits developed by rule are allowed for facilities that *would otherwise be* subject to §382.0518. The language of §382.0518 sets out requirements that logically apply to individual facilities seeking permits, including application of Best Available Control Technology (BACT), impacts review, and opportunity for hearing under §382.056(d). This type of case-by-case process is antithetical to the entire concept of permits by rule, since there would be no savings of effort, time or procedure by applicants or TNRCC staff. The Legislature could not have intended such an absurd result, and such a statutory reading flies in the face of the Code Construction Act's presumption that "a just and reasonable result is intended." Government Code §311.021(3). The TNRCC's long-standing "administrative construction of the statute" is also entitled to deference. *Id.* §311.023; *State v. Public Util. Comm'n,* 883 S.W.2d 190, 196 (Tex. 1994).

However, the commission is mindful of its obligation to protect human health and the environment. In light of this, the TNRCC has reviewed the control measures set forth by the proposed rule, and has confirmed that they essentially reflect the level of control technology that would typically be required of a similar facility seeking an individual air quality permit under §382.0518. The air quality requirements of this subchapter substantially reflect the application of best available control technology for CAFOs, including the requirement to develop and operate under a pollution prevention plan, design criteria for lagoons, operational requirements for single and multi-stage lagoon systems, requirements for wastewater irrigation practices and waste application practices, maintenance scheduling and reporting requirements for solids removal from lagoons, requirements for manure stockpiling, minimum buffer distance for nighttime application of liquid and solid waste, flushing and scraping schedules for manure, maintenance and design of earthen pens, operational requirements for settling basins, dead animal disposal limitations, and inspection requirements. The commission also affirms that the proposed rule will be protective of human health and the environment, based upon the Commission's experience with Texas CAFOs.

Dairy Farmers of America requests that provision be made in the process to assist a producer who may wish to build a new facility on an existing operating dairy location. A new facility can be located on a more environmentally and neighborly friendly site than the old facility. It would make sense to allow this to occur without requiring a new permit for the relocation.

Although the commission sympathizes with the situation presented, the commission believes that it necessary under the provision of existing state law and the requirements of the federal NPDES program, for which the TNRCC has made application for delegation, that such a suggested relocation would

require a new permit/authorization to be obtained. If such a situation would qualify for coverage under the TNRCC general permit for CAFOs, a more streamlined process would be available. Otherwise, it is necessary that such a relocation would require the need to develop a new PPP for the new location, perform the necessary recharge feature evaluations and certification for the new site and meet the other siting, administrative and technical provisions of this subchapter.

ProAg offered support in concept for the amendments to Subchapter B. It is imperative that these rules be based upon technical merit, solid science, sound engineering, reason and common sense to provide predictable time frames for companies making huge investments in agriculture.

The commission agrees with the comment.

An individual from the Panhandle area recommended that regulations are needed which will protect the present landowners and make it possible for us to continue to produce agricultural products.

The commission agrees with the comment and believes the proposed rules satisfy the commenters concern.

An individual from the Panhandle area suggested that the public should be notified of circumstances such as the expansion of CAFO near them, which could have a negative economic impact on their home and they should be allowed to voice their opinion. It could be treated similar to a variance in urban areas where a person is notified and could refuse to allow a trailer house to be placed next to their brick home. ACCORD Agriculture, Inc. recommended that the TNRCC must extend the comment period at least 120 days and notify each and every adjoining property owner to these 56 permitted facilities and the 24 pending permits, to allow the affected persons the time to seek counsel and participate in the adoption of the new rules. Their rights were adversely affected by Subchapter K and so their rights in part must be addressed by their notification via certified mail to allow for their participation in the rules now being considered by the TNRCC.

The commission believes that the rules provide for sufficient notice and opportunities for public participation to potentially affected persons of an application for a new or expanded CAFO. For example, pursuant to §321.36(e)(2)(A), notice of such applications are provided to all potentially affected landowners named on the final site plan submitted with the application. Pursuant to §321.35(c)(5) those would be all adjacent landowners within 500 feet of the property line of all tracts containing facilities and all on-site or off-site (unless not owned, operated, or controlled by the CAFO operator) waste disposal areas. Notice is also provided to local city and county authorities pursuant to §321.36(e)(2)(B) and (C), and to any persons who request to be put on the mailing list pursuant to §321.36(e)(2)(G). Finally, §321.36(c) requires that notice of the application be published in a newspaper of general circulation within the county or area where the proposed facility is to be located. Pursuant to §321.37(a) a person may provide the commission with public comment on any application for registration for which notice has been issued within 30 days of mailing of the notice. Timely comments will be utilized by the executive director in determining what action to take on an application for registration. With respect to applications for an individual permit an affected person may participate through the contested case hearing process if they submit a reasonable hearing request pursuant to Chapter 55 of this title (Relating to Request for Contested Case Hearings; Public Comment).

The commission disagrees that the variance procedure described by the commenter is necessary. The rules already contain significant restrictions on the location of AFO's which may in the future seek to be registered or permitted as CAFOs. For example, pursuant to §321.46(1), an AFO constructed after the date of adoption of these rules, when seeking registration or an individual permit as a CAFO under these rules must show that they will not locate any permanent odor sources within 0.50 miles of an occupied residence or business structure, school, church, or public park without written consent and approval from the landowner unless they develop and implement an odor abatement plan in which case they may not locate any permanent odor sources within 0.25 miles of an occupied residence or business structure, school, church, or public park without written consent and approval from the landowner. In addition, pursuant to §321.46(2) any AFO constructed prior to the adoption of these rules, when seeking registration or an individual permit as a CAFO under these rules must either show that they will not locate any permanent odor sources within 0.25 miles of any occupied residence or business structure, school, church, or public park without written consent and approval from the landowner or develop and implement a pollution abatement plan.

Finally, the commission disagrees with the commenters suggestion that notice and opportunity to comment on these rules should be expanded. Notice of the proposed rules was published in the Texas Register pursuant to the legal requirements set out in the in the Administrative Procedure Act. Persons had 30 days from the date of publication of the notice to submit written comment on the proposed rules. In addition, a public meeting was held in which the public was given an opportunity to submit oral comment on the proposed rules. Notice and opportunity to comment on these proposed rules was ample as evidenced by the numerous comments that were received from interested persons.

North Plains Ground Water Conservation District No. Two suggested that the agency use groundwater as one word throughout the document.

The commission agrees with the comment and has made the suggested revision to the rules.

Rep. Warren Chisum asked that the commission listen to the concerns of constituents from his district. Let him know if the agency does not have enough authority to protect municipal water supplies.

The commission recognizes Representative Chisum and his concerns and will consider and respond to all concerned citizens that comment on the rules.

Rep. David Swinford urged the agency to come up with a set of rules that will allow the environment and agriculture to coexist and prosper.

The commission recognizes Representative Swinford and believes that these rules satisfy his concerns.

An individual from the Panhandle area urged the changing of the rules to require every CAFO to upgrade their facilities before a renewed permit is allowed.

The commission believes that all CAFO facilities should be operated according to the best available technology and manage-

ment practices. If at any time, the facility's pollution prevention plan proves to be ineffective in controlling pollution, then the plan must be amended and the facility upgraded immediately.

ACCORD Agriculture, Inc. believes facilities seeking permits should have designated places for the waste (manure) product to be applied (people signed up and willing to take responsibility).

The commission agrees that operators which plan to do their own land application must have land available. Facilities which do not have land available are required to supply a contract hauler's agreement where the contractor agrees to haul the waste off-site. Some contractor's haul the waste to a facility for bagging and use within metropolitan areas. Currently, the need for manure as a fertilizer far exceeds the amount of manure generated.

ACCORD Agriculture, Inc. recommended that the TNRCC should adopt rules that only allow the development of the swine industry, as long as farmers are willing to contract their services to the industry.

The commission disagrees that the specie specific rules are needed to protect the environment. Contract growing of swine may be an option, but the commission does not have the authority to dictate the development of the CAFO industry.

ACCORD Agriculture, Inc. recommended that the TNRCC should not allow pollution control exemptions on equipment at the swine facilities.

The commission responds that this exemption was created by the 73rd legislature with the passage of HB 1290. The commission therefore must follows the directive of the legislature. If the commenters wish to change this law, they should contact their legislative representatives.

STATUTORY AUTHORITY

These amendments are adopted under the Texas Water Code, §26.040, under which the commission has authority to amend rules adopted under §26.040 prior to its amendment in 1997, and §5.102, which provides the commission with the authority to carry out duties and general powers of the commission under its jurisdictional authority as provided by Texas Water Code §5.103. These amendments are also adopted under §26.028(c), 26.040 and 26.041 of the Texas Water Code and §§382.011, 382.012, 382.017 and 382.051 of the Texas Health and Safety Code.

§ 321.31. Waste and Wastewater Discharge and Air Emission Limitations.

(a) It is the policy of the Texas Natural Resource Conservation Commission that there shall be no discharge or disposal of waste and/or wastewater from animal feeding operations into or adjacent to waters in the state, except in accordance with subsection (b) of this section, any individual permits issued under this subchapter prior to the effective date of these rules, any CAFO general permits, or §305.1 of this title (relating to Scope and Applicability). Waste and/or wastewater generated by a concentrated animal feeding operation under this subchapter shall be retained and utilized or disposed of in an appropriate and beneficial manner as provided by commission rules, orders, registrations, authorizations, CAFO general permits or individual permits.

(b) Wastewater may be discharged to waters in the state whenever rainfall events, either chronic or catastrophic, cause an overflow of process wastewater from a facility designed, constructed and operated to contain process generated wastewaters plus the runoff (storm water) from a 25-year, 24-hour rainfall event for the location of the point source (facility authorized under this subchapter). There shall be no effluent limitations on discharges from retention structures constructed and maintained to contain the 25-year, 24-hour storm event if the discharge is the result of a rainfall event which exceeds the design capacity and the retention structure has been properly maintained. Retention structures shall be designed in accordance with §321.39 of this title (relating to Pollution Prevention Plans).

(c) Facilities shall be operated in such a manner as to prevent the creation of a nuisance or a condition of air pollution as mandated by Texas Health and Safety Code, Chapters 341 and 382.

§321.32. Definitions.

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

(1) Agronomic rates - The land application of animal wastes and/or wastewater at rates of application which provide the crop or forage growth with needed nutrients for optimum health and growth.

(2) Air contaminant - Particulate matter, radioactive material, dust, fumes, gas, mist, smoke, vapor, or odor or any combination thereof produced by processes other than natural. Water vapor is not an air contaminant.

(3) Animal feeding operation - A lot or facility (other than an aquatic animal production facility) where animals have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and the animal confinement areas do not sustain crops, vegetation, forage growth, or post harvest residues in the normal growing season. Two or more animal feeding operations under common ownership are a single animal feeding operation if they adjoin each other, or if they use a common area or system for the disposal of wastes.

(4) Animal unit - A unit of measurement for any animal feeding operation calculated by adding the following numbers: the number of slaughter and feeder cattle and dairy heifers multiplied by 1.0, plus the number of mature dairy cattle multiplied by 1.4, plus the number of swine weighing over 55 pounds multiplied by 0.4, plus the number of sheep multiplied by 0.1, plus the number of horses/mules multiplied by 2.0.

(5) Aquifer - A saturated permeable geologic unit that can transmit, store and yield to a well, the quality and quantities of groundwater sufficient to provide for a beneficial use. An aquifer can be composed of unconsolidated sands and gravels, permeable sedimentary rocks such as sandstones and limestones, and/or heavily fractured volcanic and crystalline rocks. Groundwater within an aquifer can be confined, unconfined or perched.

(6) Best Management Practices ("BMPs") - The schedules of activities, prohibitions of practices, maintenance procedures , and other management and conservation practices to prevent or reduce the pollution of waters in the state. Best Management Practices also include treatment requirements, operating procedures, and practices to control site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.

(7) CAFO general permit - A general permit issued by the commission in accordance with Texas Water Code, §26.040 for the express purpose to regulate discharges from concentrated animal feeding operations on a statewide or geographic basis.

(8) Chronic or catastrophic rainfall event - For the purposes of these rules, these terms shall mean a series of rainfall

events which would not provide opportunity for dewatering and which would be equivalent to or greater than the 25-year, 24-hour storm event or any single event which would be equivalent to or greater than the 25-year, 24-hour storm event. Catastrophic conditions could include tornados, hurricanes, or other catastrophic conditions which could cause overflow due to the high winds or mechanical damage.

(9) Concentrated animal feeding operation ("CAFO") - Any animal feeding operation which the executive director designates as a significant contributor of pollution or any animal feeding operation defined as follows:

(A) Any new and existing operations which stable and confine and feed or maintain for a total of 45 days or more in any 12-month period more than the numbers of animals specified in any of the following categories:

(i) 1,000 slaughter or feeder cattle;

(ii) 700 mature dairy cattle (whether milkers or dry cows);

(iii) 2500 swine weighing over 55 pounds;

(iv) 500 horses;

(v) 10,000 sheep;

(vi) 55,000 turkeys;

(vii) 100,000 laying hens or broilers when the facility has unlimited continuous flow watering systems;

(viii) 30,000 laying hens or broilers when facility has a liquid waste handling system;

(ix) 5000 ducks; or

(x) 1,000 animal units from a combination of slaughter steers and heifers, mature dairy cattle, swine over 55 pounds and sheep.

(B) Any new and existing operations covered under this subchapter which discharge pollutants into waters in the state either through a man-made ditch, flushing system, or other similar man-made device, or directly into the waters in the state, and which stable or confine and feed or maintain for a total of 45 days or more in any 12-month period more than the numbers or types of animals in the following categories:

(i) 300 slaughter or feeder cattle;

(ii) 200 mature dairy cattle (whether milkers or dry cows);

(iii) 750 swine weighing over 55 pounds;

(iv) 150 horses;

(v) 3000 sheep;

(vi) 16,000 turkeys;

(vii) 30,000 laying hens or broilers when the facility has unlimited continuous flow watering systems;

(viii) 9000 laying hens or broilers when facility has a liquid waste handling system;

(ix) 1500 ducks; or

(x) 300 animal units from a combination of slaughter steers and heifers, mature dairy cattle, swine over 55 pounds and sheep.

(C) Poultry facilities that have no discharge to waters in the state normally are not considered a concentrated animal feeding operation. However, poultry facilities that use a liquid waste handling system or stockpile litter near watercourses or dispose of litter on land such that stormwater runoff or flooding will be transported into surface water or groundwater may be considered a concentrated animal feeding operation. For the purposes of air quality, the term CAFO, as used in this subchapter, includes any associated feed handling and/or feed milling operations located on the same site as the CAFO.

(10) Control facility - Any system used for the retention of wastes on the premises until their ultimate disposal. This includes the collection and retention of manure, liquid waste, process wastewater and runoff from the feedlot area.

(11) Dairy Outreach Program Areas - The areas include all of the following counties: Erath, Bosque, Hamilton, Comanche, Johnson, Hopkins, Wood and Rains.

(12) Edwards Aquifer - That portion of an arcuate belt of porous, waterbearing predominantly carbonate rocks known as the Edwards (Balcones Fault Zone) Aquifer trending from west to east to northeast in Kinney, Uvalde, Medina, Bexar, Comal, Hays, Travis and Williamson Counties; and composed of the Salmon Peak Limestone, McKnight Formation, West Nueces Formation, Devils River Limestone, Person Formation, Kainer Formation, Edwards Group and Georgetown Formation. The permeable aquifer units generally overlie the less-permeable Glen Rose Formation to the south, overlie the less-permeable Comanche Peak and Walnut formations north of the Colorado River, and underlie the less-permeable Del Rio Clay regionally.

(13) Edwards Aquifer recharge zone - Generally, that area where the stratigraphic units constituting the Edwards Aquifer crop out, including the outcrops of other geologic formations in proximity to the Edwards Aquifer, where caves, sinkholes, faults, fractures, or other permeable features would create a potential for recharge of surface waters into the Edwards Aquifer. The recharge zone is identified as that area delineated as such on official maps located in the appropriate regional office and groundwater conservation districts.

(14) Flushwater waste handling system - A system in which freshwater or wastewater is recycled or used in transporting waste.

(15) Groundwater - Subsurface water that occurs below the water table in soils and geologic formations that are saturated, and is other than underflow of a stream or an underground stream.

(16) Hydrologic connection - The interflow and exchange between control facilities or surface impoundments and waters in the state through an underground corridor or connection.

(17) Lagoon - An earthen structure for the biological treatment for liquid organic wastes. Lagoons can be aerobic, anaerobic, or facultative depending on their design and can be used in series to produce a higher quality effluent.

(18) Land application - The removal of wastewater and waste solids from a control facility and distribution to, or incorporation into the soil mantle primarily for beneficial reuse purposes.

(19) Liner - Any barrier in the form of a layer, membrane or blanket, naturally existing, constructed or installed to prevent a significant hydrologic connection between liquids contained in retention structures and waters in the state.

(20) Natural Resources Conservation Service ("NRCS") - An agency of the United States Department of Agriculture which includes the agency formerly known as the Soil Conservation Service ("SCS").

(21) New concentrated animal feeding operation - A concentrated animal feeding operation which was not authorized under a rule, order or permit of the commission in effect at the time of the adoption of these amended rules (1998) .

(22) No discharge - The absence of flow of waste, process generated wastewater, contaminated rainfall runoff or other wastewater from the premises of the animal feeding operation, except for overflows which result from chronic or catastrophic rainfall events.

(23) Nuisance - Any discharge of air contaminant(s), including but not limited to odors, of sufficient concentration and duration that are or may tend to be injurious to or which adversely affects human health or welfare, animal life, vegetation, or property, or which interferes with the normal use and enjoyment of animal life, vegetation, or property.

(24) Open lot - Pens or similar confinement areas with dirt, concrete, or other paved or hard surfaces wherein animals or poultry are substantially or entirely exposed to the outside environment except for small portions of the total confinement area affording protection by windbreaks or small shed-type shade areas. For the purposes of this subchapter, the term open lot is synonymous with the terms dirt lot, or dry lot, for livestock or poultry, as these terms are commonly used in the agricultural industry.

(25) Operator - The owner or one who is responsible for the management of a concentrated animal feeding operation or an animal feeding operation subject to the provisions of this subchapter.

(26) Permanent odor sources - those odor sources which may emit odors 24 hours per day. For the purposes of this subchapter, permanent odor sources include but are not limited to pens, confinement buildings, lagoons, retention facilities, manure stockpile areas and solid separators. For the purposes of this subchapter, permanent odor sources shall not include any feed handling facilities, land application equipment or land application areas.

(27) Permittee - Any person issued or covered by an individual permit or order, permit-by-rule or granted authorization under the requirements of this subchapter.

(28) Pesticide - A substance or mixture of substances intended to prevent, destroy, repel, or mitigate any pest, or any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant.

(29) Process wastewater - Any process generated wastewater directly or indirectly used in the operation of a CAFO (such as spillage or overflow from animal or poultry watering systems which comes in contact with waste); washing, cleaning or flushing pens, barns, manure pits, direct contact swimming, washing, or spray cooling of animals; and dust control), and precipitation which comes into contact with any manure or litter, bedding, or any other raw material or intermediate or final material or product used in or resulting from the production of animals or poultry or direct products (e.g. milk, meat or eggs).

(30) Process generated wastewater- Any water directly or indirectly used in the operation of a CAFO (such as spillage or overflow from animal or poultry watering systems which comes in contact with waste; washing, cleaning or flushing pens, barns, manure pits, direct contact swimming, washing, or spray cooling of animals; and dust control) which is produced as wastewater.

(31) Qualified groundwater scientist - A scientist or engineer who has received a baccalaureate or post-graduate degree in natural sciences or engineering and has sufficient training and experience in groundwater hydrology and related fields as may be demonstrated by state registration, professional certification, or completion of accredited university programs that enable that individual to make sound professional judgements regarding groundwater monitoring, contamination fate and transport, and corrective action.

(32) Recharge feature - Those natural or artificial features either on or beneath the ground surface at the site under evaluation which, due to their existence, provide or create a significant pathway between the ground surface and the underlying groundwater within an aquifer. Examples include, but are not limited to: a permeable and porous soil material that directly overlies a weakly cemented or fractured limestone, sandstone, or similar type aquifer; fractured or karstified limestone or similar type formation that crops out on the surface, especially near a water course; or wells.

(33) Retention facility or retention structure - All collection ditches, conduits and swales for the collection of runoff and wastewater, and all basins, ponds, pits, tanks and lagoons used to store wastes, wastewaters and manures.

(34) 25-Year, 24-Hour rainfall event/25-Year event - The maximum rainfall event with a probable recurrence interval of once in 25-years, with a duration of 24 hours, as defined by the National Weather Service in Technical Paper Number 40, "Rainfall Frequency Atlas of the United States", May 1961, and subsequent amendments, or equivalent regional or state rainfall information developed therefrom.

(35) Waste - Manure (feces and urine), litter, bedding, or feedwaste from animal feeding operations.

(36) Wastewater - Water containing waste or contaminated by waste contact, including process-generated and contaminated rainfall runoff.

(37) Waters in the state - Groundwater, percolating or otherwise, lakes, bays, ponds, impounding reservoirs, springs, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Gulf of Mexico inside the territorial limits of the state, and all other bodies of surface water, natural or artificial, inland or coastal, fresh or salt, navigable or nonnavigable, and including the beds and banks of all watercourses and bodies of surface water, that are wholly or partially inside or bordering the state or inside the jurisdiction of the state.

(38) Well - Any artificial excavation into and/or below the surface of the earth whether in use, unused, abandoned, capped or plugged that may be further described as one or more of the following:

(A) Excavation designed to explore for, produce, capture, recharge or recover water, any mineral, compound, gas, or oil from beneath the land surface;

(B) Excavation designed for the purpose of monitoring any of the physical or chemical properties of water, minerals, geology, or geothermal properties that exist or may exist below the land surface;

(C) Excavation designed to inject or place any liquid, solid, gas, vapor, or any combination of liquid, solid, gas or vapor into any soil or geologic formation below the land surface; or

(D) Excavation designed to lower a water or liquid surface below the land surface either temporarily or permanently for any reason.

§321.33. Applicability.

(a) A CAFO operating under a currently valid authorization granted prior to the effective date of these amended rules shall continue to be authorized and regulated in accordance with the terms of its existing authorization. Any application that has been determined administratively complete prior to the effective date of these amendments will be reviewed and issued under the provisions of the rules in effect at the time the application was declared administratively complete. Any application for permit renewal, amendment or transfer for any permit issued under this subchapter prior to the effective date of these rules shall be reviewed and/or issued under the provisions of §321.34 of this title (relating to Procedures for Making Application for an Individual Permit).

(b) The executive director may designate any animal feeding operation as a CAFO and require it to comply with any of the requirements of this subchapter, including those to apply for, receive and comply with an individual permit under §321.34 of this title (relating to Procedures for Making Application for an Individual Permit), in order to achieve the policy and purposes enumerated in the Texas Water Code, §§5.120 and 26.003; the Health and Safety Code, Chapters 341, 361 and 382; and §321.31 of this title (relating to Waste and Wastewater Discharge and Air Emission Limitations). Cases for which an individual permit may be required include, but are not limited to, situations where:

(1) (No change.)

(2) compliance with standards in addition to those listed in this subchapter is necessary in order to protect waters in the state from pollution;

(3) the operation is not in compliance with the standards of this subchapter;

(4) the operation is under formal commission enforcement or has been referred to the commission for enforcement by the Texas State Soil and Water Conservation Board; or

(5) the owner and/or operator has submitted an application for registration or for a major amendment to a registration which does not comply with the requirements for administrative and technical completeness in §321.36(a)(1) of this title (relating to Notice of Application for Registration).

(c) New CAFOs are prohibited on the Edwards Aquifer recharge zone.

(d) Any facility which qualifies for, obtains and is operating under a certified water quality management plan from the Texas State Soil and Water Conservation Board is not a CAFO for purposes of this subchapter and is not covered by the provisions of this subchapter, unless referred to the commission in accordance with the Texas Agriculture Code, §201.026

(e) Operators of animal feeding operations not required to submit an application for either a registration or an individual permit under this subchapter or authorized by a CAFO general permit in accordance with the notice of intent requirements of the general permit must locate, construct and manage waste control facilities and land application areas to protect surface and groundwaters and prevent nuisance conditions and minimize odor conditions in accordance with the technical requirements of §§321.38-321.40 of this title (relating to Proper CAFO Operation and Maintenance, Pollution Prevention Plan and Best Management Practices).

(f) Any existing, new or expanding CAFO which is neither authorized by a CAFO general permit in accordance with the notice of intent requirements of the general permit or authorized pursuant to subsections (a) or (b) of this section and which is designed to stable or confine and feed or maintain for a total of 45 days or more in any 12-month period more than the numbers of animals specified in the definition of CAFO in §321.32(9)(A) of this title (relating to Definitions) shall apply for registration in accordance with §321.35 of this title (relating to Procedures for Making Application for Registration) or individual permit in accordance with §321.34 of this title.

(g) Any existing, new or expanding animal feeding operation which is neither authorized by a CAFO general permit in accordance with the notice of intent requirements of the general permit nor authorized pursuant to subsections (a) or (b) of this section, which is located in areas specified in the definition of Dairy Outreach Program Areas in §321.32 of this title, and which is designed to stable or confine and feed or maintain for a total of 45 days or more in any 12-month period more than the number of animals specified in the definition of CAFO in §321.32(9)(B) of this title, but less than or equal to the number of animals specified in the definition of CAFO in §321.32(9)(A) of this title shall apply for registration in accordance with §321.35 of this title or individual permit in accordance with §321.34 of this title.

(h) Any CAFO authorized under this subchapter must develop and implement a pollution prevention plan in accordance with the provisions of this subchapter.

(i) Any existing, new or expanding CAFO, which is required to submit an application for registration or an application for an individual permit in accordance with this subchapter, may not commence operation of any waste management facilities or the construction of any facility that has the potential to emit air contaminants without first receiving authorization in accordance with this subchapter or in accordance with a commission order.

(j) Any CAFO which has existing authority under the Texas Clean Air Act (TCAA) does not have to meet the air quality criteria of this subchapter. Upon request, pursuant to the TCAA, §382.051, any CAFO which meets all of the requirements of this subchapter is hereby entitled to an air quality standard permit authorization under this subchapter in lieu of the requirement to obtain an air quality permit under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification). Those CAFOs which would otherwise be required to obtain an air quality permit under Chapter 116 of this title, which cannot satisfy all of the requirements of this subchapter shall apply for and obtain an air quality permit pursuant to Chapter 116 of this title in addition to any authorization required under this subchapter. Those animal feeding operations which are not required to obtain authorization under this subchapter may be subject to requirements under Chapter 116 of this title. Any change in conditions such that a person is no longer eligible for authorization under this section requires authorization under Chapter 116 of this title. No person may concurrently hold an air quality permit issued under Chapter 116 of this title and an authorization with air quality provisions under this subchapter for the same site. Any application for a permit renewal, amendment or transfer for any permit issued under the TCAA shall be reviewed and/or issued under the provisions of Chapter 116 of this title.

(k) Any animal feeding operation authorized under this subchapter which is a new major source, or major modification as defined in Chapter 116 of this title shall obtain a permit under Chapter 116 of this title.

(l) By written request to the executive director, the owner/operator of any facility authorized by the commission may request a transfer of authorization from an individual permit to an application for registration. Such transfer shall be processed in accordance with the provisions of §§321.35-321.37 of this title (relating to Procedures for Making Application for Registration, Notice of Application for Registration and Actions on Applications for Registration). If approved, such transfer under this subsection shall include all special conditions/provisions from the existing permit, and in addition, shall not impose any additional conditions or other requirements unless there is substantial modification to the facility constituting a major amendment as defined by §305.62 of this title (relating to Amendment) or to address compliance problems with the facility or its operations in accordance with a commission order or amendment. If approved, transfer of authorization under this subsection will require compliance with the appropriate provisions of §§321.38-321.42 of this title (relating to Proper CAFO Operation and Maintenance, Pollution Prevention Plans, Best Management Practices, Other Requirements, and Monitoring and Reporting Requirements). If approved, such transfer shall not require any changes to existing structural measures which are documented to meet design and construction standards in effect at the time of installation .

(m) No person may concurrently hold an individual permit or approved registration under this subchapter and an authorization under a CAFO general permit in accordance with the notice of intent requirements of the general permit for the same site.

(n) Any new CAFO located within one mile of Coastal Natural Resource Areas as defined by §33.203(1) of the Texas Natural Resources Code shall apply for and obtain an individual permit in accordance with §321.34 of this title (relating to Procedures for Making Application for an Individual Permit). Any owner/operator who is required to obtain an individual permit under this subsection may not commence physical construction and/or operation of any waste management facilities without first having submitted an application and received a final effective permit.

(o) By written request to the executive director, the owner/operator of any facility holding an unexpired authorization granted under Subchapter K of this Chapter (relating to Concentrated Animal Feeding Operations) may request a transfer of their authorization to a registration under this subchapter. A Subchapter K authorization that has been specifically set aside by court order shall not be eligible for transfer under this subsection. Such request shall include:

(1) the name and address of the applicant(s);

(2) the TNRCC identification number the Subchapter K authorization to be transferred;

(3) any change that has occurred in the information contained in the application upon which the Subchapter K authorization was granted;

(4) the names and addresses of the potentially affected landowners required to be identified on the final site plan that would be required under §321.35 of this title (relating to Procedures for Making Application for Registration);

(5) certification that the facility is not the subject of an unexpired final enforcement order or of an unresolved TNRCC enforcement action in which the executive director has issued written notice that enforcement has been initiated;

(6) the signatures and certifications of the applicant(s) as provided in §§305.43 and 305.44 of this title (relating to Who Applies and Signatories to Applications); and

(7) the application fee required under §321.35(d) of this title.

(p) Within five working days of receipt of a complete and accurate request, the executive director shall prepare a notice of the receipt of the request that is suitable for mailing and forward that notice, together with a copy of the request, to the chief clerk. The notice shall include a statement that the request for transfer will be granted by the executive director unless within 30 days after the date the notice is mailed, the chief clerk receives a written objection from a person described in §321.36(e) of this title (relating to Notice of Application for Registration). The chief clerk shall transmit the notice and a copy of the request to the persons and in the manner described in §321.36(e) of this title. If no such objection is timely received, the executive director shall approve the transfer. If the transfer is disapproved, and not withdrawn by the applicant, the request for transfer shall be processed under §§321.35-321.37 of this title (relating to Procedures for Making Application for Registration, Notice of Application for Registration and Actions on Applications for Registration). If the request is approved either as a transfer or as a new registration under §§321.35-321.37 of this title, such authorization will require compliance with the provisions of §§321.38-321.42 of this title (relating to Proper CAFO Operation and Maintenance, Pollution Prevention Plans, Best Management Practices, Other Requirements, and Monitoring and Reporting Requirements), except that no changes shall be required to existing structural measures which are documented to meet design and construction standards in effect at the time of installation or to any buffer zone requirement satisfied under the prior Subchapter K authorization.

§321.34. Procedures for Making Application for an Individual Permit.

(a) A CAFO that was not authorized under a rule, order or permit of the commission in effect at the time of the adoption of these amended rules shall apply for an individual permit in accordance with the provisions of this section or shall apply for an application for registration in accordance with the provisions of §321.35 of this title (relating to Procedures for Making Application for Registration). Application for an individual permit shall be made on forms provided by the executive director. The applicant shall provide such additional information in support of the application as may be necessary for an adequate technical review of the application. At a minimum, the application shall demonstrate compliance with the technical requirements set forth in §321.38-321.42 of this title (relating to Proper CAFO Operation and Maintenance, Pollution Prevention Plan, Best Management Practices, Other Requirements and Monitoring and Reporting Requirements and shall demonstrate compliance with the requirements specified in §321.35(c)(1)-(13) of this title (relating to Procedures for Making Application for Registration). Applicants shall comply with §§305.41, 305.43-305.44 and 305.46-305.47 of this title (relating to Applicability; Who Applies; Signatories to Applications; Designation of Material as Confidential and Retention of Application Data). Each applicant shall pay an application fee as required by §305.53 of this title (relating to Application Fees). An annual waste treatment inspection fee is also required of each permittee as required by §305.503 and §305.504 of this title (relating to Fee Assessments and Fee Payments). An annual Clean Rivers Program fees is also required as required under §220.21(d) of this title (relating to Water Quality Assessment Fees). Except as provided in subsections (b)-(e) of this section, each permittee shall comply with §§305.61-305.68 of this title (relating to Applicability, Amendment, Renewal, Transfer of Permits, Permit Denial, Suspension and Revocation; Revocation and Suspension Upon Request or Consent; and Action and Notice on

Petition for Revocation or Suspension). Each permittee shall comply with §305.125 of this title (relating to Standard Permit Conditions). Individual permits granted under this subchapter shall be effective for a term not to exceed five years. To qualify for the air quality standard permit, the applicant must meet the requirements in §321.46 of this title (relating to Air Standard Permit Authorization).

(b) Permit renewal will be according to the following procedure:

(1) An application to renew a permit for an animal feeding operation which was issued between July 1, 1974, and December 31, 1977, may be renewed by the commission at a regular meeting without holding a public hearing if the applicant does not seek to discharge into or adjacent to waters in the state and does not seek to change materially the pattern or place of disposal.

(2) Except as provided by §305.63(3) of this title (relating to Renewals), an application for a renewal of a permit may be granted by the executive director without public notice if it does not propose any change which constitutes a major amendment as defined in Chapter 305 of this title or a major source as defined under Chapter 116 of this title. Renewal under this paragraph shall be allowed only if there has been no related formal enforcement action against the facility during the last 36 months of the term of the permit in which the commission has determined that:

(A) a violation occurred that contributed to pollution of surface or ground water, or an unauthorized discharge has occurred, or a violation of §101.4 of this title (relating to Nuisance) has occurred or any violation of an applicable state or federal air quality control requirement has occurred; and

(B) that such discharge or air emission violation was within the reasonable control of the permittee; and

(C) such discharge or air emission violation could have been reasonably foreseen by the permittee. In addition to the provisions of subparagraphs (A)-(C) of this paragraph, for any application for renewal of a permit within an area specified in the definition of Dairy Outreach Program Areas in §321.32(11) of this title (relating to Definitions), an annual compliance inspection shall have been completed within 12 months of the date the executive director declares the application administratively complete.

(c) Each applicant shall pay an application fee as required by §305.53 of this title (relating to Application Fees).

(d)-(f) (No change.)

(g) Notice provided by the executive director under subsection (f) of this section shall be sent by certified mail, return receipt requested.

(h) A facility owner/operator shall submit a complete application within 90 days of notification from the executive director that an individual permit is required.

(i) If an application for renewal requests a major amendment, as defined by §305.62 of this title (relating to Amendment), of the existing individual permit, an application shall be filed in accordance with subsection (a) of this section.

(j) If a renewal application has been filed before the individual permit expiration date, the existing individual permit will remain in full force and effect and will not expire until action on the application for renewal is final.

§321.35. Procedures for Making Application for Registration.

(a) A CAFO that was not authorized under a rule, order or permit of the commission in effect at the time of the adoption of these amended rules shall apply for and receive registration under this section or shall apply for an individual permit in accordance with the provisions of §321.34 of this title (relating to Procedures for Making Application for An Individual Permit). A person who requests a registration or an amendment, modification, or renewal of such registration granted under this subchapter shall submit a complete and accurate application to the executive director, according to the provisions of this section.

(b) Applicants shall comply with the applicable provisions of §§305.43, 305.44, 305.46, and 305.47 of this title (relating to Who Applies; Signatories to Applications; Designation of Material as Confidential; and Retention of Application Data).

(c) Application for registration under this section shall be made on forms prescribed by the executive director. The applicant shall submit an original completed application with attachments to the executive director at the headquarters in Austin, Texas, and one additional copy of the application with attachments to the appropriate Texas Natural Resource Conservation Commission regional office. The completed application shall be submitted to the executive director signed and notarized and with the following information:

(1) The verified legal status of the applicant.

(2) The payment of applicable fees.

(3) The signature of the applicant, in accordance with subsection (b) of this section.

(4) The maximum number of animals for which the facilities have been designed.

(5) A proposed final site plan for the facility showing the boundaries of land owned, operated or controlled by the applicant and to be used as a part of a CAFO, the locations of all pens, lots, ponds, disposal areas, and any other types of control or retention facilities, and all adjacent landowners within 500 feet of the property line of all tracts containing facilities and all on-site or off-site waste disposal areas, including their name, address and telephone number. As used in this subchapter, the term "disposal area" does not apply to any lands not owned, operated or controlled by the CAFO operator for the purpose of off-site land application of manure, wherein the manure is given or sold to others for beneficial use.

(6) A County General Highway Map (with graphic scale clearly shown) to identify the relative location of the CAFO and at least a one mile area surrounding the facility.

(7) One original (remainder in copies) United States Geological Survey 7 « minute quadrangle topographic map or an equivalent high quality copy showing the boundaries of land owned, operated, or controlled by the applicant and to be used as a part of a CAFO, and within 500 feet of the outer boundary of the land application area(s), open lots and control facilities, the location of all private water wells (abandoned or in use) and public wells and all springs, lakes, or ponds within one mile of the outer boundary of the retention facility and downstream of the facility.

(8) A copy of the pollution prevention plan for the CAFO for which the application is filed. Prior to utilization of wastewater retention facilities, documentation of liner certifications by a licensed professional engineer must be submitted (if applicable).

(9) A copy of a recorded deed or tax records showing ownership, or a copy of a contract or lease agreement between the applicant and the owner/operator of any lands to be utilized under

the proposed CAFO. This requirement does not apply to any lands not owned, operated, or controlled by the applicant for the purpose of off-site land application of manure wherein the manure is given or sold to others for beneficial use, provided the owner/operator of the CAFO is not involved in the application of the manure.

(10) A certification by a NRCS engineer, licensed professional engineer or qualified groundwater scientist documenting the absence or presence of any recharge features identified on any tracts of land owned, operated or controlled by the applicant and to be used as a part of a CAFO. Documentation, by the certifying party shall identify the sources and/or methods used to identify the presence or absence of recharge features. The documentation shall include the method or approach to be used to identify previously unidentified and/or undocumented recharge features that may be discovered during the time of construction. At a minimum, the records and/or maps of the following entities/agencies shall be reviewed to locate any artificial recharge features:

(A) Railroad Commission;

(B) Groundwater District, if applicable;

(C) Texas Water Development Board;

(D) TNRCC;

(E) Natural Resource Conservation Service;

(F) previous owner of site, if available, and

(G) on-site inspection of site with a NRCS engineer, licensed professional engineer or qualified groundwater scientist.

(11) Where the applicant can not document the absence of recharge features on the tracts for which an application is being filed, the proposed final site plan shall also indicate the specific location of any and all recharge features found on any property owned, operated or controlled by the applicant under the application as certified by a NRCS engineer, licensed professional engineer, or qualified groundwater scientist. The applicant shall also submit a plan, developed by a NRCS engineer or licensed professional engineer, to prevent impacts on any located recharge feature and associated groundwater formation which may include the following:

(A) Installation of the necessary and appropriate protective measures for each located recharge feature such as impervious cover, berms or other equivalent protective measures covering all affected facilities and disposal areas; or

(B) Submission of a detailed groundwater monitoring plan covering all affected facilities and disposal areas. At a minimum, the ground-water monitoring plan shall specify procedures to annually collect a ground-water sample from representative wells, have each sample analyzed for chlorides, nitrates and total dissolved solids and compare those values with background values for each well; or

(C) Any other similar method or approach demonstrated by the applicant to be protective of any associated recharge feature.

(12) Area land use map (Air quality only). This map shall identify the property line, the permanent odor sources and the distance and direction to any residences, animal feeding operations, businesses, public parks or occupied structures within a one mile radius of the permanent odor sources to show compliance with §321.46 of this title (relating to Air Standard Permit Authorization). The map shall include the north arrow and scale of map.

(13) The applicant shall indicate in the application the location and times where the application may be inspected by the public. Within 48 hours of receiving notice of administrative and technical completeness, the applicant shall either make a copy of the application available for public inspection at the applicant's place of business during normal business hours, Monday through Friday, and shall provide a copy of the application to a public place within the county where the proposed facility is to be located so that the copy may be made available for inspection at a public place during normal business hours. For the purposes of this section, normal business hours shall be at a minimum of: 9:00 a.m. to noon and from 1:00 p.m. to 5:00 p.m., Monday through Friday allowing for the observance of state and/or federal holidays. Such places may include, but are not limited to, public libraries; district, county, or municipal court offices; community recreation centers; or public schools.

(d) Each applicant shall pay an application fee as required by §305.53 of this title (relating to Application Fees). An annual waste treatment inspection fee is also required of each registrant as required by §305.503 and §305.504 of this title (relating to Fee Assessment and Fee Payment). An annual Clean Rivers Program fees is also required as required under §220.21(d) of this title (relating to Water Quality Assessment Fees). No fees under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) shall be required of an applicant for an authorization issued under this section.

(e) Each registrant shall comply with and is subject to the provisions of §§305.61, 305.64 and 305.66-305.68 of this title (relating to Applicability, Transfer of Permits, Permit Denial, Revocation and Suspension, Revocation and Suspension Upon Request or Consent, Action and Notice on Petition for Revocation or Suspension).

(f) Registrations approved under this subchapter shall be effective for a term not to exceed five years.

(g) (Air Quality Only) . To qualify for the air quality standard permit, the applicant must meet the requirements in §321.46 of this title (relating to Air Standard Permit Authorization).

(h) Renewal of a registration under this section will be according to the following procedures:

(1) Except as provided by §305.63(3) of this title (relating to Renewals), an application for a renewal of a registration may be granted by the executive director without public notice if it does not propose any other change to the registration as approved. Renewal under this paragraph shall be allowed only if there has been no related formal enforcement action against the facility during the last 36 months of the term of the registration in which the commission has determined that:

(A) a violation occurred that contributed to pollution of surface or ground water, or an unauthorized discharge has occurred, or a violation of §101.4 of this title (relating to Nuisance) has occurred or any violation of an applicable state or federal air quality control requirement has occurred; and

(B) that such discharge or air emission violation was within the reasonable control of the registrant; and

(C) such discharge or air emission violation could have been reasonably foreseen by the registrant. In addition to the provisions of subparagraphs (A)-(C) of this paragraph, for any application for renewal of a registration within an area specified in the definition of Dairy Outreach Program Areas in §321.32(11) of this title (relating to Definitions), an annual compliance inspection shall have been completed within 12 months of the date the executive director declares the application administratively complete.

(2) Each applicant shall pay an application fee as required by §305.53 of this title (relating to Application Fees).

(3) A registrant submitting an application for renewal of a registration satisfying the criteria in paragraph (1) of this subsection will automatically be issued a renewal for the existing registration by the executive director.

(4) If the application for renewal of a registration cannot meet all of the criteria in paragraph (1) of this subsection, then an application for renewal of the registration shall be filed in accordance with subsection (a) of this section and processed in accordance with §§321.36-321.37 of this title (relating to Notice of Application for Registration and Action on Applications for Registration).

(5) Any registrant with an effective registration shall submit an application for renewal at least 180 days before the expiration date of the effective registration, unless permission for a later date has been granted by the executive director. The executive director shall provide the registrant notice of deadline for the application for renewal by certified mail, return receipt requested, at least 240 days before the registration expiration date. The executive director shall not grant permission for applications to be submitted later than the expiration date of the existing registration.

§ 321.36. Notice of Application for Registration.

(a) Administrative and Technical Review.

(1) Applications for registration or major amendments to such registrations under this subchapter shall be reviewed by the executive director for administrative and technical completeness within 30 working days of receipt of the application by the executive director. Upon determination that the application contains the information and attachments required under this subchapter, the executive director shall declare that the application is administratively and technically complete.

(2) Within five working days of declaration of administrative completeness, the executive director shall assign the application a number for identification purposes, and prepare a statement of the receipt of the application and declaration of administrative and technical completeness which is suitable for publishing or mailing, under the requirements of §321.186(b) of this title (relating to Notice of Application), and shall forward that statement to the applicant.

(b) Notice of application. The notice of application for registration and administrative/ technical completeness shall contain the following information:

(1) the identifying number given the application for registration by the commission;

(2) the type of authorization being sought under the application;

(3) the name and address of the applicant;

(4) the date on which the application for registration was submitted;

(5) a brief summary of the information included in the application for registration, including but not limited to the general location of facilities and disposal areas associated with the application, the proposed size of the facility, a description of the receiving water for any discharge and the location where a copy of the application for registration may be reviewed by interested persons;

(6) the format for submission of a comment in accordance with this subchapter to the executive director regarding the application for registration; and

(7) the date, time, and place where all comments are to be received by the executive director in relation to the numbered application for registration, such comment period shall be 30 days from the actual date of publication

(c) Publication.

(1) The applicant shall cause the notice of application for registration and administrative/technical completeness approved by the executive director to be published once in a newspaper regularly published, and generally circulated within the county and area wherein the proposed facility is to be located, and within an adjoining county wherein any potential affected person may reside.

(2) The date of publication for notice of application for registration and administrative/technical completeness shall not be later than the date set by the chief clerk.

(3) The applicant is responsible for the cost of publication. The applicant shall notify the chief clerk verbally or by facsimile within 24 hours of the first available working day after the publication of the notice, and shall provide the chief clerk a certified copy of the publication, within 20 calendar days of the date established by the chief clerk for publication. If the applicant does not provide the chief clerk with the appropriate publisher's affidavit within 20 days of the date established by the executive director, the executive director shall cease processing and return the application.

(d) Application returned. If an application for registration is received which is not administratively/technically complete, the executive director shall notify the applicant of the deficiencies prior to expiration of the review period (30 working days) by certified mail return receipt requested. If the additional requested information is received within 30 days of receipt of the deficiency notice, the executive director will evaluate the information within eight working days and, where applicable, shall prepare a statement of receipt of the application for registration and declaration of administrative/technical completeness in accordance with subsection (a) of this section. If the requested information is not submitted by the applicant within 30 days of the date of receipt of the deficiency notice, the executive director shall return the incomplete application to the applicant.

(e) Notice by mail.

(1) The chief clerk will transmit the notice of application for registration and administrative/technical completeness by first-class mail to persons listed in paragraph (2) of this subsection and to other persons who, in the judgment of the executive director, may be affected. The applicant is responsible for the cost of required notice. A record on file with the chief clerk which includes the list of persons to whom notice was mailed and the date of mailing, signed by a person with personal knowledge that the mailout occurred, shall create a presumption that notice was mailed in accordance with this section.

(2) the notice shall be mailed by the chief clerk to the following:

(A) the potentially affected landowners named on the final site plan submitted with the application;

(B) the mayor and health officials of the city or town in which the facility is or will be located or in which waste is or will be disposed of;

(C) the county judge and health authorities of the county in which the facility is located or in which waste is or will be disposed of;

(D) the Texas Department of Health;

(E) the Texas Parks and Wildlife Department;

(F) the applicant;

(G) persons who request to be put on the mailing list, including participants in past commission proceedings for the facility who have submitted a written request to be put on the mailing list;

(H) state and federal agencies for which notice is required in 40 Code of Federal Regulations §124.10(c);

(I) for applications regarding operations located in an area specified in the definition of Dairy Outreach Program Areas in §321.32 of this title (relating to Definitions), notice shall be mailed to the river authority whose jurisdictional watershed includes that location; and

(J) for applications regarding operations located in an area within the jurisdiction of a groundwater district, notice shall be mailed to such district.

(3) the date of mailing for a notice of application for registration and administrative/technical completeness shall be established by the chief clerk.

(4) The notice shall include instructions regarding the requirements contained in §321.37(a) of this title (relating to Public Comment on Applications for Registration) providing the manner and timeframe for the submission of comments to the proposed application for registration.

§321.37. Actions on Applications for Registration.

(a) Public Comment on Applications for Registrations. A person may provide the commission with written comments on any applications for registration for which notice has been issued under this subchapter. The executive director shall review any written comments when they are received within 30 days of mailing the notice. Only written comments received within the 30 day period will be considered. The written information received will be utilized by the executive director in determining what action to take on the application for registration, pursuant to subsection (b) of this section

(b) The executive director shall determine, after review of any application for registration, if he will approve or deny an application for registration in whole or in part, deny with prejudice, suspend the authority to conduct an activity for a specified period of time, or amend or modify the proposed activity requested by the applicant. The determination of the executive director shall include review and action on any new applications or changes, renewals, and requests for major amendment of any existing application. In consideration of such an application for registration, the executive director will consider all relevant requirements of this subchapter and consider all information pertaining to those requirements received by the executive director regarding the application for registration. The written determination on any application for registration, including any authorization granted, shall be mailed by the Office of Chief Clerk to the applicant upon the decision of the executive director. At the same time the executive director's decision is mailed to the applicant, a copy or copies of this decision shall also be mailed by the Office of Chief Clerk to all persons who timely submitted written information on the application, as described in subsection (a) of this section. The written determination of the executive director shall include a response to all significant comments received.

(c) Motion for reconsideration. The applicant or any person submitting comments in accordance with subsection (a) of this section may file with the chief clerk a motion for reconsideration, under the procedures of §50.39(b)-(f) of this title (relating to Motion for Reconsideration), of the executive director's final approval of an application. Any person who was entitled to but not given proper notice of an application and subsequently did not submit comments within the 30 day comment period may file a motion for reconsideration.

§321.39. Pollution Prevention Plans.

(a) A pollution prevention plan shall be developed for each CAFO covered under this subchapter. Pollution prevention plans shall be prepared in accordance with good engineering practices and shall include measures necessary to limit the discharge of pollutants to waters in the state . The plan shall describe and ensure the implementation of practices which are to be used to assure compliance with the limitations and conditions of this subchapter. The plan shall identify a specific individual(s) at the facility who is responsible for development, implementation, maintenance, and revision of the pollution prevention plan. The activities and responsibilities of the pollution prevention personnel shall address all aspects of the facility's pollution prevention plan.

(b) Where a NRCS plan has been prepared for the facility, the pollution prevention plan may refer to the NRCS plan when the NRCS plan documentation contains equivalent requirements for the facility. When the operator uses a NRCS plan as partial completion of the pollution plan, the NRCS plan must be kept on site. Design and construction criteria developed by the NRCS can be substituted for the documentation of design capacity and construction requirements (see subsection (f) of this section) of the pollution prevention plan provided the required inspection logs and water level logs in subsection (f)(3) and (11) of this section are kept with the NRCS Plan. Waste management plans developed by the NRCS can be substituted for the documentation of application rate calculations in subsection (f) (19) and (24) of this section. NRCS Waste Management Plans which have been prepared since January 1, 1989 are considered by the Natural Resources Conservation Service to contain adequate management practices. To insure the protection of water quality, the Natural Resources Conservation Service has determined that NRCS plans prepared prior to 1989 must be submitted for renewal with the Natural Resources Conservation Service or a waste management professional before December 1995. NRCS has determined that all plans should be reviewed every five (5) years to insure proper management of wastes.

(c) The plan shall be signed by the operator or other signatory authority in accordance with §305.44 of this title (relating to Signatories to Applications), and be retained on site. The plan shall be updated as appropriate.

(d) Upon completion of a plan review, the executive director may notify the operator at any time that the plan does not meet one or more of the minimum requirements of this subchapter. After such notification from the executive director, the operator shall make changes to the plan within 90 days after such notification unless otherwise provided by the executive director.

(e) The operator shall amend the plan prior to any change in design, construction, operation, or maintenance, which has a significant effect on the potential for the discharge of pollutants to waters in the state or if the pollution prevention plan proves to be ineffective in achieving the general objectives of controlling pollutants in discharges from concentrated animal feeding operations.

(f) The plan shall include, at a minimum, the following items:

(1) Each plan shall provide a description of potential pollutant sources. Potential pollutant sources include any activity or material that may reasonably be expected to add pollutants to

waters in the state from the facility. An evaluation of potential pollutant sources shall identify the types of pollutant sources, provide a description of the pollutant sources, and indicate all measures that will be used to prevent contamination from the pollutant sources. The type of pollutant sources found at any particular site varies depending upon a number of factors including site location, historical land use, proposed facility type, waste disposal practices, etc. The evaluation shall encompass all land that will be used as part of the CAFO as indicated in the site plan. Each potential pollutant source must be identified in the plan. A thorough site inspection of the facility is recommended to ensure that all sources have been identified. Potential pollutant sources found at CAFO facilities include, but are not limited to, the following: manure; sludge; wastewater; dust; silage stockpiles; fuel storage tanks; pesticide storage and applications; lubricants; disposal of any dead animals associated with production at the CAFO; land application of waste and wastewater; manure stockpiling; pond clean-out; vehicle traffic; and pen clean-out. Each plan shall include:

(A) A site plan/map, or topographic map indicating, an outline of the property that will be used in the waste generation and utilization activities of the concentrated animal feeding area; each existing structural control measure to reduce pollutants in wastewater and precipitation runoff; and surface water bodies.

(B) The plan shall identify the specific location of any recharge features identified on any tracts of land planned to be utilized under the provisions of this subchapter. In addition, the plan should also locate and describe the function of all measures installed to prevent impacts to identified recharge features.

(C) A list of any significant spills of these materials at the facility after the effective date of these rules, or for new facilities, since date of operation.

(D) All existing sampling data.

(2) The pollution prevention plan for each facility shall include a description of management controls appropriate for the facility, and the operator must implement such controls. The appropriateness and priorities of any controls shall reflect the identified sources of pollutants at the facility.

(3) The plan shall include the location and a description of structural controls. Structural controls shall be inspected, by those individuals identified in the PPP as responsible for development, implementation, maintenance and revision of the plan, at least four times per year for structural integrity and maintenance. The plan shall include dates for inspection of the retention facility, and a log of the findings of such inspections. The appropriateness of any controls shall reflect the identified sources of pollutants at the facility.

(4) The plan must include documentation of the assumptions and calculations used in determining the appropriate volume capacity of the retention facilities. In addition to the 25-year, 24-hour rainfall, the volume capacity of the retention facility shall be designed to meet the demands of a hydrologic needs analysis (water balance) which demonstrates the irrigation water requirements for the cropping system maintained on the wastewater application site(s). Precipitation inputs to the hydrologic needs analysis (water balance) shall be the average monthly precipitation taken from an official source such as the "Climatic Atlas of Texas", LP-192, published by the Texas Department of Water Resources, dated December, 1983, or the most recent edition, or successor publication. The consumptive use requirements of the cropping system shall be developed on a monthly basis, and shall be calculated as a part of the hydrologic needs analysis (water balance). The following volumes shall be considered in determining the analysis:

(A) the runoff volume from all open lot surfaces;

(B) the runoff volume from all areas between open lot surfaces that is directed into the retention facilities;

(C) the rainfall multiplied by the area of the retention and waste basin;

(D) the volume of rainfall from any roofed area that is directed into the retention facilities;

(E) all waste and process generated wastewater produced during a 21 day, or greater, period;

(F) the estimated storage volume for a minimum one year of sludge accumulation;

(G) the storage volume required to contain all wastewater and runoff during periods of low crop demand;

(H) the evaporation volume from retention facility surfaces;

(I) the volume applied to crops in response to crop demand;

(J) the minimum treatment volume required for waste treatment, if treatment lagoon; and/or

(K) any additional storage volume required as a safety measure as determined by the system designer.

(5) The maximum required storage value calculated by the hydrologic analysis requirements shall not encroach on the storage volume required for the 25-year, 24-hour rainfall event. Wastewater application rates utilized in the hydrologic needs analysis (water balance) shall not induce runoff or create tailwater.

(6) In addition, the retention facility shall include a top freeboard of not less than two feet. Freeboard shall account for settlement and slope stability of the materials used at the time of design and construction.

(7) (Air quality only) A lagoon in a single lagoon system and a primary lagoon in a multi-stage lagoon system shall be designed to maintain the necessary treatment volume or surface area as calculated using the manure production data (mean plus one standard deviation) published by American Society of Agricultural Engineers (ASAE) standards D384.1, dated June, 1988, and applicable updates to comply with anaerobic lagoon design criteria as established by ASAE standards EP-403.2, dated December, 1992, and applicable updates, or other site-specific data documented in the PPP.

(8) Evaporation systems shall be designed to withstand a 10-year (consecutive) period of maximum recorded monthly rainfall (other than catastrophic), as determined by a hydrologic needs analysis (water balance), and sufficient freeboard (not less than one foot) shall be maintained to dispose of rainfall and rainfall runoff from the 25-year, 24-hour rainfall event without overflow. In the hydrologic needs analysis determination, any month in which a catastrophic event occurs the analysis shall replace such an event with not less than the long term average rainfall for that month.

(9) Site specific information should be used to determine retention capacity and land application rates. All site specific information used must be documented in the pollution prevention plan.

(10) The plan shall include a description of the design standards for the retention facility embankments. The following minimum design standards are required for construction and/or modification of a retention facility:

(A) Soils used in the embankment shall be free of foreign material such as trash, brush, and fallen trees;

(B) The embankment shall be constructed in lifts or layers no more than six inches thick and compacted at optimum moisture content;

(C) Embankment construction must be accompanied by compaction testing and certified to be in accordance with NRCS, Corps of Engineers, Bureau of Reclamation or ASCE design standards. Compaction tests must be certified by a licensed professional engineer; and

(D) All embankment walls shall be stabilized to prevent erosion or deterioration.

(11) The plan must include a schedule for liquid waste removal. A date log indicating weekly inspection of wastewater level in the retention facility, including specific measurement of wastewater level will be kept with the plan. Retention facilities shall be equipped with either irrigation or evaporation or liquid removal systems capable of dewatering the retention facilities. Operators using pits, ponds, tanks or lagoons for storage and treatment of storm water, manure and process generated wastewater, including flush water waste handling systems, shall maintain in their wastewater retention facility sufficient available capacity to contain rainfall and rainfall runoff from a 25-year, 24-hour rainfall event. The operator shall restore such capacity to store all runoff from a 25-year, 24-hour rainfall event after any rainfall event or accumulation of wastes or process generated wastewater which reduces such capacity, weather permitting. Equipment capable of dewatering the wastewater retention structures of waste and/or wastewater shall be available whenever needed to restore the capacity required to accommodate the rainfall and runoff resulting from the 25-year, 24-hour rainfall event.

(12) A permanent marker (measuring device) shall be maintained in the wastewater retention facilities to show the following: the volume required for a 25-year, 24-hour rainfall event; and the predetermined minimum treatment volume within any treatment pond. The marker shall be visible from the top of the levee. At no time shall a treatment lagoon at a CAFO that is operated under an air quality authorization be dewatered to a level below the predetermined treatment volume, except for cleanout periods or periods where the net effect of evaporation and rainfall would require the addition of fresh water to maintain the treatment volume without pumping fresh groundwater from an aquifer.

(13) (Air quality only) The primary lagoon in a multi-stage lagoon system shall be designed and operated so that the lagoon maintains a constant level at all times unless prohibited by climatic conditions. Where practical, any contaminated runoff should be routed around the primary lagoon into the secondary lagoon.

(14) A rain gauge shall be kept on site and properly maintained. A log of all measurable rainfall events shall be kept with the pollution prevention plan.

(15) Concentrated animal feeding operations constructing a new or modifying an existing wastewater retention facility shall insure that all construction and design is in accordance with good engineering practices. Where site specific variations are warranted, the operator must document these variations and their appropriateness to the plan. Existing facilities which have been properly maintained and show no signs of structural breakage or leakage will be considered to be properly constructed. Structures built in accordance with site specific Natural Resources Conservation Service plans and specifications will be considered to be in compliance with the design and capacity requirements of this subchapter if the site specific conditions are the same as those used by the NRCS to develop the plan (numbers of animals, runoff area, wastes generated, etc.) All retention structure design and construction shall, at a minimum, be in accordance with the technical standards developed by the NRCS. The operator must use those standards that are current at the time of construction.

(16) The operator shall include in the plan, site specific documentation that no significant hydrologic connection exists between the contained wastewater and waters in the state. Where the operator cannot document that no significant hydrologic connection exists, the ponds, lagoons and basins of the retention facilities must have a liner which will prevent the potential contamination of surface waters and groundwaters.

(A) The operator can document lack of hydrologic connection by either: documenting that there will be no significant leakage from the retention structure; or documenting that any leakage from the retention structure would not migrate to waters in the state. This documentation shall be certified by a NRCS engineer, licensed professional engineer or qualified groundwater scientist and must include information on the hydraulic conductivity and thickness of the natural materials underlying and forming the walls of the containment structure up to the wetted perimeter.

(B) For documentation of no significant leakage, in-situ materials must, at a minimum, meet the minimum criteria for hydraulic conductivity and thickness described below. Documentation that leakage will not migrate to waters in the state must include maps showing groundwater flow paths, or that the leakage enters a confined environment. A written determination by a NRCS engineer, or a licensed professional engineer that a liner is not needed to prevent a significant hydrologic connection between the contained wastewater and waters in the state will be considered documentation that no significant hydrologic connection exists.

(17) Site-specific conditions shall be considered in the design and construction of liners. NRCS liner requirements or liners constructed and maintained in accordance with NRCS design specifications in Appendix 10d of the Agricultural Waste Management Handbook (or its current equivalent) shall be considered to prevent hydrologic connections which could result in the contamination of waters in the state. Liners for retention structures shall be constructed in accordance with good engineering practices. Where no site specific assessment has been done by a NRCS engineer, licensed professional engineer, or qualified groundwater scientist the liner shall be constructed to have hydraulic conductivities no greater than 1×10^{-7} cm/sec, with a thickness of 1.5 feet or greater or its equivalency in other materials.

(18) Where a liner is installed to prevent hydrologic connection the operator must maintain the liner to inhibit infiltration of wastewaters. Liners shall be protected from animals by fences or other protective devices. No trees shall be allowed to grow within the potential distance of the root zone. Any mechanical or structural damage to the liner shall be evaluated by a NRCS engineer or a licensed professional engineer within 30 days of the damage. Documentation of liner maintenance shall be kept with the pollution prevention plan. The operator shall have a NRCS engineer, licensed professional engineer, or qualified groundwater

scientist review the documentation and do a site evaluation every five years. If notified by the executive director that significant potential exists for the contamination of waters in the state or drinking water, the operator shall install a leak detection system or monitoring well(s) in accordance with that notice. Documentation of compliance with the notification must be kept with the pollution prevention plan, as well as all sampling data. In the event monitoring well(s) are required, the operator must sample each monitor well annually for nitrate as nitrogen, chloride, and total dissolved solids using the methods outlined in the PPP, and compare the analytical results to the baseline data. If a ten percent deviation in concentration of any of the sampled constituents is found, the operator must notify the executive director within 30 days of receiving the analytical results. Data from any monitoring wells must be kept on site for three years with the pollution prevention plan. The first year's sampling shall be considered the baseline data and must be retained on site for the life of the facility unless otherwise provided by the executive director.

(19) Retention facilities shall be equipped with either irrigation or evaporation systems capable of dewatering the retention facilities, or a regular schedule of wastewater removal by contract hauler. The pollution prevention plan must include all calculations, as well as, all factors used in determining land application rates, acreage, and crops. Land application rates must take into account the nutrient contribution of any land applied manures. If land application is utilized for disposal of wastewater, the following requirements shall apply:

(A) The discharge or drainage of irrigated wastewater is prohibited where it will result in a discharge of pollutants into or adjacent to waters in the state.

(B) When irrigation disposal of wastewater is used, application rates shall not exceed the nutrient uptake of the crop coverage or planned crop planting with any land application of wastewater and/or manure. Land application rates of wastewaters should be based on the available nitrogen content, however, where local water quality is threatened by phosphorus, the operator shall limit the application rate to the recommended rates of available phosphorus for crop uptake, based upon crop and realistic yield goals, and provide controls for runoff and erosion as appropriate for site conditions.

(C) Wastewater shall not be irrigated when the ground is frozen or saturated or during rainfall events (unless in accordance with subparagraph (E) of this paragraph.

(D) Irrigation practices shall be managed so as to reduce or minimize ponding or puddling of wastewater on the site, pollution of waters in the state, and prevents the occurrence of nuisance conditions.

(E) It shall be considered proper operation and maintenance for a facility which has been properly operated in accordance with this subchapter, and that is in danger of imminent overflow due to chronic or catastrophic rainfall, to discharge wastewaters to land application sites for filtering prior to discharging to waters in the state. Only that portion of the total retention facility wastewater volume necessary to prevent overflow due to chronic or catastrophic rainfall shall be land applied for filtering prior to discharging to waters in the state. Monitoring and reporting requirements for such discharges shall be consistent with §321.42 of this title (relating to Monitoring and Reporting Requirements).

(F) Facilities including ponds, pipes, ditches, pumps, diversion and irrigation equipment shall be maintained to insure ability to fully comply with the terms of this subchapter and the pollution prevention plan.

(G) Adequate equipment or land application area shall be available for removal of such waste and wastewater as required to maintain the retention capacity of the facility for compliance with this subchapter.

(H) Where land application sites are isolated from surface waters and groundwaters and no potential exists for runoff to reach any waters in the state, application rates may exceed nutrient crop uptake rates only upon written approval of the executive director. No land application under this subsection shall cause or contribute to a violation of water quality standards or create a nuisance.

(20) Solids shall be removed in accordance with a pre-determined schedule for cleanout of all treatment lagoons to prevent the accumulation of solids from exceeding 50% of the original treatment volume. Removal of solids shall be conducted during favorable wind conditions that carry odors away from nearby receptors and the operator shall notify the regional office of the commission as soon as the lagoon cleaning is scheduled, but not less than 10 days prior to cleaning, and verification shall be reported to the same regional office within five days after the cleaning has been completed. At no time shall emissions from any activity create a nuisance. Any increase in odors associated with a properly managed cleanout under this subsection will be taken into consideration by the executive director when determining compliance with the provisions of this subchapter.

(21) Manure and Pond Solids Handling and Land Application. Storage and land application of manure shall not cause a discharge of pollutants to waters in the state, cause a water quality violation in waters in the state or cause a nuisance condition. At all times, sufficient volume shall be maintained within the control facility to accommodate manure, other solids, wastewaters and contaminated storm water (rainwater runoff) from the concentrated animal feeding areas.

(22) Where the operator decides to land apply manures and pond solids the plan shall include: a description of waste handling procedures and equipment availability; the calculations and assumptions used for determining land application rates; and all nutrient analysis data. Land application rates of wastes should be based on the available nitrogen content of the solid waste. However, where local water quality is threatened by phosphorus, the application rate shall be limited to the recommended rates of available phosphorus for crop uptake, based upon crop and realistic yield goals, and provide controls for runoff and erosion as appropriate for site conditions.

(23) If the waste (manure) is sold or given to other persons for disposal, the operator must maintain a log of: date of removal from the CAFO; name of hauler; and amount, in wet tons, dry tons or cubic yards, of waste removed from the CAFO. (Incidental amounts, given away by the pick-up truck load, need not be recorded.) Where the wastes are to be land applied by the hauler, the operator must make available to the hauler any nutrient sample analysis from that year.

(24) The procedures documented in the pollution prevention plan must ensure that the handling and disposal of wastes as defined in §321.32 of this title (relating to Definitions) comply with the following requirements:

(A) Manure storage capacity based upon manure and waste production and land availability shall be provided. Storage and/or surface disposal of manure in the 100-year flood plain, near water courses or recharge feature is prohibited unless protected by

adequate berms or other structures. The land application of wastes at agronomic rates shall not be considered surface disposal in this case and is not prohibited.

(B) When manure is stockpiled, it shall be stored in a well drained area with no ponding of water, and the top and sides of stockpiles shall be adequately sloped to ensure proper drainage. Runoff from manure storage piles must be retained on site.

(C) Waste shall not be applied to land when the ground is frozen or saturated or during rainfall events.

(D) Waste manure shall be applied to suitable land at appropriate times and at agronomic rates. Discharge (run-off) of waste from the application site is prohibited. Timing and rate of applications shall be in response to crop needs, assuming usual nutrient losses, expected precipitation and soil conditions.

(E) All necessary practices to minimize waste manure transport to waters in the state shall be utilized and documented to the plan.

(F) Edge-of-field, grassed strips shall be used to separate water courses from runoff carrying eroded soil and manure particles. Land subject to excessive erosion shall be avoided.

(G) Where land application sites are isolated from surface waters and no potential exists for runoff to reach waters in the state, application rates may exceed nutrient crop uptake rates only upon written approval by the executive director. No land application under this subchapter shall cause or contribute to a violation of surface water quality standards, contaminate groundwater or create an nuisance condition.

(H) Nighttime application of liquid and/or solid waste shall only be allowed in areas with no occupied residence(s) within 0.25 mile from the outer boundary of the actual area receiving waste application. In areas with an occupied residence within 0.25 mile from the outer boundary of the actual area receiving waste application, application shall only be allowed from one hour after sunrise until one hour before sunset, unless the current occupants of such residences have in writing agreed to such nighttime applications.

(I) Accumulations of solids on concrete cow lanes at dairies and concrete swine pens, without slotted floors, shall be scraped or flushed at least once per week or in accordance with proper design and maintenance of the facility. Farrowing pens at swine facilities which are not scraped or flushed once per week shall be scraped/flushed after each group of sows have been removed from the facility.

(J) Buildings designed with mechanical flush/scrape systems shall be flushed/scraped at least once per week or as often as necessary to maintain the design efficiency. This provision would include, but would not be limited to swine and caged poultry operations.

(K) Earthen pens shall be designed and maintained to ensure good drainage and to prevent ponding.

(L) Facilities that utilize a solid settling basin(s) shall remove solids from the basin as often as necessary to maintain the design efficiency.

(25) The plan shall include an appropriate schedule for preventative maintenance. Operators will provide routine maintenance to their control facilities in accordance with a schedule and plan of operation to ensure compliance with this subchapter. The operator shall keep a maintenance log documenting that preventative maintenance was done. A preventive maintenance program shall involve inspection and maintenance of all runoff management devices (mechanical separators, catch basins) as well as inspecting and testing facility equipment and containment structures to uncover conditions that could cause breakdowns or failures resulting in discharge of pollutants to waters in the state or the creation of a nuisance condition.

(26) The plan shall identify areas which, due to topography, activities, or other factors, have a high potential for significant soil erosion. Where these areas have the potential to contribute pollutants to waters in the state the pollution prevention plan shall identify measures used to limit erosion and pollutant runoff.

(27) The operator shall document to the pollution prevention plan as soon as possible, any planned physical alterations or additions to the permitted facility. The operator must insure that any change or facility expansion will not result in a discharge in violation of the provisions of this subchapter or will require an amendment to an existing authorization in force at the time of modification.

(28) Prior to commencing wastewater irrigation and/or waste application on land owned or operated by the operator, and annually thereafter, the operator shall collect and analyze representative soil samples of the wastewater and waste application sites according to the following procedures:

(A) Sampling procedures shall employ accepted techniques of soil science for obtaining representative and analytical results.

(B) Samples should be taken within the same 45 day time-frame each year.

(C) Obtain one composite sample for each soil depth zone per land management unit and per uniform (soils with the same characteristics and texture) soil type within the land management unit. For the purposes of this subchapter, a land management unit shall be considered to be an area associated with a single center pivot system or a tract of land on which similar soil characteristics exist and similar management practices are being used.

(D) Composite samples shall be comprised of 10 - 15 randomly sampled cores obtained from each of the following soil depth zones:

(i) Zone 1: 0-6 inches for land application areas where the waste is incorporated directly into the soil or 0-2 inches for land application areas where the waste is not incorporated into the soil; if a 0-2 inch sample is required under this subsection, then an additional sample from the 2-6 inch soil depth zone shall be obtained in accordance with the provisions of this section, and

(ii) Zone 2: 6 - 24 inches.

(E) Soil samples shall be submitted to a soil testing laboratory along with a previous crop history of the site, intended crop use and yield goal. Soil reports should include nutrient recommendations for the crop yield goal.

(F) Chemical/nutrient parameters and analytical procedures for laboratory analysis of soil samples from wastewater and waste application sites shall include the following:

(i) Nitrate reported as nitrogen in parts per million (ppm)

(ii) Phosphorus (extractable, ppm) - Texas Agricultural Extension Service Soil Testing Laboratory - TAMU extractant or Mehlich III,

(iii) Potassium (extractable, ppm),

(iv) Sodium (extractable, ppm),

(v) Magnesium (extractable, ppm),

(vi) Calcium (extractable, ppm),

(vii) Soluble salts/electrical conductivity (dS/m) - determined from extract of 2:1 (v/v) water/soil mixture,

(viii) Soil water pH,

(G) When results of the annual soil analysis for extractable phosphorus in subparagraph (F) of this paragraph indicates a level greater than 200 ppm of extractable phosphorus (reported as P) in Zone 1 for a particular waste and/or wastewater disposal field or if ordered by the commission to do so in order to protect the quality of waters in the state, then the operator shall limit waste and/ or wastewater application on that site to the recommended P rates based on crop uptake. Waste and/or wastewater application shall remain limited to recommended P rates until soil analysis indicates extractable phosphorus levels have been reduced below 200 ppm P, or to a lower level as ordered by the commission.

(29) The operator shall annually analyze at least one representative sample of irrigation wastewater and one representative sample of solid waste for total nitrogen, total phosphorus and total potassium.

(30) Results of initial and annual soils, wastewater and solid waste analyses shall be maintained on-site as part of the pollution prevention plan.

(31) Operators submitting applications for renewal or expansion of existing facilities authorized under this subchapter to utilize a playa lake as a wastewater retention structure shall within 90 days of the effective date of the renewal, submit a groundwater monitoring plan to the Agriculture Section, Water Quality Division of the Texas Natural Resource Conservation Commission. At a minimum, the ground water monitoring plan shall specify procedures to annually collect a ground water sample from each well providing water for the facility, have each sample analyzed for chlorides and nitrates and compare those values to background values for each well.

§ 321.40. Best Management Practices.

The following Best Management Practices (BMPs) shall be utilized by concentrated animal feeding operations owners/ operators, as appropriate, based upon existing physical and economic conditions, opportunities and constraints. Where the provisions in a NRCS plan are equivalent or more protective the operator may refer to the NRCS plan as documentation of compliance with the BMPs required by this subchapter.

(1) Control facilities must be designed, constructed, and operated to contain all process generated wastewaters and the contaminated runoff from a 25-year, 24-hour rainfall event for the location of the point source. Calculations may also include allowances for surface retention, infiltration, and other site specific factors. Waste control facilities must be constructed, maintained and managed so as to retain all contaminated rainfall runoff from open lots and associated areas, process generated wastewater, and all other wastes which will enter or be stored in the retention structure.

(2) Facilities shall not expand operations, either in size or numbers of animals, prior to amending or enlarging the waste handling procedures and structures to accommodate any additional wastes that will be generated by the expanded operations.

(3) Open lots and associated wastes shall be isolated from outside surface drainage by ditches, dikes, berms, terraces or other such structures designed to carry peak flows expected at times when the 25-year, 24-hr. rainfall event occurs.

(4) New or expanding facilities shall not be built in any stream, river, lake, wetland, or playa lake (except as defined by and in accordance with the Texas Water Code §26.048).

(5) No waters in the state shall come into direct contact with the animals confined on the concentrated animal feeding operation. Fences and other methods may be used to restrict such access.

(6) Wastewater retention facilities or holding pens may not be located in the 100-year flood plain, as defined in Chapter 301 of this title, unless the facility is protected from inundation and damage that may occur during that flood event.

(7) There shall be no water quality impairment to public and neighboring private drinking water wells due to waste handling at the permitted facility. Facility wastewater retention facilities, holding pens or waste/wastewater disposal sites shall not be located closer than 500 feet of a public water supply well or 150 of a private water wells, except in accordance with Chapter 238 of this title (relating to Water Well Drillers).

(8) Waste handling, treatment, and management shall not create a nuisance condition or an environmental or a public health hazard; shall not result in the contamination of drinking water; shall conform with State regulations for the protection of surface and ground water quality.

(9) Solids, sludges, manure, or other pollutants removed in the course of treatment or control of wastewaters shall be disposed of in a manner such as to prevent pollutants from being discharged into waters in the state or creation of a nuisance condition.

(10) The operator shall prevent the discharge of pesticide contaminated waters into waters in the state. All wastes from dipping vats, pest and parasite control units, and other facilities utilized for the application of potentially hazardous or toxic chemicals shall be handled and disposed of in a manner such as to prevent any significant pollutants from entering the waters in the state or create a nuisance condition.

(11) Dead animals shall be properly disposed of within three days as required by statute or by rules of the commission unless otherwise provided for by the executive director. Animals shall be disposed of in a manner to prevent contamination of waters in the state or creation of a nuisance or public health hazard.

(12) Collection, storage, and disposal of liquid and solid waste should be managed in accordance with recognized practices of good agricultural management. The economic benefits derived from agricultural operations carried out at the land disposal site shall be secondary to the proper disposal of waste and wastewater.

(13) Appropriate measures necessary to prevent spills and to clean up spills of any toxic pollutant shall be taken. Where potential spills can occur materials, handling procedures and storage shall be specified. Procedures for cleaning up spills shall be identified and the necessary equipment to implement a clean up shall be available to personnel.

§321.41. Other Requirements.

(a) Education and Training.

(1) Any CAFO owner/operator with greater than 300 animal units and located within an area specified in the definition of Dairy Outreach Program Areas in §321.32 of this subchapter (relating to Definitions) shall obtain authorization under this subchapter

and, within twelve months of receiving such authorization, the owner/operator or his designee with operational responsibilities shall complete an eight hour course or its equivalent on animal waste management. In addition, that owner/operator shall also complete at least eight additional hours of continuing animal waste management education for each two year period after the first twelve months. The minimum criteria for the initial eight hours and the subsequent eight hours of continuing animal waste management education shall be developed by the executive director and the Texas Agricultural Extension Service. Verification of the date and time(s) of attendance and completion of required training shall be documented to the pollution prevention plan.

(2) Where the employees are responsible for work activities which relate to compliance with provisions of this subchapter, those employees must be regularly trained or informed of any information pertinent to the proper operation and maintenance of the facility and waste disposal. Employee training shall inform personnel at all levels of responsibility of the general components and goals of the pollution prevention plan. Training shall include topics as appropriate such as land application of wastes, proper operation and maintenance of the facility, good housekeeping and material management practices, necessary recordkeeping requirements, and spill response and clean up. The operator is responsible for determining the appropriate training frequency for different levels of personnel and the pollution prevention plan shall identify periodic dates for such training.

(b) Inspections and Recordkeeping. The operator or the person named in the pollution prevention plan as the individual responsible for drafting and implementing the plan shall be responsible for inspections and recordkeeping.

(c) Recordkeeping and Internal Reporting Procedures. Incidents such as spills, other discharges or nuisance conditions, along with other information describing the pollution potential and quality of the discharge shall be included in the records. Inspections and maintenance activities shall be documented and recorded. These records must be kept on site for a minimum of three years.

(d) Visual Inspections. The authorized person shall inspect designated equipment and facility areas. Material handling areas shall be inspected for evidence of, or the potential for, pollutants entering the drainage system or the creation of a nuisance. A follow-up procedure shall be used to ensure that appropriate action has been taken in response to the inspection.

(e) Site Inspection. A complete inspection of the facility shall be done and a report documenting the findings of the inspection made at least once/year. The inspection shall be conducted by the authorized person named in the pollution prevention plan, to verify that the description of potential pollutant sources is accurate; the site plan/map has been updated or otherwise modified to reflect current conditions; and the controls outlined in the pollution prevention plan to reduce pollutants and avoid nuisance conditions are being implemented and are adequate. Records documenting significant observations made during the site inspection shall be retained as part of the pollution prevention plan. Records of inspections shall be maintained for a period of three years.

(f) Additional Requirements. No condition of this authorization shall release the operator from any responsibility or requirements under other statutes or regulations, Federal, State or Local.

§321.42. Monitoring and Reporting Requirements.

(a) If, for any reason, there is a discharge to waters in the state, the operator is required to notify the executive director orally within 24 hours and in writing within 14 working days of the discharge from the retention facility or any component of the waste handling or disposal system. In addition, the operator shall document the following information to the pollution prevention plan within 14 days of becoming aware of such discharge:

(1) A description and cause of the discharge, including a description of the flow path to the receiving water body. Also, an estimation of the flow and volume discharged.

(2) The period of discharge, including exact dates and times, and, if not corrected the anticipated time the discharge is expected to continue, and steps being taken to reduce, eliminate and prevent recurrence of the discharge.

(3) If caused by a precipitation event(s), information from the on site rain gauge concerning the size of the precipitation event.

(4) Unless otherwise directed by the executive director, facilities authorized under this subchapter shall sample and analyze all discharges from retention facilities. Sample analysis shall be documented to the pollution prevention plan.

(5) Samples shall consist of grab samples taken from the over-flow or discharges from the retention structure. A minimum of one sample shall be taken from the initial discharge (within 30 minutes). The sample shall be taken and analyzed in accordance with EPA approved methods for water analysis listed in 40 CFR 136. Measurements taken for the purpose of monitoring shall be representative of the monitored discharge.

(6) Sample analysis of the discharge must, at a minimum, include the following: Fecal Coliform bacteria; 5-day Biochemical Oxygen Demand (BOD5); Total Suspended Solids (TSS); ammonia nitrogen; and any pesticide which the operator has reason to believe could be in the discharge.

(7) In lieu of discharge sampling data, the operator must document description of why discharge samples could not be collected when the discharger is unable to collect samples due to climatic conditions which prohibit the collection of samples including weather conditions that create dangerous conditions for personnel (such as local flooding, high winds, hurricane, tornadoes, electrical storms, etc.). Once dangerous conditions have passed, the operator shall collect a sample from the retention structure pond or lagoon. The sample shall be analyzed in accordance with paragraph (6) of this subsection.

(b) All discharge information and data will be made available to the executive director upon request. Signed copies of monitoring reports shall be submitted to the executive director if requested at the address specified in the request.

(c) Any person who knowingly makes any false statement, representation, or certification in any record or other document submitted or required to be maintained under the provisions of this subchapter, including reports of compliance or noncompliance shall be subject to administrative penalties not to exceed $10,000 per violation. Such person(s) may also be subject to civil and criminal penalties pursuant to the Texas Water Code, §26.122 and §26.213.

(d) The operator shall retain copies of all records required by this subchapter for a period of at least three years from the date reported. This period may be extended by request of the executive director at any time.

(e) The operator shall furnish to the executive director, within a reasonable time, any information which the executive director may request to determine compliance with the provisions of this subchapter. The operator shall also furnish to the executive director,

upon request, copies of records required to be kept by the provisions of this subchapter.

(f) When the operator becomes aware that they failed to submit any relevant facts or submitted incorrect information in any report to the executive director, they shall promptly submit such facts or information.

(g) All reports or information submitted to the executive director shall be signed and certified in accordance with §305.44 of this title (relating to Signatories to Applications).

(h) The operator shall maintain ownership, operation or control over the retention facilities, disposal areas and control facilities identified in the final site plan submitted with the application under §321.34 or §321.35 of this title (relating to Procedures for Making Application for an Individual Permit or Procedures for Making Application for Registration). In the event owner loses ownership, operation or control of any of these areas, the operator shall notify the executive director prior to such loss of control and immediately request and file an application to amend the existing authorization, an application for a new authorization under this subchapter or present the executive director with a plan to cease all concentrated animal feeding operations at that site.

(i) Any operator required to obtain authorization under §321.33 of this title (relating to Applicability) shall locate and maintain all facilities in accordance with the final site plan submitted with the application as required under §321.34 or §321.35 of this title (relating to Procedures for Making Application for an Individual Permit or Procedures for Making Application for Registration). In the event the operator does not properly locate and maintain such facilities in accordance with the final site plan they shall be deemed in noncompliance with the provisions of this subchapter.

(j) Operator shall furnish to the executive director soil testing laboratory results of all soil samples within 60 days of the date the samples were taken in accordance with the requirements of this subsection.

§321.44. Dairy Outreach Program Areas.

For the purposes of this subchapter the Dairy Outreach Program Areas includes all of the following counties: Erath, Bosque, Comanche, Hamilton, Johnson, Hopkins, Wood and Rains. The commission shall review the areas designated under this section on at least a triennial basis to determine whether counties should be deleted or other areas should be added. At any time, areas under this section may be added or deleted by the commission in accordance with the rulemaking process.

§ 321.46. Air Standard Permit Authorization .

Pursuant to Texas Clean Air Act §382.051, any CAFO which meets all of the requirements for registration or individual permit outlined in this subchapter or all the requirements for operating under a CAFO general permit and which satisfy this section is hereby entitled to an air quality standard permit authorization in lieu of the requirement to obtain an air quality permit under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification). Facilities which meet all the "Air Quality Only" requirements in §321.39 of this title (relating to Pollution Prevention Plans) and obtain either a registration or individual permit or a CAFO general permit are eligible for an air quality standard permit. In addition to meeting the "Air Quality Only" requirements, the applicant must also demonstrate compliance with the following:

(1) Construction or expansion of a new animal feeding operation. Animal feeding operations not in operation on the date of the adoption of these amended rules, must document compliance with either paragraph (1)(A) or (1)(B) of this section at the time of application for amendment, transfer, registration or an individual permit under this subchapter or for a CAFO general permit.

(A) Operator shall not locate any permanent odor sources within 0.50 miles of any occupied residence or business structure, school (including associated recreational areas), church, or public park without written consent and approval from the landowner. For the purposes of this section, any measurement of a buffer distance shall be from the nearest edge of the permanent odor source to the nearest edge of an occupied structure or designated recreational area listed under this subsection; or

(B) Operator shall not locate any permanent odor sources within 0.25 miles of any occupied residence or business structure, school (including associated recreational areas), church, or public park without written consent and approval from the landowner. For the purposes of this section, any measurement of a buffer distance shall be from the nearest edge of the permanent odor source to the nearest edge of an occupied structure or designated recreational area listed under this subsection. Operator shall also develop and implement a plan to control odors at the CAFO. Such plan shall identify all structural and/or management practices that the owner/operator will employ to minimize odor and control air contaminants at the facility. The odor control plan should at a minimum address manure collection, manure and wastewater storage and treatment, land application, dead animal handling and dust control measures. The plan shall be kept with the Pollution Prevention Plan.

(2) Expansion of an existing animal feeding operation. Animal feeding operations in operation on the date of the adoption of these amended rules must document compliance with either paragraph (2)(A) or

(2) (B) of this section at the time of application for transfer, amendment, registration or an individual permit under this subchapter or for a CAFO general permit.

(A) Operator shall not locate any permanent odor sources within 0.25 miles of any occupied residence or business structure, school (including associated recreational areas), church, or public park without written consent and approval from the landowner. For the purposes of this section, any measurement of a buffer distance shall be from the nearest edge of the permanent odor source to the nearest edge of an occupied structure or designated recreational area listed under this subsection; or

(B) Operator shall develop and implement a plan to control odors at the CAFO. Such plan shall identify all structural and/or management practices that the owner/operator will employ to minimize odor and control air contaminants at the facility. The odor control plan should at a minimum address manure collection, manure and wastewater storage and treatment, land application, dead animal handling and dust control measures. The plan shall be kept with the Pollution Prevention Plan.

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 August 28, 1998.

TRD-9813704
Margaret Hoffman
Director, Environmental Law
Texas Natural Resource Conservation Commission
Effective date: September 18, 1998

Proposal publication date: March 6, 1998
For further information, please call: (512) 239–4640

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

Part XVI. Coastal Coordination Council

Chapter 506. Coastal Procedures for Federal Consistency with Coastal Management Program Goals and Priorities

31 TAC §506.12

The Coastal Coordination Council (Council) adopts amendments to §506.12(a)(1)(F) (relating to Federal Agency Actions, Federal Agency Activities and Development Projects, and Outer Continental Shelf Plans Subject to the Coastal Management Program, without changes to the proposed text as published in the June 26, 1998, issue of the *Texas Register* (23 TexReg 6695). The text will not be republished.

The amendment to §506.12(a)(1)(F) adds to the Council's list of federal activities subject to consistency review federal agency approval of restoration/mitigation plans that arise from §404 of the Clean Water Act and §10 of the Rivers and Harbors Act enforcement actions. While most of these activities are individually inconsequential, they are numerous and frequent. It is appropriate for the Council to list these activities because they may cumulatively affect coastal natural resource areas within Texas' coastal zone. Because of their nature, number, and frequency, however, it would be inefficient for each approval to be individually reviewed by the Council. Therefore, the Council is simultaneously issuing a General Concurrence (GC) deeming consistent all such activities below a certain threshold. This focuses the Council's involvement on those activities that are individually more significant in scope. The particular type of enforcement method employed by federal agencies correlates to the scope or significance of the violation. The GC deems consistent the two methods that are usually employed to resolve routine and relatively minor violations. This relieves the Council of reviewing these individually.

The Council has prepared a takings impact assessment for the adoption of these amendments and determined that adoption of the amendments will not result in a taking of private real property. To receive a copy of the takings impact assessment, please send a written request to Ms. Carol Milner, Texas Register Liaison, General Land Office, Legal Services Division, 1700 N. Congress Avenue, Room 626, Austin, Texas 78701-1495, facsimile number (512) 463-6311.

Two commenters commented on the proposed amendments. The Galveston District of the U.S. Army Corps of Engineers objected to the proposed amendment. Mobil Oil corporation objected in part.

The Galveston District commented that its staff was promised that an interagency staff workgroup would be convened to discuss this matter. The Council expressly solicited the Galveston District's involvement in the workgroup, but the district declined the offer. By letter of February 27, 1998, Council Member John Barrett invited Colonel Eric R. Potts, District Engineer of the Galveston District, to have district staff participate in an interagency staff workgroup that was convened to discuss a specific proposal designed to address the Corps' concerns regarding this matter. By letter of March 30, 1998, however, Colonel Potts replied that it would be premature to participate in the workgroup until the district had received guidance on this matter from Corps headquarters. The guidance, which was issued May 4, 1998, took the position that the Council's proposal was contrary to both federal statute and the U.S. Constitution. This position rendered the workgroup irrelevant, since a staff workgroup can change neither statute nor constitution.

The Galveston District commented that actions the Corps either undertakes or declines to undertake to enforce its statutory regulatory authorities are not subject to state consistency review under the federal Coastal Zone Management Act (CZMA). However, the district stated that it would voluntarily submit after-the-fact permits to the Council for consistency review. The Galveston District characterized the Council's position "contrary to the most basic principles of Federal supremacy under the U.S. Constitution." The Council's action is in full keeping with federal supremacy principles because it is an action undertaken pursuant to a congressional waiver of federal supremacy. Congress expressly and unequivocally waived federal supremacy in §307 of the CZMA by giving the weight of federal law to state policies contained in federally approved state coastal management programs. Section 307(c)(3)(a) prohibits a federal agency from issuing a permit authorizing an activity in the coastal zone unless the state has certified that the activity will be carried out in a manner that is consistent with state coastal policies. After-the-fact permits fall squarely within this provision. Section 307(c)(1)(A) provides that each activity undertaken directly by a federal agency that "affects any land or water use or natural resource" of a state's coastal zone shall also be consistent with the policies of the state's program. NOAA regulations at 15 CFR §930.31 define the term "federal activity" as "any functions performed by or on behalf of a Federal agency in the exercise of its statutory responsibilities." (Emphasis supplied.) Therefore, there is no issue of federal supremacy with respect to the amendments. The only possible issues relate to interpretation of the language in the CZMA and its implementing regulations that delineate what federal actions are subject to §307. However, the actions described in the amendment plainly fall within the scope of that language.

The Galveston District also commented that the CZMA's implementing regulations misconstrue and "reverse" federal agencies' §307 consistency obligations by requiring them to be consistent with state coastal policies unless specifically prohibited by statute. The Corps interprets §307 to require federal agencies to be consistent only if specifically authorized by statute. This section of the regulations has been in existence and Congress has been cognizant of its meaning and effect for almost two decades. Congress has reauthorized and amended the CZMA on numerous occasions during that period. By not amending the CZMA to alter that longstanding interpretation, Congress has thereby expressly ratified it.

The Galveston District further commented that "to subject enforcement of federal laws to regulation by the states is an extraordinary, unprecedented view with no support in the CZMA or its legislative history," that "the entire focus of the CZMA is to give greater protection to coastal resources," and that "allowing state interference with enforcement of federal laws . . . would be directly contrary to the stated purposes of the CZMA." With respect to legislative history, the Corps' position is that actions

related to enforcement are categorically exempt from §307. However, the legislative history of the 1990 reauthorization of the CZMA states that "[n]o federal agency activities are categorically exempt from this requirement." *See H.R. Conf. Rep. No. 964, 101st Cong., 2d Session.* With respect to the CZMA's statutory purposes, protecting coastal resources was only one of many. In §303(2), Congress expressly found and declared that one purpose was "to encourage and assist the states to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone, giving full consideration to ecological, cultural, historic, and esthetic values, as well as the needs for compatible economic development." In §303(4), Congress stated that another purpose was "to encourage the participation and cooperation of the public, state and local governments, and interstate and other regional agencies, as well as of the Federal agencies, in carrying out the purposes of this chapter." The primary assistance that Congress gave states to ensure the cooperation of federal agencies was the ability under §307 to require federal agencies to comply with the state's coastal policies. Therefore, both the legislative history and the stated purposes of the CZMA support the Council's action.

The Galveston District also objected to the amendment on practical grounds. The district pointed out that interagency coordination on a recent enforcement case was extensive and that "the state already has adequate remedies to protect its coastal resources." The district stated that Council involvement would be time consuming, lead to delays, and be wasteful. First, the Council acknowledges the district's views on the adequacy of state law. However, Congress has encouraged states to supplement state authorities with the authority granted under §307 of the CZMA. The Council is simply taking advantage of the means Congress has provided to make the state's management of coastal resources even more comprehensive. For example, an authority such as Clean Water Act §401 certification may not apply to a restoration/mitigation activity in a particular case because of some procedural technicality. Section 307 could in that case provide the state an alternative means of applying its policies for wetlands resources to that activity. Second, before proposing the amendments, the Council was aware that the Corps was concerned that Texas' exercising its congressionally granted consistency review authority would delay or complicate the Corps' enforcement program. Mobil Oil Corporation submitted a comment letter raising a similar issue. The Council addressed that concern by issuing a General Concurrence (GC) for most Corps enforcement actions simultaneously with the adoption of the rule amendment. As stated in the preamble to the amendment proposal, the net effect of the amendment and GC are that fewer than 3% of the district's enforcement cases will be subject to any form of review by the Council. The effect on the Galveston District's enforcement program will clearly be minimal. Nevertheless, the Council has offered, and remains willing, to work with the Corps to ensure that any review in this small number of cases is efficient and expeditious.

The Galveston District commented that the requirements of §307 of the CZMA do not apply to the judicial branch of the federal government and that there is no final executive branch agency action to trigger §307. The Council agrees that §307 does not apply to the judicial branch, but disagrees that there is no final executive branch agency action to review. As stated in the preamble to the amendment proposal, that action is submission of a restoration plan or similar document to the court for its consideration. The district commented that restoration plans are "rarely" developed and that, contrary to the Council's assertion in the preamble to the amendment proposal, 33 CFR §326.5 is simply a statement of whether restoration or mitigation should be required, not a plan. Section 326.5 requires the district engineer to prepare a document that, among other things, "will also recommend what, if any, restoration or mitigative measures are required and will provide the rationale for any such recommendation." Clearly, the document describes a course of action that should be taken and therefore can fairly be characterized as a plan. The Council would also point out that it the official policy of the U.S. Department of Justice to consent to an environmental enforcement judgment only after an opportunity is afforded to those who are not party to the litigation to comment on it. Under 28 CFR §50.7(b), prior to finalizing the judgment, the Department of Justice "will receive and consider, and file with the court, any written comments, views, or allegations relating to the proposed judgment." This demonstrates that a state's assertion of consistency review authority is not fundamentally incompatible with the process by which federal agencies conduct their enforcement litigation because that process already contains a window for input, albeit very limited input.

The amendments are adopted under the Texas Natural Resources Code, Chapter 33, Subchapter C, §33.053(a)(10), and the Texas Natural Resources Code, Chapter 33, Subchapter F, §33.206(d), which provide the Council with, respectively, the authority to list each federal activity that may have a direct and significant detrimental impact on CNRAs and to adopt procedural rules for review of federal activities.

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 August 31, 1998.

TRD-9813779
Garry Mauro
Chairman, Coastal Coordination Council
Coastal Coordination Council
Effective date: September 20, 1998
Proposal publication date: June 26, 1998
For further information, please call: (512) 305–9129

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

Part I. Texas Department of Human Services

Chapter 3. Income Assistance Services

Subchapter CC. Claims

40 TAC §3.2901

The Texas Department of Human Services (DHS) adopts an amendment to §3.2901, in its Income Assistance Services chapter. The amendment is adopted without changes to the

proposed text published in the July 17, 1998, issue of the *Texas Register* (23 TexReg 7361) and will not be republished.

The justification for the amendment is to comply with an agency initiative and the Program Simplification Workgroup by making Temporary Assistance for Needy Families (TANF) policies more compatible with current Food Stamp policies.

The amendment will function by significantly reducing the amount to be collected for overpayment of TANF benefits.

The department received no comments regarding adoption of the amendment.

The amendment is adopted under the Human Resources Code, Title 2, Chapters 22 and 31, which provides the department with the authority to administer public and financial assistance programs.

The amendment implements the Human Resources Code, §§22.001-22.030 and §§31.001-31.0325.

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 August 25, 1998.

TRD-9813509
Glenn Scott
General Counsel, Legal Services
Texas Department of Human Services
Effective date: October 1, 1998
Proposal publication date: July 17, 1998
For further information, please call: (512) 438–3765

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Subchapter NN. Electronic Benefit Transfer

40 TAC §3.4011

The Texas Department of Human Services (DHS) adopts an amendment to §3.4011, in its Income Assistance Services chapter. The amendment is adopted without changes to the proposed text as published in the July 17, 1998, issue of the *Texas Register* (23 TexReg 7362) and will not be republished.

The justification for the amendment is to comply with state legislation relating to expunging Temporary Assistance for Needy Families (TANF) benefits after the account has been dormant for 12 months.

The amendment will function by ensuring that the state will be in compliance with state legislation and will be compatible with the expungement policy in the Food Stamp Program.

The department received no comments regarding adoption of the amendment.

The amendment is adopted under the Human Resources Code, Title 2, Chapters 22 and 31, which provides the department with the authority to administer public and financial assistance programs.

The amendment implements the Human Resources Code, §§22.001-22.030 and §§31.001-31.0325.

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 August 31, 1998.

TRD-9813741
Glenn Scott
General Counsel, Legal Services
Texas Department of Human Services
Effective date: October 1, 1998
Proposal publication date: July 17, 1998
For further information, please call: (512) 438–3765

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Chapter 18. Nursing Facility Administrators

40 TAC §§18.2–18.10, 18.15, 18.16

The Texas Department of Human Services (DHS) adopts the repeal of §§18.2-18.10, 18.15, and 18.16, and new §§18.2-18.10, 18.15, and 18.16, without changes to the proposed text as published in the July 24, 1998, issue of the *Texas Register* (23 TexReg 7537).

The justification for the repeals and new sections is to comply with Senate Bill 84, passed during the regular session of the 75th Texas Legislature, that administratively transferred the rules from the Texas Board of Nursing Facility Administrators to the Texas Department of Human Services (DHS).

The repeals and new sections will function by ensuring that nursing facility administrators meet the necessary requirements to be licensed in the state of Texas and also to promote the safety of nursing facility residents.

During the comment period, DHS received the following comment from the Texas Health Care Association (THCA).

Comment: Regarding §18.2(i)(3), fees, we recommend that the department reexamine the fees that are being charged for licenses, license renewals, and examinations and all other administrative fees under the Act. In previous appropriations, a specific amount was appropriated for the function of licensing administrators and the amount collected using the above fee structure exceeded the appropriation. All excess funds reverted to the general revenue fund and were not applied to expenses. Is this still the case? If so, consideration should be given to reevaluating the fee structure to more closely meet the appropriation request.

Response: DHS will evaluate the fees charged in the nursing facility administrator program for licensure, licensure renewal, and state requirements examination. However, the cost of the national examination for administrators is established by the National Association of Board of Examiners of Long Term Care Administration. Senate Bill 84, at §242.304(b) does specify that funds DHS collects under Health and Safety Code, Chapter 242, Subchapter I, be deposited in the state treasury to the credit of the general revenue fund.

The repeals are adopted under the Texas Health and Safety Code, Chapter 242, Subchapter I, (Nursing Facility Administration, §§242.301, added by Acts 1997, 75th Legislature, Chapter 1280, §1.01), which authorizes the department to license nursing facility administrators.

The repeals implement the Texas Health and Safety Code, Chapter 242.302, as added by Acts 1997, 75th Legislature, Chapter 1280, §1.01.

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 August 31, 1998.

TRD-9813742
Glenn Scott
General Counsel, Legal Services
Texas Department of Human Services
Effective date: September 20, 1998
Proposal publication date: July 24, 1998
For further information, please call: (512) 438–3765

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40 TAC §§18.2–18.10, 18.15, 18.16

The new sections are adopted under the Texas Health and Safety Code, Chapter 242, Subchapter I, (Nursing Facility Administration, §§242.301, added by Acts 1997, 75th Legislature, Chapter 1280, §1.01), which authorizes the department to license nursing facility administrators.

The new sections implement the Texas Health and Safety Code, Chapter 242.302, as added by Acts 1997, 75th Legislature, Chapter 1280, §1.01.

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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Glenn Scott
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Texas Department of Human Services
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For further information, please call: (512) 438–3765

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Chapter 48. Community Care for Aged and Disabled

Subchapter E. Client-Managed Attendant Services

40 TAC §48.2615 and §48.2616

The Texas Department of Human Services (DHS) adopts new §§48.2615 and 48.2616, without changes to the proposed text published in the June 12, 1998, issue of the *Texas Register* (23 TexReg 6151) and will not be republished.

The justification for the new sections is to implement a pilot voucher project statewide as part of DHS's client-managed attendant services (CMAS) program and in conjunction with the personal attendant services (PAS) program of the Texas Rehabilitation Commission. The voucher is a new, third option that a current CMAS or PAS client may select in receiving attendant services. Current CMAS rules in this chapter apply to the pilot as well as these rules.

The new sections will function by adding a new payment option for consumers of client-managed attendant services.

No comments were received regarding adoption of the new sections.

The new sections are adopted under the Human Resources Code, Title 2, Chapter 22, which provides the department with the authority to administer public assistance programs.

The new sections implement §§22.001-22.030 of the Human Resources Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 25, 1998.

TRD-9813506
Glenn Scott
General Counsel, Legal Services
Texas Department of Human Services
Effective date: October 1, 1998
Proposal publication date: June 12, 1998
For further information, please call: (512) 438–3765

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Chapter 79. Legal Services

Subchapter T. Administrative Fraud Disqualification Hearings

40 TAC §§79.1901, 79.1906, 79.1914, 79.1917 and 79.1919

The Texas Department of Human Services (DHS) adopts amendments to §§79.1901, 79.1906, 79.1914, 79.1917, 79,1919, 79.2003, 79.2009, and 79.2011, in its Legal Services chapter. The amendments are adopted without changes to the proposed text published in the July 10, 1998, issue of the *Texas Register*(23 TexReg 7178) and will not be republished.

The justification for the amendments is to update the existing rules to bring them into compliance with the name change of Aid to Families with Dependent Children (AFDC) to Temporary Assistance for Needy Families (TANF), and 7 CFR 273.16(4) Scheduling of Hearing.

The amendments will function by changing the term AFDC to TANF and amending state rules to coincide with federal regulations as related to administrative disqualification hearing procedures.

The department received no comments regarding adoption of the amendments.

The amendments are adopted under the Human Resources Code, Title 2, Chapters 22 and 31, which provides the department with the authority to administer public and financial assistance programs.

The amendments implement the Human Resources Code, §§22.001-22.030 and §§31.001-31.0325.

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 August 25, 1998.

TRD-9813507
Glenn Scott
General Counsel, Legal Services
Texas Department of Human Services
Effective date: September 14, 1998
Proposal publication date: July 10, 1998
For further information, please call: (512) 438–3765

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Subchapter U. Fraud Involving Recipients

40 TAC §§79.2003, 79.2009, and 79.2011

The amendments are adopted under the Human Resources Code, Title 2, Chapters 22 and 31, which provides the department with the authority to administer public and financial assistance programs.

The amendments implement the Human Resources Code, §§22.001-22.030 and §§31.001-31.0325.

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 August 25, 1998.

TRD-9813508
Glenn Scott
General Counsel, Legal Services
Texas Department of Human Services
Effective date: September 14, 1998
Proposal publication date: July 10, 1998
For further information, please call: (512) 438–3765

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Part XIX. Texas Department of Protective and Regulatory Services

Chapter 700. Child Protective Services

Subchapter C. Eligibility for Child Protective Services

40 TAC §700.316

The Texas Department of Protective and Regulatory Services (TDPRS) adopts an amendment to §700.316, without changes to the proposed text as published in the July 10, 1998, issue of the *Texas Register* (23 TexReg 7180).

The justification for the amendment is to allow Child Protective Services (CPS) to provide up to 3 and 1/2 months of transitional state-paid foster care assistance to youth who completed high school (usually in May), but who are not able to move into a college dormitory until August or September. Obtaining short-term housing in these situations can be difficult, as current CPS policy requires that paid foster care end the month the youth graduates from high school.

The amendment will function by providing placement services that better meet the needs of individual youth. Youth will have a greater likelihood of following through with their college and vocational goals because they have a continuity of stable living arrangement before they begin their higher educational or vocational program.

TDPRS received one comment from Driscoll Children's Hospital in support of the amendment.

The amendment is adopted under the Texas Family Code, Title 5, Chapters 261 and 264, which authorizes the department to provide services to alleviate the effects of child abuse and neglect. In addition, the amendment is adopted under Public Law No. 96-272, Title I, which authorizes the department to administer foster-care and adoption assistance programs provided for under the Social Security Act, Title IV-E.

The amendment is also adopted under the Human Resources Code (HRC), Chapter 40, which describes the services authorized to be provided by the Texas Department of Protective and Regulatory Services; authorizes the department to enter into agreements with federal, state, or other public or private agencies or individuals to accomplish the purposes of the programs authorized by the HRC; grants authority to contract to that department; and establishes the department's rulemaking authority.

The amendment implements the HRC, Chapter 40, which authorizes the department to enter into agreements with federal, state, or other public or private agencies or individuals to accomplish the purposes of the programs authorized by the HRC and which authorizes the department to enter into contracts as necessary to perform any of its powers or duties.

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 August 31, 1998.

TRD-9813758
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Effective date: October 1, 1998
Proposal publication date: July 10, 1998
For further information, please call: (512) 438–3765

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Subchapter R. Cost-finding Methodology for 24–Hour Child-care Facilities

40 TAC §§700.1803–700.1806

The Texas Department of Protective and Regulatory Services (TDPRS) adopts amendments to §§700.1803-700.1806. The amendment to §700.1803 is adopted with changes to the proposed text as published in the July 10, 1998, issue of the *Texas Register* (23 TexReg 7181). The amendments to §§700.1804- 700.1806 are adopted without changes to the proposed text and will not be republished.

The justification for the amendments is to create one set of cost principles and guidelines for both residential child care contractors and purchase-of-service contractors. The basis of the principles and guidelines is found in the federal circulars.

The amendments will function by providing residential child care contractors one set of rules for cost reporting and expenditures. Purchase-of-service contractors will no longer have differences between federal circulars and TDPRS's rules, unless the state specifically desires to be more restrictive than federal guidelines.

No comments were received regarding adoption of the amendments. However, in §700.1803, TDPRS has deleted the phrase "general information" from the beginning of the rule.

The amendments are adopted under the Human Resources Code (HRC), Chapter 40, which describes the services authorized to be provided by the Texas Department of Protective and Regulatory Services; and authorizes the department to enter into agreements with federal, state, and other public or private agencies or individuals to accomplish the purposes of the programs authorized by the HRC; and grants authority to contract to that Department.

The amendments implement the HRC, Chapter 40, which authorizes the department to enter into agreements with federal, state, or other public or private agencies or individuals to accomplish the purposes of the programs authorized by the HRC and which authorizes the department to enter into contracts as necessary to perform any of its powers or duties. 700.1803. Definition of Allowable and Unallowable Costs. The Texas Department of Protective and Regulatory Services (TDPRS) defines allowable and unallowable costs in order to identify the reasonable expenses that a prudent and cost effective provider must incur to provide the 24-hour child-care services specified in the provider's contract or agreement with TDPRS. The primary objective of TDPRS's cost-reporting system is to determine a fair and reasonable reimbursement rate for a prudent and cost effective provider. To achieve this objective, TDPRS compiles a rate base that includes only information about allowable costs. TDPRS reimburses its residential child care contractors only for costs which are allowable, reasonable, necessary, and properly allocated to the specific contract. The cost principles, guidelines, and definitions for allowable and unallowable costs for cost-reporting purposes (such as rate setting) and for expenditure purposes are the same. Those guidelines are published in §§732.240 and 732.242-732.256 of this title (relating to Contract Administration).

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 August 31, 1998.

TRD-9813759

C. Ed Davis

Deputy Director, Legal Services

Texas Department of Protective and Regulatory Services

Effective date: October 1, 1998

Proposal publication date: July 10, 1998

For further information, please call: (512) 438–3765

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Chapter 710. Protection of Clients and Staff

Subchapter B. Client Abuse and Neglect in Community Mental Health and Mental Retardation Centers

40 TAC §§710.41–710.50

The Texas Department of Protective and Regulatory Services (TDPRS) adopts the repeal of §§710.41-710.50, and adopts new §§710.41-710.55, in its Protection of Clients and Staff chapter. New §§710.43, 710.46-710.52, and 710.55 are adopted with changes to the proposed text as published in the May 8, 1998, issue of the *Texas Register* (23 TexReg 4551). The repeal of §§710.41-710.50 and new §§710.41, 710.42, 710.44, 710.45, 710.53, and 710.54 are adopted without changes to the proposed text and will not be republished.

The justification for the repeals and new sections is to update the rules regarding investigations of abuse, neglect, and exploitation of persons served by community mental health and mental retardation centers. TDPRS is also changing the title of Subchapter B to be Abuse, Neglect, and Exploitation of Persons Served by Community Mental Health and Mental Retardation Centers.

The sections will function by providing efficient procedures for the investigation of abuse, neglect, and exploitation in community mental health and mental retardation centers.

During the public comment period, TDPRS received comments from the Texas Department of Mental Health and Mental Retardation, the Center for Health Care Services, the Texas Council of Community Mental Health and Mental Retardation Centers, Inc., Advocacy, Incorporated, and several individuals. A summary of the comments and TDPRS's responses follow:

Comment concerning §710.42, Application: A commenter thought the language in this section applied only to "adult protective services" investigations of alleged abuse and therefore would not apply to other TDPRS investigative departments.

Response: This section does apply only to adult protective services investigations and does not apply to other TDPRS investigative departments.

Comments concerning §710.43, Definitions:

1) A commenter thought the definition of "adult" should address emancipated minors who have the decision making authority of an adult.

Response: Although persons who are under 18 years of age and are emancipated minors are addressed in the definition of a "child," for the sake of clarify, the definition of "adult" is changed to read "A person 18 years of age or older, or a person under 18 years of age who is or has been married or who has had the disabilities of minority removed for general purposes."

2) A commenter suggested that the definition of "agent" be expanded to read "an individual who is not an employee of a community center or contractor but working under the auspices of the community center or contractor, such as a consultant, volunteer or student."

Response: TDPRS agrees and has amended the language.

3) A commenter thought that the definition of "clinical practice" should be broadened to include licensed professionals other than physicians, dentists, registered nurses, and licensed vocational nurses.

Response: TDPRS agrees and has amended the definition to include all licensed professionals.

4) A commenter thought that the definition of "confirmed" should refer to the preponderance of "creditable" evidence.

Response: Preponderance of evidence is defined within this section as "the greater weight of evidence, or evidence which is more credible and convincing to the mind."

5) A commenter noted that in many community centers, the term CEO is used to describe the director, rather than executive director.

Response: Section 534.010 of the Health and Safety Code refers to the head of a community center as the executive director.

6) Several commenters recommended that a definition of "legally authorized representative (LAR)" be added and references to legal guardian and parent be deleted.

Response: "Legally authorized representative" is a broader term and less descriptive than the current language throughout the rules, which refers to the (alleged) victim, guardian, or parent (if the (alleged) victim is a child), as appropriate.

7) A commenter thought that the definition of "person served" excluded some persons who receive services from a community center and who meet the definition of a disabled person as defined in Human Resources Code, Chapter 48.

Response: TDPRS agrees and has amended the definition to include such persons.

8) Several commenters recommended changing the term "person served" to "individual served."

Response: The term "person served" is used in the TDMHMR companion rule, TAC 404B, and TDPRS believes consistency between the two rules will reduce confusion.

9) A commenter noted that there was inconsistency between the proposed TDPRS rule and the MHMR draft community center abuse rule in the definition of "serious physical injury." The proposed TDPRS rule included a first degree burn as a serious physical injury, while the MHMR draft rule does not.

Response: TDPRS acknowledges the inconsistency and has revised the rule to be consistent with the MHMR draft rule.

10) A commenter noted that the definition of "victim" would be clearer if it was clarified to say, "A person served who is reported to have been abused, neglected, or exploited."

Response: TDPRS agrees and has revised the rule.

Comments concerning §710.44, Abuse, Neglect, and Exploitation of an Adult Defined:

1) In §710.44(a)(2), several commenters requested that certain language from the definition of neglect in the Texas Family Code be added to the definition of neglect of an adult. The commenters explained that although some individuals with mental retardation are considered adults because of their age in years, they may function at the level of an infant, and therefore require the same protections as a child.

Response: The definition of "neglect of a child" parallels the statutory definition in the Texas Family Code, §261.001(4), and applies to persons 17 years of age and under. The definition of "neglect" in §710.44(a)(2) provides adequate and appropriate protection for adults with mental retardation including those described by the commenters.

2) In §710.44(a)(2)(C), a commenter noted that this section, in part, defines neglect as the failure to provide a safe environment for a person served, including the failure to maintain adequate numbers of appropriately trained staff. Later, in §710.44 (b)(3) when describing what abuse, neglect, or exploitation does not include, the rule states that "complaints related to the failure to maintain adequate numbers of appropriately trained staff that do not relate to a specific incident or allegation involving a specific person served" ... are referred to the executive director. The commenter recommends that this qualifying language be added to the definition of neglect.

Response: The definition of neglect is consistent with the definition found in the federal Protection and Advocacy for Mentally Ill Individuals Amendments Act of 1991.

Comments concerning §710.46, Responsibilities of Community Centers:

1) In §710.46(a), a commenter thought that the language directing employees, agents, and contractors to report allegations not under the jurisdiction of this rule to the appropriate branch of TDPRS or another state agency, was confusing and should be deleted.

Response: The TDMHMR companion rule, Title 25, Texas Administrative Code, Chapter 404, Subchapter B, directs local authorities to clearly identify and display for providers the agency with investigatory responsibility in each of the provider's programs.

2) In §710.46(a), several commenters note that this section does not address notification of the legal guardian or parent of the person served that an allegation of abuse has been made.

Response: The executive director of the community center is required to make such notification as specified in 25 TAC §404.47(a).

3) In §710.46(b), regarding the preservation of evidence, a commenter recommended that this section be amended to state, "Each community center shall require of its employees, contractors, and agents that any evidence related to an allegation is appropriately preserved and protected in accordance with instructions from TDPRS."

Response: TDPRS agrees and has revised the rule.

Comments concerning §710.47, Adult Protective Services (APS) Investigator:

1) In §710.47(b), a commenter recommended that language regarding training be deleted as it adds nothing of value and is not supported in the stated purpose of the rule.

Response: TDPRS feels it is appropriate to make a statement in the rule regarding the scope of investigator training. Further, a statement regarding training directly relates to the purpose of this rule which is in part to " ... define abuse, neglect, and exploitation ... and to describe procedures for its report and investigation."

2) In §710.47(b), a commenter suggested that PMAB techniques and restraint/seclusion policies be added to the training elements listed in this section.

Response: TDPRS disagrees. The purpose of this section is not to list specific training elements but rather to make a general

statement as to training requirements for investigators. PMAB and restraint/seclusion policies are routinely covered in Basic Job Skills Training along with many other equally important policies. TDPRS prefers not to include a list of training elements in the rule.

3) In §710.47(c)(1), a commenter recommended that language describing notification of the executive director of an allegation be modified to executive director "or designee."

Response: Section 710.43 defines executive director as "the head of a community center or a staff member temporarily or permanently appointed to assume the designated responsibilities of the executive director."

4) In §710.47(c)(3), a commenter recommended that the department's notification of law enforcement be consistent with statutory requirements, no more, no less.

Response: TDPRS agrees. Historically, stakekholders have wanted TDPRS to notify law enforcement of potential abuse at the beginning of an investigation to enhance the law enforcement agency's ability to collect evidence and build a criminal case. This "up-front" notification exceeds the requirements for law enforcement notification found in HRC §48.081(g) which states, "If the department's investigation under this section reveals that an elderly or disabled person has been abused by another person in a manner that constitutes a criminal offense under any law, including Section 22.04, Penal Code, a copy of the investigation shall be submitted to the appropriate law enforcement agency." TDPRS has amended the language in this section to be consistent with statutory requirements and yet maintain prompt notification in the likelihood of a criminal case.

5) In §710.47(d)(1), a commenter requests that the term "alleged incidents" be changed to "allegations" for consistency in language.

Response: TDPRS agrees and has made this change.

6) In §710.47(d)(1)(A), a commenter states that "initiation" of an investigation should be defined as a face-to-face interview with the alleged victim, reporter or witness.

Response: TDPRS has set forth requirements for face-to-face contact with the alleged victim in the priority system described in §710.47(d)(1)(B). TDPRS has received no comments objecting to the priority system. In addition to the requirements set forth in the priority system, an investigator is required to "initiate" the investigation by contacting the alleged victim or an individual with knowledge of the safety and welfare of the alleged victim within 24 hours, regardless of the assigned priority. This language is consistent with the language in 40 TAC, Chapter 710, Subchapter A (relating to Abuse, Neglect, and Exploitation of Persons Served by TDMHMR Facilities and State-Operated Community Services) and §48.087 of the Human Resources Code.

7) In §710.47(d)(1)(D) and (E), several commenters state that whenever an allegation involves the clinical practice of a licensed professional, the APS investigator should always report the allegation to the appropriate licensing authority, even if the center has an established professional review process.

Response: TDPRS agrees and has amended the definition to require that allegations involving clinical practice of a licensed professional always be reported to the appropriate licensing authority.

8) In §710.47(d)(1)(D) and (E), one commenter recommended that the language regarding allegations involving the clinical practice of licensed professionals be clarified to explain when TDPRS will and will not conduct an investigation.

Response: TDPRS agrees and has added this information.

9) In §710.47(d)(3), one commenter stated that this section should read " ...a finding of inconclusive shall be made ..." rather than " ...a finding of inconclusive may be made..." indicating that in appropriate situations such a finding is mandatory rather than optional.

Response: TDPRS agrees and has made the change.

Comments concerning §710.48, Completion of Investigation:

1) In §710.48(b)(1), a commenter recommended that the name of the (alleged) perpetrator be added to the list of information identified as being included in an investigative report provided to the executive director of a community center. This information is currently provided in an investigative report, but for consistency between the TDPRS and MHMR rules, it was suggested that this information be added.

Response: TDPRS agrees and has added this information.

2) In §710.48(b)(1)(G), a commenter recommended that the term "incident" be replaced with "allegation" in regard to classifying incidents in accordance with the Texas Family Code.

Response: Allegations are often changed or modified as information is gathered during the investigative process. In such situations, it would be inaccurate to classify an incident based on the initial allegation rather than the incident itself.

3) In §710.48(h)(2), a commenter noted that the proposed language implied that anyone who is notified of an allegation has the right to request an appeal of the finding. Of the persons notified of the finding by the executive director, only the (alleged) victim/guardian has the right to appeal the finding. Therefore it would be clearer to say, "The executive director is responsible for notifying the (alleged) victim, guardian, or parent (if the (alleged) victim is a child) of the finding of the investigation and of the method of appealing the finding."

Response: TDPRS agrees and has made the change.

4) In §710.48(h)(2), a commenter stated that in addition to notifying the (alleged) victim and guardian of the finding of the investigation and method of appealing the finding, the executive director should also notify Advocacy, Incorporated, in instances where Advocacy, Incorporated, is representing an individual who is legally competent but whose factual competency is in question.

Response: TDPRS agrees and has modified the language to state that the executive director will notify Advocacy, Incorporated, if the executive director is aware that Advocacy, Incorporated is representing the (alleged) victim.

Comments concerning §710.49, Community Center Contractors:

1) In §710.49(a)(1), a commenter recommended that the language in this section be modified to read, "An allegation against a contractor or an employee or agent of a contractor shall be reported to the Texas Department of Protective and Regulatory Services ..."

Response: TDPRS agrees and the definition has been amended to reflect this change.

2) In §710.49(a)(4), a commenter recommended that for consistency with 25 TAC, Chapter 417K (relating to Abuse, Neglect, and Exploitation in TDMHMR Facilities) the executive director as well as the contractor CEO should be able to request a review in cases involving contractor employees.

Response: TDPRS agrees. Section 710.51(a) has been amended to clarify that both the executive director and contractor CEO may request a review of the finding.

3) In §710.49(b), a commenter questioned whether community centers actually contract with Independent School Districts to provide education services to persons served, and suggests that if this is not occurring, that the reference be deleted.

Response: TDPRS agrees and has deleted the language.

Comments concerning §710.50, Functions of the Office of Adult Protective Services:

1) One commenter recommended that this rule be deleted as it adds nothing of value and is not supported in the stated purpose of the rule.

Response: TDPRS feels that this language is appropriate since it addresses the development and enforcement of procedures for investigations.

2) One commenter recommended that "State" be added to this title to clarify that the section refers to the state office rather than regional offices of Adult Protective Services.

Response: TDPRS agrees and has modified the title to read, "Functions of the State Office Division of Adult Protective Services."

3) One commenter recommended that this section be modified to read "monitor and evaluate investigations for quality assurance ..."

Response: TDPRS agrees and the language has been amended.

Comments concerning §710.51, Request for Review of Finding; Request for Appeal:

1) One commenter noted that this section does not include an appeal process for the alleged perpetrator.

Response: TDPRS is aware of this concern and is working to establish a system which will afford community center employees another level of review when in disagreement with the TDPRS decision.

2) One commenter requested that the department amend its process for internal reconsideration of an investigation finding to allow for inclusion of mental health and mental retardation service experts from the Texas Department of MHMR.

Response: TDPRS seeks guidance from the Texas Department of MHMR when appropriate. Ultimately, a decision as to whether an incident meets the criteria for abuse or neglect is based on the definitions found in §§710.44 and 710.45.

3) One commenter suggested that the department verify with field representatives that the request for review form adequately records the information on which the center has based its rejection of the initial finding or by which the department will consider an alternative conclusion.

Response: TDPRS's Request for Review of Finding form has been designed to elicit the information needed to process a request for a review.

4) One commenter noted that the executive director is allowed 14 days to request a review of a finding, while the reporter, (alleged) victim, and legal guardian are allowed 30 days to request an appeal. The commenter recommended that for consistency, the time allowed for requesting a review or an appeal of the finding be the same.

Response: TDPRS agrees and has amended §710.51(b) to allow 14 rather than 30 calendar days to request an appeal. Section 710.51(a) and (b) have been further amended to allow additional time for requesting a review or appeal beyond 14 calendar days for extenuating circumstances.

5) In §710.51(a)(1) and (2), one commenter recommended that the requirement for the executive director to send a copy of the investigative report when requesting a review of the finding is not necessary.

Response: A request for review is to be completed within 14 calendar days after receipt of the request. When a copy of the investigative report accompanies the request for review, the review process can begin immediately. Otherwise, the reviewer has to wait for the regional TDPRS office where the case was worked to copy and mail the it to Austin which may take several days.

6) In §710.51(b), a commenter recommended that the language in this section be changed to state, "The reporter and the (alleged) victim, legal guardian, or parent (if the (alleged) victim is a child) may request an appeal of the finding of an investigation conducted by APS ..."

Response: TDPRS agrees and has amended the language to reflect this.

7) In §710.51(b), a commenter requested that Advocacy, Incorporated be added to those individuals who may request an appeal of a finding as there may be instances when an individual who is legally competent but considered factually incompetent may be represented by Advocacy, Incorporated.

Response: TDPRS agrees to add Advocacy, Incorporated, to those individuals who may request an appeal of a finding in instances when a person served is legally competent but considered factually incompetent and is represented by Advocacy, Incorporated.

8) In §710.51(b)(4), one commenter requested that the reporter and Advocacy, Incorporated, be added to those individuals who are notified of the appeal decision.

Response: TDPRS agrees to add the reporter to those individuals who are notified of an appeal decision, and to add Advocacy, Incorporated, if Advocacy, Incorporated, is representing the (alleged) victim and TDPRS knows that Advocacy, Incorporated, is representing the (alleged) victim.

Comments concerning §710.52, Confidentiality of Investigative Process and Report:

1) In §710.52(a), one commenter recommended that the cited references from the Human Resources Code be described in the text of the rule.

Response: TDPRS avoids descriptions of statutory references in agency rules to avoid having to amend the rules following statutory changes.

2) In §710.52(c), several commenters requested that language be added that requires the executive director to notify the (alleged) victim and guardian of the outcome of an investigation.

Response: Section 710.48(h)(2) directs the executive director to notify the (alleged) victim and guardian of the finding of an investigation.

3) In §710.52(c), one commenter expressed concern that the executive director is authorized to release a de-identified copy of an investigation to an alleged perpetrator, citing possible retaliatory action against witnesses as the reason. The commenter requested that release of such information should only occur when a perpetrator is initiating grievance proceedings.

Response: The (alleged) perpetrator is legally entitled to a copy of the investigative report.

4) In §710.52(c), one commenter requested that language be added to clarify that the executive director may release a copy of the investigative report to Advocacy, Incorporated, if Advocacy, Incorporated, is representing the (alleged) victim.

Response: The language has been amended to reflect this change.

Comments concerning §710.55, Distribution:

1) One commenter noted that the Texas Department of Mental Health and Mental Retardation should be added to the distribution list of agencies receiving a copy of this subchapter.

Response: TDPRS agrees and has made the change.

2) One commenter noted that the executive director should not be responsible for disseminating copies of TDPRS's rules to advocacy organizations.

Response: TDPRS agrees. Advocacy organizations have been deleted from the list in this subsection. TDPRS will disseminate copies of its rules to advocacy organizations.

In addition to changes made as a result of comment, in §710.48(b)(4), TDPRS has changed the acronym "TDPRS" to "TDMHMR."

The repeals are adopted under the Human Resources Code, Title 2, Chapter 48, which provides the department with the right to investigate reports of abuse, exploitation, or neglect of an elderly or disabled person.

The repeals implement §48.081(c) of the Human Resources Code, which gives TDPRS the authority to investigate in community mental health and mental retardation centers.

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 August 31, 1998.

TRD-9813762

C. Ed Davis

Deputy Director, Legal Services

Texas Department of Protective and Regulatory Services

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Proposal publication date: May 8, 1998

For further information, please call: (512) 438–3765

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Subchapter B. Abuse, Neglect, and Exploitation of Persons Served by Community Mental Health and Mental Retardation Centers

40 TAC §§710.41–710.55

The new sections are adopted under the Human Resources Code, Title 2, Chapter 48, which provides the department with the right to investigate reports of abuse, exploitation, or neglect of an elderly or disabled person.

The new sections implement §48.081(c) of the Human Resources Code, which gives TDPRS the authority to investigate in community mental health and mental retardation centers.

§710.43. Definitions.

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

(1) Adult - A person 18 years of age or older, or a person under 18 years of age who is or has been married or who has had the disabilities of minority removed for general purposes.

(2) Adult Protective Services (APS) investigator - An employee of the Texas Department of Protective and Regulatory Services with expertise and demonstrated competence in conducting investigations.

(3) Agent - An individual who is not an employee of a community center or contractor, but who is working under the auspices of the community center or contractor, such as a consultant, volunteer, or student.

(4) Allegation - A report by a person believing or having knowledge that a person served has been or is in a state of abuse, exploitation, or neglect as defined in this subchapter.

(5) Chief executive officer (CEO) - The head of any organization or entity associated by contract in a working alliance with a community center to provide community-based services.

(6) Child - A person under 18 years of age who is not and has not been married and who has not had the disabilities of minority removed for general purposes.

(7) Clinical practice - Relates to issues of potentially or allegedly unsafe professional practice. These include acts or omissions of the licensed professional which result from a lack of competence in his/her profession, impaired status, or failure to provide adequate professional care to a person served.

(8) Community center - A community MHMR center established under the Texas Health and Safety Code, Title 7, Chapter 534, Subchapter A.

(9) Confirmed - Term used to describe an allegation which is supported by the preponderance of evidence.

(10) Contractor - Any organization or entity associated by contract in a working alliance with a community center to provide services to a person served.

(11) Department - The Texas Department of Protective and Regulatory Services.

(12) Employee - Any person employed by a community center or contractor for a specific job position or to be part of a

"pool" for specific job positions; expected to work on a continuous basis, seasonally, or to perform work of a transitory nature or foreseeable end and meet certain minimum performance and time-on-job expectations; and paid from a budgeted position in the salary schedule and through a payroll process. A person receiving payment as a "vocational trainee" in a properly authorized vocational training program is not considered an employee.

(13) Executive director - The head of a community center or a staff member temporarily or permanently appointed to assume the designated responsibilities of the executive director.

(14) Incitement - To spur to action or instigate into activity; implies responsibility for initiating the actions of another.

(15) Inconclusive - Term used to describe an allegation leading to no conclusion or definite result due to lack of witnesses or other relevant evidence.

(16) Mental health service provider - Pursuant to §81.001 of the Texas Civil Practices and Remedies Code, an individual, licensed or unlicensed, who performs or purports to perform mental health services, including a:

(A) licensed social worker as defined by §50.001, Human Resources Code;

(B) chemical dependency counselor as defined by §1, Chapter 635, Acts of the 72nd Legislature, Regular Session, 1991 (Article 4512o, Vernon's Texas Civil Statutes);

(C) licensed professional counselor as defined by §2, Licensed Professional Counselor Act (Article 4512g, Vernon's Texas Civil Statutes);

(D) licensed marriage and family therapist as defined by §2, Licensed Marriage and Family Therapist Act (Article 4512c-1. Vernon's Texas Civil Statutes);

(E) member of the clergy;

(F) physician who is "practicing medicine" as defined by §1.03, Medical Practice Act (Article 4495b, Vernon's Texas Civil Statutes);

(G) psychologist offering "psychological services" as defined by §2, Psychologists' Certification and Licensing Act (Article 4512c. Vernon's Texas Civil Statutes); or

(H) registered nurse or licensed vocational nurse as defined by law.

(17) Non-serious physical injury - Any injury determined not to be serious by the appropriate medical personnel who examined the person served. Examples of non-serious physical injuries include, but are not limited to, the following: superficial laceration, contusion, or abrasion.

(18) Perpetrator - The person who has committed an act of abuse, neglect, or exploitation.

(19) Perpetrator unknown - Term used to describe instances in which abuse or neglect is evident but positive identification of the responsible person(s) cannot be made, and in which self-injury has been eliminated as the cause.

(20) Person served - Any person registered or assigned in the Client Assignment and Registration (CARE) system or who is otherwise served by the center and is disabled as defined in Chapter 48, Human Resources Code.

(21) Preponderance of evidence - The greater weight of evidence, or evidence which is more credible and convincing to the mind.

(22) Prevention and Management of Aggressive Behavior (PMAB) - The Texas Department of Mental Health and Mental Retardation's proprietary risk management program which uses the least intrusive, most effective options to reduce the risk of injury for persons served and for staff from acts or potential acts of aggression.

(23) Reporter - The person filing a report of alleged abuse, neglect, or exploitation.

(24) Serious physical injury - Any injury determined to be serious by the appropriate medical personnel who examined the person served. Examples of serious physical injuries include, but are not limited to, the following: dislocation of any joint; internal injury; nonsuperficial contusion; concussion; second or third degree burn; or any laceration requiring sutures.

(25) Sexual abuse - Any sexual activity involving an employee, agent, or contractor and a person served. Sexual activity includes but is not limited to:

(A) kissing with sexual intent;

(B) hugging with sexual intent;

(C) stroking with sexual intent;

(D) fondling with sexual intent;

(E) oral sex or sexual intercourse;

(F) request or suggestion or encouragement for the performance of sex;

(G) sexual exploitation as defined in this section; and

(H) sexual assault as defined in §22.011 of the Texas Penal Code.

(26) Sexual exploitation - A coercive, manipulative, or otherwise exploitative pattern, practice, or scheme of conduct, which may include sexual contact, that can be reasonably construed as being for the purposes of sexual arousal or gratification or sexual abuse of any person. The term does not include obtaining information about a patient's sexual history within standard accepted practice.

(27) Unconfirmed - Term used to describe an allegation in which a preponderance of evidence exists to prove that abuse, neglect, or exploitation did not occur.

(28) Unfounded - Term used to describe an allegation that is spurious or patently without factual basis.

(29) Victim - A person served who is reported to have been abused, neglected, or exploited. 710.46. Responsibilities of Community Centers.

§710.46. Responsibilities of Community Centers.

(a) Each community center shall require that its employees, agents, and contractors who suspect or have knowledge of abuse, neglect, or exploitation of a person served make a verbal report to the Texas Department of Protective and Regulatory Services (TDPRS) immediately, if possible, but in no case more than one hour after suspicion or after learning of the incident, by calling 1-800-647-7418, unless jurisdiction to investigate rests with another investigative branch of TDPRS or with another state agency.

(b) Each community center shall require its employees, contractors, and agents to appropriately preserve and protect any

evidence related to an allegation in accordance with instructions from TDPRS.

§710.47. Adult Protective Services (APS) Investigator.

(a) APS investigator. An APS investigator will conduct all investigations of abuse, neglect, and exploitation, unless another investigative branch of the department or another state agency has responsibility for the investigation.

(b) Training. APS investigators will receive appropriate training in issues related to the efficient and effective investigation of allegations of abuse, neglect, and exploitation. Investigators will be oriented to issues pertaining to individuals with disabilities and how to communicate effectively with them in the community.

(c) Notifications. Upon receiving an allegation, the person receiving the intake or the APS investigator will:

(1) immediately notify the executive director of the allegation without revealing the identity of the reporter. Pursuant to Chapter 81 of the Texas Civil Practices and Remedies Code, if the allegation involves sexual exploitation of a person served by a mental health services provider, the name of the reporter shall be released to the executive director;

(2) immediately notify the executive director as to whether the allegation will be reported to a law enforcement agency;

(3) immediately, if possible, but in no case more than one hour later, report allegations involving serious physical injury, sexual abuse, or death of an adult person served to the appropriate local or state law enforcement agency; and

(4) immediately, if possible, but in no case more than one hour later, report all allegations of abuse or neglect of a child to the appropriate local or state law enforcement agency.

(d) Responsibilities.

(1) The APS investigator shall fully investigate allegations of abuse, neglect, or exploitation as follows.

(A) Investigations shall be initiated within 24 hours of receipt of a report by the Texas Department of Protective and Regulatory Services (TDPRS). Initiation is defined as an interview with the alleged victim or an individual who has current knowledge of the safety and welfare of the alleged victim.

(B) Investigations shall be conducted in accordance with the following priority system:

(i) Priority I reports are those in which the alleged incident occurred seven calendar days or less prior to the date the report was received by TDPRS. Face-to-face contact with the alleged victim is required within 24 hours of receipt of the report by TDPRS.

(ii) Priority II reports are those in which the alleged incident occurred more than seven but less than 90 calendar days prior to the date the report was received by TDPRS. Face-to- face contact with the alleged victim is required within two calendar days of receipt of the report by TDPRS.

(iii) Priority III reports are those in which the alleged incident occurred 90 calendar days or more prior to the date of the report to TDPRS. Face-to-face contact with the alleged victim is required within five calendar days of receipt of the report by TDPRS.

(C) Allegations by an anonymous reporter will be accepted and investigated following the same procedures that are used when the reporterþs identity is known.

(D) If the APS investigator determines that the allegation involves the clinical practice of a licensed professional, then the APS investigator shall refer the professional's action to the executive director for professional review, if the center provides one, and to the appropriate licensing authority.

(E) The APS investigator will pursue an investigation if the allegation involves the clinical practice of a licensed professional other than a physician, dentist, registered nurse, or licensed vocational nurse, or if the allegation is against a licensed professional but does not involve clinical practice.

(2) If at any point during the course of the investigation it becomes apparent (via written witness statements and other evidence gathered) that the allegation is spurious or patently without factual basis, the investigation may be closed as unfounded. The reason for this determination, based on specific evidence, shall be included in the report.

(3) If there is not a preponderance of evidence to indicate that an allegation should or should not be confirmed, due to lack of witnesses or other evidence, a finding of inconclusive shall be made.

(4) A designation of perpetrator unknown may be used:

(A) at the time of intake to indicate that the identity of an alleged perpetrator is unknown; and

(B) at the conclusion of an investigation to describe instances in which positive identification of the responsible person(s) cannot be made, and in which self-injury has been eliminated as the cause.

§710.48. Completion of Investigation.

(a) The adult protective services (APS) investigator shall complete investigations within established timeframes as follows:

(1) Priority I and II investigations in residential programs shall be completed within 14 calendar days of receipt of the report by the Texas Department of Protective and Regulatory Services (TDPRS). If the 14th day falls on a weekend or holiday, the report shall be completed by the next business day.

(2) Priority I and II investigations in non-residential programs shall be completed within 21 calendar days of receipt of the report by TDPRS. If the 21st day falls on a weekend or holiday, the report shall be completed by the next business day.

(3) Priority III investigations in both residential and non-residential programs shall be completed within 21 calendar days of receipt of the report by TDPRS. If the 21st day falls on a weekend or holiday, the report shall be completed by the next business day.

(b) Upon completion of an investigation, the APS investigator shall submit to the executive director, a copy of:

(1) the investigative report, with any information that would reveal the identity of the reporter concealed, including:

(A) a statement of the allegation(s);

(B) a summary of the investigation;

(C) an analysis of the evidence;

(D) the investigator's finding that the allegation is confirmed, unconfirmed, inconclusive, or unfounded;

(E) recommendations resulting from the investigation;

(F) an opinion as to how the allegation(s) might be classified in accordance with Title 25, Part II, TAC, Chapter 404, Subchapter B, Exhibit B;

(G) a determination as to how the incident should be classified in accordance with §261.001. of the Texas Family Code, if the incident involves a child; and

(H) the name of the (alleged) perpetrator, if known;

(2) photographs relevant to the investigation, including photographs depicting the existence of injuries, or the non-existence of injuries, when appropriate;

(3) all witness statements and supporting documents; and

(4) a TDMHMR "Client Abuse/Neglect Report" (AN-1-A), reflecting the finding of the investigation.

(c) Pursuant to Chapter 81 of the Texas Civil Practices and Remedies Code, if the incident involves sexual exploitation of a person served by a mental health services provider, the name of the reporter shall not be concealed in the report provided to the executive director.

(d) If additional time is required to complete the investigation, the APS investigator may request an extension by submitting a TDPRS Extension Request form to the regional APS program administrator. An extension from one to 14 days may be granted depending on the needs of the case. The executive director shall be notified of all extensions.

(e) If the investigation reveals that a person served has been abused, neglected, or exploited in a manner that constitutes a criminal offense under any law, including §22.04, Penal Code, the APS investigator shall submit a copy of the investigation to the appropriate law enforcement agency.

(f) If an allegation is confirmed and the perpetrator is a physician, dentist, registered nurse, or licensed vocational nurse, the APS investigator shall forward a copy of the completed investigative report to the State Office of Adult Protective Services. Such reports will then be forwarded to the licensing authority for the discipline under review, as required by law.

(g) The investigator will notify the reporter in writing of the outcome of the investigation and the method of appealing the outcome of the investigation.

(h) The executive director is responsible for notifying:

(1) the (alleged) victim, guardian, or parent (if the (alleged) victim is a child), of the finding of the investigation and of the method of appealing the finding;

(2) Advocacy, Incorporated, of the finding of the investigation and of the method of appealing the finding if the executive director is aware that Advocacy, Incorporated, is representing the (alleged) victim; and

(3) the (alleged) perpetrator of the finding of the investigation.

(i) Within 14 calendar days of receipt of the investigative report or the final finding, the executive director is responsible for forwarding a completed Client Abuse and Neglect Report (AN-1-A) form to the APS investigator.

(j) Upon request, the APS investigator will attend and participate in a community center grievance hearing related to an investigation the APS investigator conducted.

§710.49. Community Center Contractors.

For purposes of reporting and investigating abuse, neglect, and exploitation by contractors, the procedures outlined in this subchapter shall be followed.

(1) An allegation against a contractor or an employee or agent of a contractor shall be reported to the Texas Department of Protective and Regulatory Services (TDPRS) in accordance with §710.46 of this title (relating to Responsibilities of Community Centers).

(2) Upon notification of an allegation, the adult protective services (APS) investigator shall immediately notify the contractor chief executive officer (CEO) and the executive director of the community center. If the contractor CEO is the alleged perpetrator, the APS investigator only notifies the executive director of the community center.

(3) Upon completion of the investigation the APS investigator shall submit a copy of the investigative report and supporting documents to the contractor CEO and the executive director of the community center. If the contractor CEO is the alleged perpetrator, the APS investigator only submits a copy of the report to the executive director of the community center.

§710.50. Functions of the State Office Division of Adult Protective Services.

The functions of the State Office Division of Adult Protective Services related to community center investigations are to:

(1) develop policy related to investigations in community centers;

(2) monitor and evaluate investigations for quality assurance and compliance with adult protective services (APS) program standards;

(3) provide consultation and technical assistance to APS regional staff; and

(4) coordinate with the Texas Department of Protective and Regulatory Services' (TDPRS's) professional development division in the development of training curricula.

§710.51. Request for Review of Finding; Request for Appeal.

(a) If the executive director or contractor CEO believes the methodology used in conducting an investigation was flawed or disagrees with the finding of the investigation, the executive director or contractor CEO may request in writing a review of the case by filing a Texas Department of Protective and Regulatory Services (TDPRS) Request for Review of Finding form within 14 calendar days after receiving the report from TDPRS. TDPRS may accept a request for review after 14 calendar days for reasons determined by TDPRS to be appropriate, e.g., a grievance proceeding or due process hearing in which additional information crucial to the investigation is revealed. A request for review will not be accepted for review if it is postmarked more than 30 days from the date the report was received by the community center or contractor.

(1) A request related to methodology is forwarded by the executive director or contractor CEO, along with a copy of the investigative report, to the regional adult protective services (APS) program administrator. A review will be completed within 14 calendar days. The regional APS program administrator will notify the executive director and the contractor CEO, if appropriate, in writing of the results of the review.

(2) A request related to the finding of an investigation, or to a methodological concern that was unable to be resolved at the regional level, is forwarded by the executive director or contractor CEO, along with a copy of the investigative report, to the Director of Adult Protective Services, Texas Department of Protective and Regulatory Services, P.O. Box 149030, E-561, Austin, Texas, 78714-9030. The review will be completed within 14 calendar days.

(3) If the contractor CEO is the alleged perpetrator, only the executive director of the community center may request a review of the finding.

(b) The reporter and the (alleged) victim, legal guardian, or parent (if the alleged victim is a child) may request an appeal of the finding of an investigation conducted by APS within 14 calendar days of notification of the finding. Advocacy, Incorporated, may request an appeal of a finding in instances in which a person served who is legally competent but considered factually incompetent is represented by Advocacy, Incorporated. TDPRS may accept a request for appeal after 14 calendar days for reasons determined by TDPRS to be appropriate, e.g., difficulty accessing a copy of the investigative report. A request for appeal will not be accepted for review if it is postmarked more than 30 days from the date the person requesting the appeal was notified of the finding. An appeal may be requested in writing to the Director of Adult Protective Services, State Office, Mail Code E-561, P.O. Box 149030, Austin, Texas, 78714-9030, or by calling 1-888-778-4766.

(1) The appeal shall be completed within 30 calendar days from the date of the request unless a review of the finding has been requested by the executive director or contractor chief executive officer (CEO). The appeal process will be postponed until the request for review has been completed, at which point it will be completed within 30 calendar days.

(2) The appeal process will include an analysis of the investigative report and all supporting documents and records.

(3) The reviewer makes a decision to sustain, alter, or reverse the original finding of the APS investigator based on the same criteria used by APS investigators to conduct investigations and reach conclusions, or to re-open the investigation.

(4) Within 30 calendar days after the appeal process is completed, the reviewer shall document the appeal decision and notify in writing:

(A) the reporter;

(B) the (alleged) victim, guardian, or parent (if the (alleged) victim is a child); and

(C) Advocacy, Incorporated, if TDPRS is aware that Advocacy, Incorporated, is representing the (alleged) victim.

(5) A copy of the appeal decision shall be sent to the APS investigator to be filed with the original investigative report.

(6) A copy of the appeal decision shall be sent to the executive director and/or the contractor CEO, as appropriate.

(7) If the person who requested an appeal of the finding is not satisfied with the appeal decision, or wishes to file a complaint of a different nature, the person may contact the Ombudsman Office of the Texas Department of Protective and Regulatory Services by calling 1- 800-720-7777, or by writing to Ombudsman Office, Mail Code Y-946, P.O. Box 149030, Austin, Texas, 78714-9030.

§710.52. Confidentiality of Investigative Process and Report.

(a) The reports, records, and working papers used by or developed in the investigative process and the resulting final report regarding abuse, neglect, and exploitation are confidential and may be disclosed only as provided in §§40.005, 48.081, and 48.101 of the Human Resources Code, §261.201 of the Texas Family Code, and other rules of this agency in the Texas Administrative Code.

(b) Pursuant to Chapter 81 of the Texas Civil Practices and Remedies Code, if the incident involves sexual exploitation of a person served by a mental health services provider, a copy of the investigative report and all supporting documents, in which the identity of the reporter has not been concealed, shall be released to the executive director.

(c) Upon request, the executive director may release a copy of the investigative report, with any information that might reveal the identity of the reporter and other persons served concealed, to the:

(1) (alleged) victim served, legal guardian, or parent (if the (alleged) victim is a child);

(2) (alleged) perpetrator; and

(3) Advocacy, Incorporated, if representing the (alleged) victim.

§710.55. Distribution.

(a) This subchapter shall be distributed to:

(1) members of the Texas Board of Protective and Regulatory Services;

(2) the Texas Department of Protective and Regulatory Services (TDPRS) executive, management, and program staff;

(3) chairpersons of boards and executive directors of community centers;

(4) interested advocacy organizations;

(5) the Texas Board of Medical Examiners;

(6) the Texas Board of Nurse Examiners;

(7) the Texas Board of Licensed Vocational Nurse Examiners; and

(8) the Texas Department of Mental Health and Mental Retardation.

(b) The executive director of each community center shall be responsible for disseminating copies of this subchapter to:

(1) appropriate staff;

(2) agents;

(3) contractors; and

(4) any person served, employee, or other person desiring a copy.

(c) The executive director of the community center shall be responsible for ensuring that copies of this subchapter are prominently displayed in center 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 August 31, 1998.

TRD-9813763
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
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For further information, please call: (512) 438–3765

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Chapter 725. General Licensing Procedures

Subchapter A. Definitions

40 TAC §725.1001

The Texas Department of Protective and Regulatory Services (TDPRS) adopts amendments to §§725.1001, 725.2006, 725.2036, 725.2046; and adopts new §§725.1808 and 725.1809, without changes to the proposed text as published in the July 10, 1998, issue of the *Texas Register* (23 TexReg 7185).

The justification for the amendments to §§725.1001 and 725.2046 is to define primary caretaker and to clarify that the registered caregiver must be the primary caretaker in the home as stipulated in the Human Resources Code, §42.002(9). The justification for new §725.1808 is to require that the probation notice be posted in the facility or family home so that parents and others can view it. The justification for the amendment to §725.2006 and new §725.1809 is to show the correct address for submitting requests for appeals of a denied application and to establish that an applicant must wait a period of one year to reapply if three previous applications have been received by licensing staff and returned as incomplete within one year. The justification for the amendment to §725.2036 is to ensure that Licensing Division notices of inspection results are posted in the registered family home for parents to see.

The sections will function by ensuring that parents are allowed to see notices of noncompliances and probation and for applicants to plan appropriately before caring for children.

During the public comment period, TDPRS received comments from two providers. Both commenters were concerned about the language used in defining primary caretaker. They thought that the definition proposed could be interpreted to mean that the caretaker could never leave the home or have a substitute. The two commenters identified necessary absences such as a doctor's appointment or maternity care when one provider had her grandmother help out with the child care. When it was explained that this was not the interpretation, both commenters were satisfied. TDPRS is not revising the language of the rule because TDPRS considers the current language sufficiently clear for providers. Any questions raised can be interpreted by licensing staff during the application phase or monitoring phase of regulation. TDPRS also received comments from the Advisory Committee on Child Care Administrators and Facilities supporting the proposal.

The amendment is adopted under the Human Resources Code, Title 2, Chapter 42, which authorizes the department to administer general child-placing and child care licensing programs.

The amendment implements the Human Resources Code, §§42.001-42.077.

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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C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
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For further information, please call: (512) 438–3765

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Subchapter S. Administrative Procedures

40 TAC §725.1808, §725.1809

The new sections are adopted under the Human Resources Code, Title 2, Chapter 42, which authorizes the department to administer general child-placing and child care licensing programs.

The new sections implement the Human Resources Code, §§42.001-42.077.

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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C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
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For further information, please call: (512) 438–3765

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Subchapter U. Day Care Licensing Procedures

40 TAC §§725.2006, 725.2036, 725.2046

The amendments are adopted under the Human Resources Code, Title 2, Chapter 42, which authorizes the department to administer general child-placing and child care licensing programs.

The amendments implement the Human Resources Code, §§42.001-42.077.

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 732. Contracted Services

Subchapter L. Contract Administration

40 TAC §§732.240, 732.242–732.252, 732.254–732.256

The Texas Department of Protective and Regulatory Services (TDPRS) adopts amendments to §§732.240, 732.242-732.252, and 732.254-732.256; and adopts the repeal of §732.241, in its

Contracted Services chapter. The amendments to §§732.240 and 732.243 are adopted with changes to the proposed text as published in the July 10, 1998, issue of the *Texas Register* (23 TexReg 7189). The amendments to §§732.242, 732.244-732.252, and 732.254- 732.256, and the repeal of §732.241 are adopted without changes to the proposed text and will not be republished.

The justification for the amendments and repeal is to create one set of cost principles and guidelines for both residential child care contractors and purchase-of-service contractors. The basis of the principles and guidelines is found in the federal circulars.

The amendments and repeal will function by providing residential child care contractors with one set of rules for cost reporting and expenditures. Purchase-of-service contractors will no longer have differences between federal circulars and TDPRS's rules, unless the state specifically desires to be more restrictive than federal guidelines.

No comments were received regarding adoption of the sections. In §732.240(i)(5), TDPRS has changed the word "completed" to "completely" for clarification. In §732.243, TDPRS has deleted the parenthesis after the word "costs" for clarification.

The amendments are adopted under the Human Resources Code (HRC), Chapter 40, which describes the services authorized to be provided by the Texas Department of Protective and Regulatory Services; and authorizes the department to enter into agreements with federal, state, and other public or private agencies or individuals to accomplish the purposes of the programs authorized by the HRC; and grants authority to contract to that Department.

The amendments implement the HRC, Chapter 40, which authorizes the department to enter into agreements with federal, state, or other public or private agencies or individuals to accomplish the purposes of the programs authorized by the HRC and which authorizes the department to enter into contracts as necessary to perform any of its powers or duties.

§732.240. General Principles of Allowable and Unallowable Costs.

(a) The Texas Department of Protective and Regulatory Services (TDPRS) reimburses its contractors only for costs (both direct and indirect) which are allowable, reasonable, necessary, and properly allocated to the specific contract. The cost guidelines, principles, and definitions for allowable and unallowable costs (both direct and indirect) for purposes of preparing budgets, for expenditure purposes, and for cost-reporting purposes are the same. Those guidelines are published in federal and state regulations. Contractors receiving Title IV-E funding are required to be in compliance with 45 Code of Federal Regulations (CFR) Part 74 and 48 CFR Part 31 regarding the use and expenditure of Title IV-E funds. Contractors receiving Title IV-B funding are required to be in compliance with 45 CFR Part 92 regarding the use and expenditure of Title IV-B funds. All purchased client services contractors (both for-profits and nonprofits) are required to be in compliance with Office of Management and Budget (OMB) Circular A-110 (Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals and Other Non-Profit Organizations) and this section and §§732.242-732.256 of this title (relating to Contract Administration) regarding the guidelines for use and expenditure of funds received from TDPRS, which consist of federal and/or state revenues. If the contractor is a governmental entity, the contractor shall remain in compliance with OMB Circular A-87 (Cost Principles for State and Local Governments). If the contractor is either a for-profit entity or a nonprofit entity, the contractor is required to be in compliance with OMB Circular A-122 (Cost Principles for Nonprofit Organizations). In the event of any conflict or contradiction between or among the regulations referenced in this subsection, the regulations shall control in the following order of precedence:

(1) federal regulations - for Title IV-E funding, 45 CFR Part 74 and 48 CFR Part 81; for Title IV-B funding, 45 CFR Part 92;

(2) federal OMB circulars - OMB Circular A-110 and either OMB Circular A-87 or OMB Circular A-122, as applicable;

(3) state regulations - §§732.240 of this title (relating to General Principles of Allowable and Unallowable Costs) and §§732.242-732.256 of this title (relating to Contract Administration); and

(4) any other applicable departmental regulations.

(b) Only those items that represent an actual cash outlay, an accrued expense paid within 90 days of incurrence, or the compensation for the use of buildings, other capital improvements, and equipment on hand through a use allowance or depreciation are allowable. The value of donated goods or services (in-kind) are not allowable (i.e., unallowable). However, depreciation or a use allowance on a donated building, donated capital improvements, or donated equipment subject to ownership requirements and/or donor-imposed conditions is allowable. Contractors shall not use revenues from TDPRS to finance activities other than those activities specifically allowable under their contract with TDPRS. Unallowable uses of contract revenues from TDPRS include, but are not limited to, interfund loans/transfers, interdepartmental loans/transfers, intercompany loans/transfers, and employee loans not considered salary advances.

(c) Costs budgeted, expended, used, and/or reported by a contractor and/or paid by TDPRS must be consistent with generally accepted accounting principles (GAAP), which are those principles approved by the American Institute of Certified Public Accountants (AICPA). Internal Revenue Services (IRS) laws and regulations do not necessarily apply in the preparation of budgets, the expenditure and/or use of funds received from the department, and/or the reporting of costs to TDPRS. In cases where there are differences between TDPRS's rules, GAAP, IRS, or other authorities, TDPRS's rules take precedence.

(d) The contractor's accounting system must include an accurate and consistent method for gathering statistical information that properly relates the costs incurred to the units of service rendered.

(e) The contractor is responsible for designing and implementing fiscal policies and ensuring that financial data are collected, recorded, and analyzed as part of the delivery of service under a contract with TDPRS.

(f) Costs incurred under less-than-arms-length (related-party) transactions are allowable only up to the cost to the related party (see OMB Circulars A-87 and A-122). However, the cost must not exceed the price of comparable services, equipment, facilities, or supplies that could be purchased or leased elsewhere. The purpose of this principle is twofold: to avoid the payment of a profit factor to the contractor through the related organization (whether related by common ownership or control), and to avoid payment of artificially-inflated costs which may be generated from less-than-arms-length bargaining. The related organization's costs include all reasonable costs, direct and indirect, incurred in the furnishing of services, equipment, facilities, and supplies to the contractor. The intent is to treat the costs incurred by the related organization as if they were

incurred by the contractor itself. An exception is provided to the general rule applicable to related organizations and applies if the contractor demonstrates by convincing evidence to the satisfaction of TDPRS that certain criteria have been met. Those criteria are:

(1) The related organization is a bona fide separate corporation and not merely an operating division of the contractor's organization.

(2) A majority of the related organization's business activity of the type carried on with the contractor is transacted with other organizations not related to the contractor or the related organization by common ownership or control and there is an open, competitive market for the type of services, equipment, facilities, or supplies furnished by the related organization. In determining whether the business activities are of a similar type, it is important also to consider the scope of the business activity. The requirement that there be an open, competitive market is intended to assure that the item supplied has a readily discernible price that is established through arms-length bargaining by well-informed buyers and sellers.

(3) The charge to the contractor is in line with the charge of such services, equipment, facilities, or supplies in the open, competitive market and no more than the charge made under comparable circumstances to others by the related organization for such services, equipment, facilities, or supplies.

(g) In determining whether a contractor is related to a supplying organization, the tests of common ownership and control are to be supplied separately. Related to a contractor means that the contractor to a significant extent is associated or affiliated with, has control of, or is controlled by the organization furnishing the services, equipment, facilities, or supplies. Common ownership exists if an individual or individuals posses any ownership or equity in the contractor and the supplying organization. Control exists if an individual or an organization has the power, directly or indirectly, to significantly influence or direct the actions or policies of an organization or institution. If the elements of common ownership or control are not present in both organizations (i.e., the contractor and the supplying organization), then the organizations are deemed not to be related to each other. The existence of an immediate family relationship will create an irrebuttable presumption of relatedness through control or attribution of ownership or equity interests where the significance tests are met. The following persons are considered immediate family: husband and wife; natural parent, child, and sibling; adopted child and adoption parent; stepparent, stepchild, stepsister, and stepbrother; father-in-law, mother-in-law, sister-in-law, brother-in-law, son-in-law, and daughter-in-law; grandparent and grandchild; uncles and aunts by blood or marriage; nephews and nieces by blood or marriage; and first cousins by blood or marriage.

(1) A determination as to whether an individual (or individuals) or organization possesses ownership or equity in the contractor and the supplying organization, so as to consider the organizations related by common ownership, will be made on the basis of the facts and circumstances in each case. This rule applies whether the contractor or supplying organization is a sole proprietorship, partnership, corporation, trust or estate, or any other form of business organization, proprietary or nonprofit. In the case of a nonprofit organization, ownership or equity interest will be determined by reference to the interest in the assets of the organization, for example, a reversionary interest provided for in the articles of incorporation of a nonprofit organization.

(2) The term control includes any kind of control, whether or not it is legally enforceable and however it is exercisable or exercised. It is the reality of the control which is decisive, not its form or the mode of its exercise. The facts and circumstances in each case must be examined to ascertain whether legal or effective control exists. Since a determination made in a specific case represents a conclusion based on the entire body of facts and circumstances, such determination should not be used as a precedent in other cases unless the facts and circumstances are substantially the same. Organizations, whether proprietary or nonprofit, are considered to be related through control to their directors in common.

(h) Disclosure of all less-than-arms-length (related-party) transactions is required for all costs budgeted, expended, used, and/or reported by the contractor, including related-party transactions occurring at any level in the contractor's organization. The contractor must make available, upon request, adequate documentation to support the costs incurred by the related party. Such documentation could include an identification of the related organization's total costs, the basis of allocation of direct and indirect costs to the contractor, and other business entities served. If a contractor fails to provide adequate documentation to substantiate the cost to the related organization, then the cost is unallowable.

(i) Direct costing must be used whenever reasonably possible. Direct costing means that costs, direct or indirect, incurred for the benefit of, or directly attributable to, a specific business component must be directly charged to that particular business component. For direct costs as defined in OMB Circulars A-122 and A-87, direct costing is required. For indirect costs as defined in OMB Circulars A-122 and A-87, it is necessary to allocate these costs either directly or as a pool of costs across those business components sharing in the benefits of those costs. If cost allocation is necessary, contractors must use reasonable methods of allocation and must be consistent in their use of allocation methods across all program areas and business entities in which the contractor has an interest (see OMB Circulars A-87 and A-122).

(1) Each employee is required (see OMB Circulars A-122 and A-87) to have time sheets. Time sheets must be prepared at least monthly and must coincide with one or more pay periods. Time sheets must account for the total activity for which the employee is compensated and which is required to fulfill the employee's obligation to the contractor. If an employee performs only one function and only performs that one function for one contract/program area, then that employee's time sheet can include the minimum information: name, date, beginning time, ending time, total time worked, appropriate signature(s), and accounting for paid and unpaid leave time.

(2) Direct care staff must be directly costed between program areas (business components) based upon their time sheets (not a time study). If a direct care employee performs more than one function, performs one function for more than one contract/program area, and/or performs more than one function for more than one contract/program area, the time sheets must account for those different functions and/or contracts/program areas. These time sheets should be the documentation for the percentages of salaries budgeted to the various contracts. In other words, if a counselor works on a contractor's nonresidential contract and for one or more of the contractor's residential contracts, the percentage of that counselor's salary in the nonresidential budget should be based upon the results of time sheets for a recent historical period prior to the submission of the budget. The actual amounts charged to the nonresidential contract for that counselor should be based upon the counselor's time sheets during the contract period, with a reconciliation to the contract's budget. If the actual counselor's time is less than that budgeted, the contractor is reimbursed based upon the actual time. If the actual counselor's time is more than that budgeted, the contractor is reimbursed based upon the budgeted amount. The counselor's time

sheets for that contract period then become the basis for the estimates used for the next year's contract budget.

(3) Any cost allocation method should be a reasonable reflection of the actual business operations. Allocation methods that do not reasonably reflect the actual business operations and resources expended toward each unique business entity are not acceptable. An indirect allocation method approved by some other department, program, or governmental entity is not automatically approved by TDPRS. The purpose of cost allocation of shared indirect costs is to ensure that those costs are properly and accurately recorded within each program area, so that each program receives its fair share of those shared indirect costs which benefit that program and so that each program's costs are properly identified (direct and indirect). There are three basic methods for allocating shared (pooled) indirect costs: units of service, cost-to-cost, and functional.

(A) In order to use the units-of-service cost allocation method, each of your program areas would have to deliver the same type of services (i.e., equivalent services) and would have to be measured with the same units of service (i.e., equivalent units). If your program areas (business components) do not have equivalent units of equivalent services, you must use a cost-to-cost or functional allocation method for shared indirect costs that are not directly chargeable to a specific program area (business component).

(B) Cost-to-cost allocation methods merely calculate a program's percentage of a specified cost basis and use that percentage to then calculate that program's share of indirect costs. Shared indirect costs are always allocated first to each program area, then any unallowable shared indirect costs are removed from (or separately reported for) each program area for purposes of contracting with TDPRS. In this manner, it is ensured that 100% (and only 100%) of the total shared indirect costs have been allocated across the various program areas. The specific cost bases for a cost-to-cost allocation methodology include: salaries; salaries, payroll taxes and employee benefits; salaries and contract labor; salaries, payroll taxes, employee benefits, and contract labor; all direct program costs; and all direct program costs minus building costs. These shared indirect costs must be allocated across all the program areas which benefit from these shared indirect costs. If there are some shared indirect costs that benefit only a portion of the corporation's program areas, then an allocation method must be used to properly allocate that subset of the total shared indirect costs to those program areas benefiting from those shared indirect costs. In such complex financial systems, these subsets of shared indirect costs become part of the basis for allocating the shared administration costs benefiting all program areas. For example, if a contractor has a subset of shared indirect costs that only benefits the contractor's residential programs, that subset could be allocated based upon units of service. When allocating on a cost-to-cost basis those shared indirect costs benefiting all program areas (business components) for the contractor, the cost basis for each of the contractor's residential programs would include the residential program's direct care costs and its allocated share of the subset of shared indirect costs.

(C) Functional cost allocation for an administrative staff person can be based upon a time study. Time studies can only be used to allocate administrative time and cannot be used to allocate direct care time. In other words, if an administrative employee also performs direct care duties, that employee must have time sheets (not a time study) to document his/her direct care time.

(i) The baseline for allocation using a time study can be calculated upon time sheets recording daily time/effort for an entire month.

(ii) Daily time sheets are then completed for a randomly-selected period throughout the remainder of the fiscal year. That "randomly-selected period" could be a randomly-selected week each quarter, randomly-selected two days per month, or other time period which would result in time sheets representing at least 20 days per year, in addition to the baseline.

(iii) A contractor can use the results of the baseline time study for allocating the employee's salary for the remainder of the year and make any necessary adjustments required from the results of the randomly-selected periods during the last month of the year or a contractor can allocate the employee's salary each month based upon the results of that month's time study.

(iv) A contractor must have its time study methodology and procedures in writing.

(D) Other shared indirect costs may be more accurately allocated based upon a functional methodology rather than a cost-to-cost allocation method.

(i) Maintenance staff costs could be functionally allocated, based upon the percentage (or dollar amounts) of work orders performed for the various program areas.

(ii) If one program pays its employees weekly and another program pays its employees monthly, payroll costs could be functionally allocated based upon each programþs pro rata share of the number of payroll checks issued.

(4) Each cost allocation method will be reviewed on a case-by-case basis in order to ensure that the allocated costs fairly and reasonably represent the operations of the contractor. If in the course of an audit it is determined that the cost allocation method does not fairly and reasonably represent the operations of the contractor, then an adjustment to the allocation method will be made.

(5) Cost allocation methods must be clearly and completely documented in the contractor's workpapers, with details as to how pooled costs are allocated to each segment (component) of the business entity, for both contracted and noncontracted programs.

§732.243. Employee Compensation.

(a) Employee compensation costs (or compensation for personal services) must be calculated in compliance with Office of Management and Budget (OMB) Circulars A-87 and A-122.

(b) A contractor must:

(1) compensate employees according to policy, program, and procedures that effectively relate individual compensation to the person's contribution to performance of the contract work; result in internally consistent, equitable treatment of employees; and effectively relate compensation paid within the organization to that paid for similar services outside the organization.

(2) review and approve salaries by position or function.

(3) not provide retroactive salary increases or future increases unless the contract specifically allows for increases.

(4) keep time sheets on part-time employees or employees who devote a portion of their time to the contract.

(5) provide job descriptions when required by the Texas Department of Protective and Regulatory Services (TDPRS) and only hire or promote people who meet job qualifications.

(c) A contractor must not bill and receive reimbursement from funding sources for more than 100% of an employee's total salary or work time.

(d) Contractors substantially engaged in activities other than the services for which TDPRS is contracting must provide compensation for employees engaged in contract services that is comparable to compensation for other comparable contractor activities. The contractor also must provide compensation to employees that is considered reasonable and comparable to the compensation paid for similar work in the labor market in which the contractor competes for the kind of employees involved.

(e) Overtime is allowable as a cost to TDPRS only under the following conditions:

(1) When necessary to cope with emergencies, such as those resulting from accidents, natural disasters, or temporary, unavoidable situations.

(2) When periodically paying overtime to current staff will cost the department less than hiring temporary or additional staff.

(3) When services are required to meet client needs and no substitute direct service staff are available.

(f) Overtime is reimbursable subject to allowability and budget limitations of the contract.

(g) Merit raises or other additional compensation reimbursed by TDPRS and instituted by a contractor must meet the following requirements:

(1) Incentive compensation must be reasonable.

(2) Payment is made according to an agreement entered into in good faith between the contractor and its employees before the services are rendered or according to an established plan that the contractor follows.

(h) A contractor must determine its responsibilities and comply with applicable state and federal laws and regulations to include the following:

(1) Workers' compensation - questions may be addressed to a qualified local insurance agency, the State Board of Insurance, or the State Industrial Accident Board.

(2) F.I.C.A. - questions may be addressed to IRS.

(3) Federal unemployment taxes - questions may be addressed to IRS.

(4) State unemployment taxes - questions may be addressed to the Texas Workforce Commission.

(i) A contractor may be reimbursed for budget costs incurred by its employees (who are providing services under the contract) for travel including mileage, food, and lodging costs and travel-related expenses in a cost reimbursement contract. However, the budget for the cost reimbursement contract must follow the requirements in §732.239 of this title (relating to Budget Changes), §732.240 of this title (relating to General Principles of Allowable and Unallowable Costs), and §§732.242-732.256 of this title (relating to Contract Administration).

(1) Certification of travel. The contractor must certify that travel expenses were incurred by staff while performing official contract business. The purpose for the trip, points of departure and arrival, and times of departure and arrival must be specified.

(2) Mileage. Allowable reimbursement for mileage is computed on a per mile rate, not exceeding the current mileage reimbursement rate set by the Texas Legislature for state employee travel. For audit purposes, contractors must keep copies of travel forms that TDPRS approved in writing. Contractors may reimburse staff at rates in excess of those currently in effect for state employees if the contractor pays the difference. TDPRS will not pay for the difference in mileage rate.

(3) Food and lodging. Costs for staff food may be reimbursed either on a per-diem rate or an actual cost basis, with the results of either method not exceeding the current per-diem rate set by the Texas Legislature for state employee travel. Costs for staff lodging must not exceed the per-night rate set by the Texas Legislature for state employee travel. Reimbursement must be substantiated by adequate documentation.

(4) Other travel-related expenses. All other travel-related expenses, such as air fare and taxi fare, may be budgeted and are allowed on a cost-incurred basis if these costs are reasonable, necessary, and substantiated by adequate documentation.

(5) Volunteer travel. Travel for volunteers may be paid, if appropriate. Travel to and from home is not included, but travel on agency business is.

(6) Out-of-state travel. Out-of-state travel may be budgeted. The purpose and destination must be stated and the contract manager's previous approval is required for all contracts with the exception of residential child care contracts. The determination of allowability of out-of-state travel is based upon a comparison of total costs for similar or comparable travel purposes available within 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 August 31, 1998.

TRD-9813760
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Effective date: October 1, 1998
Proposal publication date: July 10, 1998
For further information, please call: (512) 438–3765

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40 TAC §732.241

The repeal is adopted under the Human Resources Code (HRC), Chapter 40, which describes the services authorized to be provided by the Texas Department of Protective and Regulatory Services; and authorizes the department to enter into agreements with federal, state, and other public or private agencies or individuals to accomplish the purposes of the programs authorized by the HRC; and grants authority to contract to that Department.

The repeal implements the HRC, Chapter 40, which authorizes the department to enter into agreements with federal, state, or other public or private agencies or individuals to accomplish the purposes of the programs authorized by the HRC and which authorizes the department to enter into contracts as necessary to perform any of its powers or duties.

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 August 31, 1998.

TRD-9813761
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Effective date: October 1, 1998
Proposal publication date: July 10, 1998
For further information, please call: (512) 438–3765

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TITLE 43. TRANSPORTATION

Part I. Texas Department of Transportation

Chapter 17. Vehicle Titles and Registration

Subchapter B. Motor Vehicle Registration

43 TAC §17.22

The Texas Department of Transportation adopts amendments to §17.22, concerning motor vehicle registration. Section 17.22 is adopted without changes to the proposed text as published in the May 15, 1998, issue of the *Texas Register* (23 TexReg 4894) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

House Bill 1532, 75th Texas Legislature, 1997, amended the Transportation Code by adding §502.185. This new section provides the procedure that the department or a county tax assessor-collector may, pursuant to the provisions of a contract entered into between the department and the county in accordance with Government Code, Chapter 791, refuse to register a vehicle owned by a person who owes the county money for a fine, fee, or tax that is past due. Once the fine, fee, or tax is paid, the registration may be completed. The amendments are in response to House Bill 1532 and the need to provide an additional enforcement tool for the collection of delinquent county fines, fees, or taxes.

RESPONSE TO COMMENTS

Written comments were received from the County Tax Assessor-Collectors of Liberty, Lamar, Bee, Washington, and Madison counties. One of the commenters was in favor of the amendments and the others did not indicate whether they were for or against the amendments. Many comments were in the form of questions about the procedural specifics of the department's implementation plan for House Bill 1532. These questions will be responded to by direct written communication between the department and the county tax assessor-collectors. The following are the department's responses to all comments received regarding the amendments.

Comment: Two tax assessor-collectors commented that the rules require that the county contract with the department in order to refuse to register a vehicle owned by a person who owes the county money for a fine, fee, or tax that is past due.

Response: A contract between the county and the department is required only if the county wishes to flag motor vehicle records. A county may carry out the provisions of this bill using its own internal system if it so chooses.

Comment: Four tax assessor-collectors commented that the rules are burdensome because they require the vehicle identification number (VIN) and license plate number to be provided.

Response: The department's automated systems are not designed to access motor vehicle records by legal owner name primarily because of duplication of names, nicknames, business/association/trust names, multiple owners and similar situations. Thus, the department cannot legally "match-up" a name supplied by the county to a specific vehicle owned by a person who owes a fine, fee, or tax to that county. The VIN and plate number must be provided in order to locate and flag the correct vehicle record.

Comment: One tax assessor-collector suggested a direct-input system be provided that would allow the entry of limited data indicating the type of monies owed to the county.

Response: The department's automated system is not designed for this type of data entry. To create such a system would require an extensive design and programming effort for which funding (several hundred thousand dollars) is not currently available. It would also cause considerable delay in the department's implementation of the provisions of this bill, as well as the need for increased workstations in the counties.

Comment: One tax assessor-collector commented that the tape exchange aspect of the rules will not be time-efficient, and that processing time may cause erroneous denial of registration. Another commenter questioned whether the tape submissions will keep the information current.

Response: At present, there is no other viable alternative to tape exchange in order to flag vehicle records. Since the flags will not cause a "hard stop" in the system, the county may still register a vehicle with a flag if they have satisfactory evidence that the fine, fee, or tax has been paid.

Comment: One tax assessor-collector stated that the fiscal note is ambiguous, and requested that the minimum cost for data transfer be included in the rules. Another commented she did not think the commissioners of her county would approve payment of the fees. Another commenter asked how much it would cost to contract with the department.

Response: Because there is no way to know how many people will avoid registration because they owe a fine, fee, or tax, or how often a county will submit a tape to the department, an estimate of the cost to the county cannot be determined. The fees required of the county for tape submission and flagging of records are authorized under 43 TAC §3.13 pursuant to Government Code, Chapter 552, and will be provided in the contract.

Comment: One tax assessor-collector suggested that the cost to the county should be included in the fee to the taxpayer.

Response: The statute allows the county to collect an additional fee to cover costs to pay the department to flag vehicle records.

Comment: One commenter asked whether the county can refuse to register vehicle dealers who have not paid the vehicle inventory tax.

Response: Transportation Code, Chapter 502.185, provides that registration may be refused if the assessor-collector or the department receives information that "the owner of the vehicle" owes the county money for a fine, fee, or tax that is past due.

Questions as to the ownership of the vehicle should be directed to the appropriate county attorney.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation, and more specifically, Government Code, Chapter 791, which authorizes local governments to enter into contracts, and Transportation Code, Chapter 502.185, which authorizes the department or a county tax assessor-collector to refuse to register a vehicle owned by a person who owes the county money for a fine, fee, or tax that is past due.

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 August 31, 1998.

TRD-9813609
Bob Jackson
Acting General Counsel
Texas Department of Transportation
Effective date: September 20, 1998
Proposal publication date: May 15, 1998
For further information, please call: (512) 463–8630

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43 TAC §17.52

The Texas Department of Transportation adopts new §17.52, concerning the vehicle emissions enforcement system. Section 17.52 is adopted with changes to the proposed text as published in the June 12, 1998, issue of the *Texas Register* (23 TexReg 6187).

EXPLANATION OF ADOPTION OF NEW SECTION

Senate Bill 1856, 75th Legislature, 1997, added Transportation Code, §502.009, to include provisions for registration denial as required by 40 C.F.R. §51.361. In accordance with 40 C.F.R. §51.361, the Environmental Protection Agency (EPA) has determined that the state has not demonstrated that inspection sticker-based enforcement is more effective than registration-based enforcement in ensuring compliance with the Motor Vehicle Emissions Inspection And Maintenance (I/M) Program. Therefore, Senate Bill 1856, requires the department to implement a registration-based plan.

If the EPA determines that the requirements for registration denial are no longer necessary and gives the Texas Natural Resources Conservation Commission (TNRCC), or a person the TNRCC commission designates, written notification that registration-based enforcement is not required for the state implementation plan, the department will terminate registration-based enforcement of the program.

Currently, the Dallas, El Paso, Harris, and Tarrant County areas are federal nonattainment areas. Vehicles in these counties must pass an emissions test, and vehicles coming into those counties from surrounding counties are subject to an emissions test. A vehicle that fails the emissions test will not be eligible to be registered or re-registered until the vehicle passes the test.

New §17.52 provides an efficient and effective enforcement system for compliance with vehicle emissions I/M programs regulated by federal and state laws and the provisions of the Texas air quality State Implementation Plan (SIP). New §17.52 defines general words and terms for the section. It provides criteria for the department and the county to deny vehicle registration for a vehicle registered in any county that is included in a vehicle emissions I/M program when the county or department is notified by the TNRCC or the Texas Department of Public Safety (DPS), after notifying the vehicle owner, that the registered owner of the vehicle has failed to comply with the vehicle emissions I/M program as required by Transportation Code, Chapter 548, Subchapter F, and Health and Safety Code, §382.037 and §382.0372.

RESPONSE TO COMMENTS

A public hearing was held on June 30, 1998 and no oral comments were received. However, written comments were received from the Liberty County Tax Assessor-Collector, the Texas Natural Resource Conservation Commission, and the Texas Automobile Dealers Association (TADA). The comments were neither in favor nor against the rules.

Comment: The Liberty County Tax Assessor-Collector asked whether active testing would continue to apply to the four major counties with passive testing for other nonattainment areas or whether comprehensive active inspection sticker-based testing would be implemented in all non-attainment area counties.

Response: The active and passive testing is required by the EPA.

Comment: TADA suggested that a sticker be placed on the vehicle when a vehicle fails emissions testing. Once the vehicle has passed the emissions test, the sticker would be removed by the inspector. This could prevent an owner from failing to disclose the failed inspection when trading in vehicles or selling them.

Response: This section only addresses "flagging" identified vehicle records when a vehicle has not passed inspection, and the exchange of this information among the three agencies. The legislation did not address a separate sticker program that would indicate that a vehicle failed inspection.

Comment: The Liberty County Tax Assessor-Collector noted the uncertainty of impact on state government and loss of non-registration revenue mentioned in the proposed preamble, but added that the local governments would also be negatively impacted because they would lose a significant amount in optional add-on fees. The commenter estimated that for every $1,000,000 of lost state revenue, there would be a corresponding loss in excess of $200,000 to local governments (assuming a $10 add-on fee).

Response: There is no way to estimate the number of owners who will avoid registration; therefore, additional costs to the county tax assessor-collector for administering this program cannot be estimated. These costs may include the loss of optional fees.

Comment: TNRCC commented that it is unsure what impact registration denial enforcement would have on registration revenues. It stated that it knows of no evidence suggesting that motorists will avoid registering their vehicles because of the program and is confident that law enforcement measures will minimize circumvention of the requirements.

Response: A study of the historical data from previous emissions programs shows that when these types of prerequisites are added to registration, there has been a decrease in registration revenue in the following years.

Comment: TNRCC commented that it does not issue waivers as part of the Texas Motorist's Choice (TMC) Program. The commenter recommends, therefore, that the words allowing the motorist to show proof of waiver by the TNRCC be deleted from subsection (c)(6)(B).

Response: The department agrees with this suggestion and has removed the words "or TNRCC."

Comment: TADA suggested that subsection (c)(7) be revised to require DPS and TNRCC to provide the department with notifications on a daily basis instead of a weekly basis.

Response: The department will work with TNRCC and DPS to maximize notification efficiency. The wording "on a weekly basis" has been removed.

Comment: TNRCC also recommended deleting the language from subsection (c)(8) which requires the TNRCC to pay the department on a quarterly basis because a Memorandum of Understanding is currently under development between TNRCC, DPS, and the department to establish a mechanism through which the three agencies will cooperate concerning the costs associated with registration denial.

Response: The language was changed to satisfy the specific requirement of Transportation Code, §502.009(d), by stating that DPS and TNRCC will enter into an agreement with the department.

A change has been made to subsection (c) to incorporate the complete citation to Transportation Code, Chapter 548, Subchapter F.

STATUTORY AUTHORITY

The new section is adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation, and more specifically, Transportation Code, §502.009, which authorizes the department to deny registration or re-registration for vehicles in nonattainment areas that do not meet the emissions standards.

§17.52. Vehicle Emissions Enforcement System.

(a) Purpose. Transportation Code, §502.009 requires the department to implement a system requiring verification that a vehicle complies with vehicle emissions inspection and maintenance (I/M) programs as required by the Health and Safety Code, §382.037 and §382.0372, and Transportation Code, Chapter 548, Subchapter F. This section prescribes the policies and procedures for a denial of registration enforcement system if a vehicle does not comply with the emissions standards set by federal and state laws and the provisions of the Texas air quality State Implementation Plan.

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

(1) Department - The Texas Department of Transportation.

(2) DPS - The Texas Department of Public Safety.

(3) Nonattainment area - Any portion of an air quality control region where any pollutant exceeds the national ambient air quality standards for the pollutant as designated pursuant to the Federal Clean Air Act.

(4) State Implementation Plan (SIP) - A document required by the United States Environmental Protection Agency that commits to the adoption and implementation of a vehicle emissions I/M program which meets all the requirements of the Environmental Protection Agency.

(5) TNRCC - The Texas Natural Resource Conservation Commission.

(6) Vehicle - A motor-driven or propelled vehicle required to be registered in the state except those vehicles exempted by the TNRCC.

(7) Vehicle inspection report - A vehicle inspection form prescribed by the DPS that is printed by the vehicle exhaust gas analyzer immediately following an emissions test.

(8) Waiver - A form and certificate that allows a vehicle to be considered in compliance with the vehicle emissions I/M program for a specified period of time after a vehicle fails an emissions test.

(c) Conditions to vehicle registration denial.

(1) The DPS, after notice to the vehicle owner, will notify the department if a motor vehicle owner fails to comply with the requirements of Transportation Code, Chapter 548, Subchapter F.

(2) The TNRCC, after notice to the vehicle owner, will notify the department if a motor vehicle fails to comply with the requirements of Health and Safety Code, §382.037 and §382.0372 and Transportation Code, Chapter 548, Subchapter F.

(3) The notice will include the vehicle identification number (VIN) and the registration plate number of the affected vehicle.

(4) If the department receives a notice of emissions noncompliance from the DPS or TNRCC, the department will place a notation on the motor vehicle record that the motor vehicle has failed to comply with the vehicle emissions I/M program.

(5) If the department receives a notice emissions compliance from the DPS or TNRCC, the department will remove the non-compliance notation from the motor vehicle record.

(6) If a vehicle record contains a notation of failure to comply with the vehicle emissions I/M program, the tax assessor-collector will deny registration unless provided with:

(A) proof of compliance with the vehicle emissions I/M program with a "passing" vehicle inspection report; or

(B) proof of a waiver issued by the DPS that includes the vehicle identification number (VIN) and the registration plate number.

(7) The DPS and TNRCC will provide the department with the notifications in a format approved by the department.

(8) The DPS and TNRCC will enter into an agreement with TxDOT regarding the remittance to the department for costs associated with implementation of the emissions 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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Texas Department of Transportation
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Chapter 25. Traffic Operations

Subchapter G. Specific Information Logo Sign Program

43 TAC §25.406, §25.409

The Texas Department of Transportation adopts amendments to §25.406 and §25.409, concerning the specific information logo sign program. Sections 25.406 is adopted with changes to the proposed text as published in the June 12, 1998, issue of the *Texas Register* (23 TexReg 6189). Section 25.409 is adopted without changes and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

Senate Bill 370, §2.04, 75th Legislature, 1997, added Transportation Code, §391.098, requiring the Texas Transportation Commission to authorize the executive director to grant variances on a case-by-case basis, to the eligibility, location, or placement of specific information logo signs, major agricultural interest signs, and major shopping area guide signs.

The department adopted rules to implement provisions of Senate Bill 370 which became effective on March 19, 1998. These rules allowed for variances to be requested for only major shopping area guide signs. During the public comment period, the department received several comments requesting that variances also be allowed for the logo sign program. The department also received comments that indicated the criteria under which a variance could be requested for major shopping area guide signs should be broadened. These amendments take the comments into consideration and specify which requests for variances the department will consider. However, at this time, the sections are not being amended to allow for variance in the major agricultural interest sign program because the program is too new to determine what variances may be needed.

Section 25.406 is amended by adding subsection (d) which describes the conditions under which a person may request a variance from the information logo sign program for waiver of the requirements of eligibility, location, placement, and type of highway. The section authorizes the department to require additional documentation including, but not limited to, traffic studies, maps, traffic flow analysis, crash data and analysis, and a detailed site plan of the commercial establishment, and describes the conditions under which the executive director may grant or deny the variance. This new subsection requires the executive director to indicate the reason for granting or denying the requested variance in writing.

The amendments do not allow a variance to be requested from certain eligibility requirements of the information logo sign program. A commercial establishment may not request a variance from the §25.406(a) eligibility provisions that it must: offer at least one primary motorist service (gas, food, lodging, or camping); have a driveway access to a frontage road, ramp, or intersecting crossroad (except that an exception may be asked for an intersecting crossroad if the roadway with driveway access Tees into the frontage road of the eligible highway); comply with all applicable laws concerning the provisions of public accommodations without regard to race, religion, color, sex or national origin; or post its hours of operation on or near the main entrance so that they are visible to the public during open and closed hours.

The department is retaining these eligibility requirements to ensure that commercial establishments requesting a variance are still required to provide basic motorist services in a non-discriminatory fashion that will best serve the needs of the traveling public.

In addition to the eligibility requirements noted above, commercial establishments may not request a variance from certain specific service requirements contained in §25.406(b).

A commercial establishment requesting a variance for a "gas" logo sign must still meet the requirements contained in §25.406(b)(1) concerning the services and facilities that such an establishment must provide.

A commercial establishment requesting a variance for a "food" logo sign must still meet the requirements contained in §25.406(b)(2)(A) requiring that the establishment provide a license or other evidence of compliance with public health or sanitation laws, or other applicable laws. Such an establishment must also still meet the requirements contained in §25.406(b)(2)(C)-(E) requiring that the establishment have seating for at least 16 people, a public restroom, and a public telephone.

A commercial establishment requesting a "lodging" logo sign may not request a variance to the requirements contained in §25.406(b)(3) that the establishment have a license, at least 10 rooms, and a public telephone.

A commercial establishment requesting a "camping" logo sign may not request a variance to the requirements contained in §25.406(b)(4) that the establishment have a commercial license, adequate parking accommodations, and modern sanitary facilities and drinking water.

The department is not proposing permitting variances for these requirements for commercial establishments to ensure that all establishments noted by logo signs provide high-quality services to the traveling public.

In addition to the above restrictions, a commercial entity may not request a variance from the requirement that the establishment be located on and the logo sign be erected on the state highway system. This restriction is necessary to ensure that the program is operated only on highways under the department's jurisdiction.

The amendments to §25.409 will allow broader types of variances to be requested for eligibility, location, placement, and type of highway for major shopping area guide sign.

Major shopping areas will not be able to request a variance from the eligibility requirement contained in §25.409(a)(5). This requires that these establishments must post their hours of operation on or near the main public entrance. In addition to the above restriction, a major shopping area may not request a

variance from the requirement that the establishment be located on, and the sign be erected on, a portion of the state highway system. This restriction is necessary to ensure that the program is operated only on highways under the state's jurisdiction.

RESPONSE TO COMMENTS

A comment deadline of July 13, 1998 was published in the Texas Register. Written comments in favor of the rules were received from Cracker Barrel, Benbrook Economic Development Corporation, and one individual. A comment was also received from an aide in Representative Alexander's office, however, there was no indication whether Representative Alexander was in favor or against the rules.

Comment: The aide from Representative Alexander's office requested signing for businesses which are located on roadways that Tee into a frontage road of an eligible highway.

Response: Section 25.406(d)(A) has been revised to allow a request for a waiver from the requirement of an intersecting crossroad if the roadway with driveway access Tees into the frontage road of the eligible highway. Allowing this type of sign will notify the traveling motorist of development that is beyond the immediate vicinity of the intersection of the eligible highway and crossroad, but is still easily accessible or visible from that intersection. Section 25.406(d)(A) has also been reworded to clarify which requests are considered to be waivers of eligibility requirements.

Section 25.406 (d)(2)(A) has also been revised to correct a reference to subsection (a)(5) and (6) which has been renumbered.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation, and more specifically, Transportation Code, §391.098, which requires the Texas Transportation Commission to authorize the executive director to grant variances on a case-by-case basis to the eligibility, location, and placement of major shopping area guide signs.

§ 25.406. Commercial Establishment Eligibility.

(a) General requirements for eligibility. To be eligible to have a business logo placed on a specific information logo sign, a commercial establishment must:

(1) offer at least one primary motorist service;

(2) be located with driveway access to the access road (frontage road), ramp, or intersecting crossroad;

(3) be visible, or have on-premise signing visible, from the commercial establishment's driveway access or the exit ramp, access road, crossroad, or intersection; and

(4) be located within the marketing inventory as stated in §25.402(b) of this title (relating to Information Logo Sign Program) but not farther than three miles from an interchange on an eligible highway, but if no service participating or willing to participate in the specific information logo sign program is located within three miles of an interchange, the department may approve commercial establishments of the same service:

(A) if located not farther than six miles from the interchange;

(B) nine miles from the interchange if no service participating or willing to participate is located six miles from the interchange;

(C) 12 miles from the interchange if no service participating or willing to participate is located nine miles from the interchange; or

(D) 15 miles from the interchange if no service participating or willing to participate is located 12 miles from the interchange;

(5) comply with all applicable laws concerning the provisions of public accommodations without regard to race, religion, color, sex, or national origin; and

(6) post its hours of operation on or near the main entrance so that they are visible to the public during open and closed hours.

(b) Specific services eligibility. In addition to the general requirements for eligibility to have a business logo placed on a specific information logo sign, a commercial establishment must meet the requirements for at least one of the following primary motorist services.

(1) Gas. To be eligible to have a business logo placed on a specific information logo sign carrying the legend "GAS," a commercial establishment must provide:

(A) vehicle services, including fuel, oil, and water;

(B) tire repair, if the establishment is not a self-service station;

(C) restroom facilities and drinking water;

(D) continuous operation for at least 12 hours per day, seven days a week; and

(E) a telephone accessible to the public.

(2) Food. To be eligible to have a business logo placed on a specific information logo sign carrying the legend "FOOD," a commercial establishment must provide:

(A) a license or other evidence of compliance with public health or sanitation laws, if required by law;

(B) continuous operation at least 12 hours a day to serve three meals a day;

(C) seating capacity for at least 16 people;

(D) public restrooms; and

(E) a telephone accessible to the public.

(3) Lodging. To be eligible to have a business logo placed on a specific information logo sign carrying the legend "LODGING," a commercial establishment must provide:

(A) a license or other evidence of compliance with laws regulating facilities providing lodging, if required by law;

(B) at least 10 rooms; and

(C) a telephone accessible to the public.

(4) Camping. To be eligible to have a business logo placed on a specific information logo sign carrying the legend "CAMPING," a commercial establishment must provide:

(A) a license or other evidence of compliance with laws regulating camping facilities, if required by law;

(B) adequate parking accommodations; and

(C) modern sanitary facilities and drinking water.

(c) Multiple services eligibility. If a commercial establishment offers more than one primary motorist service, it will be eligible to display a business logo for each of those services on the appropriate specific information logo sign, provided that:

(1) minimum criteria for the service as described in §25.405 of this title (relating to Specifications for Information Logo Signs) are met;

(2) the additional business logo(s) would not prevent participation by another eligible commercial establishment whose sole service would be displaced; and

(3) a business logo space is available.

(d) Variances.

(1) A person may request a variance from the information logo sign program. Requests for variances will only be considered if the existing requirements preclude participation in the program.

(2) A variance may be requested for a waiver of:

(A) an eligibility requirement except for the requirements listed in subsections (a)(1), (2) (except that an exception may be asked for an intersecting crossroad if the roadway with driveway access Tees into the frontage road of the eligible highway and is easily accessible or visible from that intersection), (5), and (6), and (b)(1), (2)(A), (2)(C)-(E), and (3)-(4) of this section;

(B) location of the establishment;

(C) placement of the sign; or

(D) highway, except the highway must be on the state highway system.

(3) A person may submit a request for a variance to the department's local district engineer indicating:

(A) which requirement of the program it does not meet; and

(B) the variance requested.

(4) The department may require additional documentation following generally accepted engineering standards, which shall include, but not be limited to:

(A) traffic studies;

(B) maps indicating ramps, major arterials, ingress and egress points, existing signs and distances;

(C) traffic flow analysis including traffic counts to and from the commercial establishment or major shopping area;

(D) crash data and analysis; and

(E) detailed site plan of the commercial establishment or major shopping area, including but not limited to parking available, driveways, and location in reference to eligible highway or eligible urban highway.

(5) The executive director may grant a variance if he or she determines it is feasible to place the sign at the requested location and the sign meets the requirements of the Texas MUTCD; and

(A) the variance will substantially promote traffic safety;

(B) the variance will substantially improve traffic flow;

(C) an overpass, highway sign or other highway structure unduly obstructs the visibility of an existing commercial sign; or

(D) the variance is necessary to substantially improve the efficiency and effectiveness of communicating information needed by people to safely and efficiently use the transportation system.

(6) The executive director will indicate the reason for granting or denying a variance in writing.

§25.409. Major Shopping Area Eligibility.

(a) Eligibility criteria. To be eligible to have a major shopping area guide sign, the retail shopping mall must:

(1) be located not farther than three miles from an interchange with an eligible urban highway;

(2) consist of 30 acres or more of land;

(3) include an enclosed gross building area of 1,000,000 square feet or more;

(4) be located with driveway access to the eligible urban highway access road (frontage road), ramp, intersecting crossroad or city street; and

(5) post its hours of operation on or near the main public entrance(s) so that they are visible to the public during open and closed hours.

(b) Variances.

(1) A person may request a variance from the requirements of the major shopping area guide sign program. A request for a variance will only be considered if the existing requirements preclude participation in the program.

(2) A variance may be requested for wavier of the requirement of:

(A) eligibility except for the requirement of subsection (a)(5);

(B) location of the major shopping area;

(C) placement of the sign; or

(D) highway, except the highway must be on the state highway system.

(3) A person may submit a request for a variance to the department's local district engineer indicating:

(A) which requirement of the program it does not meet; and

(B) the variance requested.

(4) The department may require additional documentation following generally accepted engineering standards, which shall include, but not be limited to:

(A) traffic studies;

(B) maps indicating ramps, major arterials, ingress and egress points, existing signs and distances;

(C) traffic flow analysis including traffic counts to and from the major shopping area;

(D) crash data and analysis;

(E) detailed site plan of the major shopping area, including but not limited to:

(i) parking available;

(ii) driveways; and

(iii) location in reference to eligible urban highways.

(5) The executive director may grant a variance if he or she determines it is feasible to place the sign at the location and the sign meets the requirements of the Texas MUTCD; and

(A) the variance will substantially promote traffic safety;

(B) the variance will substantially improve traffic flow;

(C) an overpass, highway sign, or other highway structure unduly obstructs the visibility of an existing commercial sign; or

(D) the variance is necessary to substantially improve the efficiency and effectiveness of communicating the information needed by people to safely and efficiently use the transportation system.

(6) The executive director will indicate the reason for granting or denying a variance in writing.

(7) A variance will not be granted if the executive director finds that:

(A) a retail shopping mall is located on an intersecting crossroad or city street whose name can be easily identified with the retail shopping mall and has existing advance and exit guide signs; or

(B) the retail shopping mall's parking is so insufficient that it causes undue congestion of the roadway 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.

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Bob Jackson
Acting General Counsel
Texas Department of Transportation
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Subchapter I. Debarment of a Maintenance Contractor

43 TAC §§25.501–25.506

Texas Department of Transportation adopts the repeal of §§25.501-25.506, concerning debarment of a maintenance contractor. Sections 25.501-25.506 are adopted without changes to the proposed text as published in the July 3, 1998, issue of the Texas Register (23 TexReg 6942), and will not be republished.

EXPLANATION OF ADOPTED REPEALS

Sections 25.501-25.506 provide procedures for the debarment of state highway maintenance contractors. The current rules refer to a Safety and Maintenance Operations Division and delegate certain responsibilities to the Deputy Director, Field Operations. Due to recent department reorganizations, the maintenance duties of the former Safety and Maintenance Operations Division now reside in the new Maintenance Division, and the position of Deputy Director, Field Operations no longer exists. Accordingly, the existing rules adopted for repeal appear in Chapter 25, Traffic Operations, and the adopted new sections will more appropriately appear in Chapter 29, Maintenance. These sections are no longer necessary due to the simultaneous adoption of the reenacted subject matter in new §§29.21-29.26, concerning this same subject.

COMMENTS

No comments were received on the proposed repeals.

STATUTORY AUTHORITY

The repeals are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation.

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 L. Telecommunications Facilities

43 TAC §§25.801–25.806

The Texas Department of Transportation adopts new §§25.801-25.806, concerning telecommunications facilities in the right of way. Sections 25.801-25.806 are adopted without changes to the proposed text as published in the June 12, 1998, issue of the *Texas Register* (23 TexReg 6191) and will not be republished.

EXPLANATION OF ADOPTED NEW SECTIONS

Senate Bill 370, §1.20, 75th Legislature, 1997, created new Subchapter E in Chapter 202, Transportation Code, to allow the department to enter into an agreement for the placement of private telecommunications facilities within the median of a divided state highway.

The new subchapter also allows the department to enter into an agreement with a telecommunications provider to place lines within or otherwise use telecommunications facilities owned or installed by the state in or on the improved portion of a state highway. The new subchapter allows the department to solicit proposals from telecommunications providers for use of the state highway system using a competitive process. This agreement may also include compensation to the department

in the form of cash or the shared use of facilities. The new subchapter requires the department to develop rules.

New §25.801 describes the purpose of the new subchapter, including implementing Transportation Code, Chapter 202, Subchapter E.

New §25.802 provides definitions for words and terms used in new Subchapter L.

New §25.803 defines the conditions under which the department may enter into an agreement with a telecommunications provider for use of department facilities. The department may enter into such an agreement if the agreement is in the best interest of the department; is consistent with the department's primary objectives in key areas such as safety and operations; allows the department to maximize revenues; and advances the department's efforts to develop its own telecommunications program.

New §25.803 also allows a telecommunications provider to either place its facilities within the median of a divided state highway or use telecommunications facilities owned or installed by the department in or on the improved portion of a state highway consistent with Transportation Code, Chapter 202, Subchapter E.

New §25.803 allows for the telecommunications provider to offer consideration to the department in the form of payment, or in the shared use of telecommunications equipment. This provision is included to ensure that the department receives fair value for the use of its right of way and to maintain the department's flexibility in the development of a project with a private telecommunications provider.

New §25.803 also includes a provision that confirms that a telecommunications provider still may place its facilities in the traditional utility corridor as authorized by state law and §§21.31-21.56 of this title (relating to Utility Accommodation).

New §25.803 states that placement of telecommunications facilities on federal-aid highways is subject to approval from the Federal Highway Administration. The Federal Highway Administration is the department's federal funding partner on certain portions of the state highway system and the department believes that its acceptance of these installations is valuable.

New §25.804 outlines the process by which the department will issue a request for proposals (RFP). This section describes what information, at a minimum, the department will include in each RFP issued under these new sections. This section also requires the department to issue an RFP in at least two general circulation newspapers, on the department's Internet web site, and in the Texas Register at least 45 days prior to the deadline for submission of a proposal to ensure that the RFP is widely circulated to all interested parties.

New §25.805 defines what information must be included in each proposal submitted to the department. These items are required to allow the department to effectively evaluate each proposal.

New §25.806 defines how the executive director, or his or her designee, will evaluate, negotiate, and award a contract under these new sections. Proposals will be evaluated based on consistency with the department's primary goals and purposes such as safety and operational efficiency; maximization of revenue; development of the department's telecommunication infrastructure; and any other benefit accrued to the state. The executive director, or his or her designee, may negotiate and seek counteroffers from telecommunications providers. Also, as provided for in Transportation Code, Chapter 202, Subchapter E, the executive director, or his or her designee, may reject all offers should they not meet the department's needs. The department will notify the selected provider in writing.

New §25.806 also outlines the manner in which the contract will be executed. Contract execution is required within 90 days from award. This provision is to ensure that, once a contract is awarded, it is executed in a reasonable time frame.

New §25.806 states that the agreement may also allow a telecommunications provider to have exclusive use of a portion of the department's median or other facilities. Exclusivity is allowed to make the offer of use of the department's median or facilities of maximum value.

The new section also states that the department may require the telecommunications provider to be a wholesaler of telecommunications capacity. The provision is included to allow the department to have maximum flexibility on the manner in which any agreement for use of state right of way is structured.

New §25.806 also states that the agreement will include provisions for termination and may include provisions requiring the removal of any improvements placed on state right of way at the provider's expense. This provision is to ensure that, should termination of the contract be deemed necessary, the provider will be responsible for removal of all telecommunications improvements installed on state right of way.

New §25.806 requires the telecommunications provider to notify the department prior to entering department right of way to perform any installation, maintenance, or operation. It also requires the provider to conform to the requirements of the Texas Manual on Uniform Traffic Control Devices in all traffic control plans. This provision is included to ensure that all work performed on state right of way is accomplished in the safest and most efficient manner possible and with the least amount of impact on the traveling public.

New §25.806 places responsibility for maintenance of any installation with the telecommunications provider to ensure that any telecommunications infrastructure placed on department right of way is adequately maintained.

COMMENTS

A public hearing was held on June 30, 1998, and no comments were received on the proposed new sections.

STATUTORY AUTHORITY

The new sections are adopted under Transportation Code, §2001.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation, and more specifically, Transportation Code, Chapter 202, Subchapter E which authorizes the department to carry out the provisions of those laws governing the placement of telecommunications facilities on department right of way.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Chapter 29. Maintenance

Subchapter B. Debarment of Maintenance Contractors

43 TAC §§29.21–29.26

The Texas Department of Transportation adopts new §§29.21-29.26, concerning debarment of maintenance contractors. Sections 29.23, 29.24, and 29.26 are adopted with changes to the proposed text as published in the July 3, 1998, issue of the *Texas Register* (23 TexReg 6942). Sections 29.21, 29.22, and 29.25 are adopted without changes and will not be republished.

EXPLANATION OF ADOPTED NEW SECTIONS

Due to recent department reorganizations, the maintenance duties of the former Safety and Maintenance Operations Division now reside in the new Maintenance Division, and the position of Deputy Director, Field Operations no longer exists. Accordingly, the existing rules adopted for repeal appear in Chapter 25, Traffic Operations and the adopted new sections will more appropriately appear in Chapter 29, Maintenance. New §§29.21-29.26 have been rewritten to refer to the new Maintenance Division and to delegate responsibilities to the executive director or the director's designee not below the level of deputy or assistant executive director which allows for more administrative flexibility. The new sections also correct the name of the department and its commission.

In §25.503, which is simultaneously being repealed, a maintenance contractor could be debarred for assigning any interest in a maintenance contract for any purpose, or subletting any work under that contract without express approval by the Texas Transportation Commission. To expedite approval of assignments and allow for more administrative flexibility, that provision has been revised in new §29.23(a)(2)(E) and (F) by providing that a maintenance contractor must have the express approval of the executive director, or his designee, to assign a contract, and must have the approval of the department to sublet any work under the contract.

New §29.23 outlines the reasons the department follows and the circumstances the department considers in determining whether a maintenance contractor, a contractor's affiliate or successor should be debarred from bidding on, entering, and/or participating as a subcontractor under a maintenance contract.

Section 29.23 is adopted with changes by deleting the proposed subparagraph (E) which allowed the department to debar a contractor if the contractor became insolvent, including bankruptcy. This provision is not necessary since insolvency becomes an issue only if the work is not performed, and in the case of bankruptcy, the court has jurisdiction over the contract.

Throughout §§29.23, 29.24 and 29.26 the term "executive director or his designee" is used. These sections are adopted with changes by deleting any reference to the term "or his designee" as that phrase is redundant and unnecessary since the term has been previously defined in §29.22, Definitions.

COMMENTS

No comments were received on the proposed new sections.

STATUTORY AUTHORITY

The new sections are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation.

§ 29.23. Debarment.

(a) The executive director may debar a contractor, and/or a contractor's affiliate or successor, from bidding on, entering, and/or participating as a subcontractor under a maintenance contract, if that contractor:

(1) fails to enter a maintenance contract duly awarded by the commission;

(2) performs a maintenance contract in an unsatisfactory manner by:

(A) failing to begin work within the specified time;

(B) failing to perform the work with sufficient workmen, equipment and/or materials to ensure completion of the work within the specified time;

(C) neglecting or refusing to remove materials or to perform anew work rejected by the department as being defective or not meeting specifications;

(D) discontinuing prosecution of the work without the express approval of the department;

(E) assigning any interest in a maintenance contract for any purpose without express approval by the executive director;

(F) subletting any work under that contract without express approval by the department; or

(G) failing for any other reason to perform the work in an acceptable and workmanlike manner;

(3) is declared in default on a contract; or

(4) commits an act or offense, or engages in conduct which is a basis for debarment of a contractor pursuant to §9.6 of this title (relating to Procedure for Debarment of a Contractor) or §9.8 of this title (relating to Supplemental Procedures for Suspension or Debarment of a Contractor).

(b) The existence of a cause for debarment under this section does not necessarily require that the contractor be debarred; the seriousness of the contractor's acts or omissions and any mitigating circumstances should be considered in making any debarment decision.

(c) Failure to perform, unsatisfactory performance, or default caused by acts beyond the control of the contractor shall not be considered as a basis for debarment.

§29.24. Notice and Appeal.

(a) Upon a determination that a contractor should be debarred, the department shall mail a notice of the proposed debarment to the last known address of the contractor by certified mail.

(b) The notice shall clearly state:

(1) the facts and circumstances underlying the proposed debarment;

(2) the effective date and period of debarment; and

(3) the right of the contractor to request an administrative hearing on the question of the proposed debarment.(c) A request for administrative hearing under this section must be made in writing to the executive director within 10 days of the receipt of the notice of proposed debarment.

(d) An administrative hearing requested pursuant to this section shall be conducted in accordance with §§1.21-1.61 of this title (relating to Contested Case Procedure), and shall serve to abate the proposed debarment unless and until that debarment is affirmed by order of the commission.

§29.26. Period of Debarment.

(a) The period of a single debarment imposed under §29.23 of this title (relating to Debarment), shall be for a period commensurate with the seriousness of the cause, but shall not exceed 12 months duration.

(b) The executive director may consider terminating the debarment or reducing the period, upon the contractor's application, supported by documentation, for reasons deemed appropriate by that official.

This agency hereby certifies that the 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 August 26, 1998.

TRD-9813614
Bob Jackson
Acting General Counsel
Texas Department of Transportation
Effective date: September 15, 1998
Proposal publication date: July 3, 1998
For further information, please call: (512) 463–8630

♦ ♦ ♦

TEXAS DEPARTMENT OF INSURANCE

Notification Pursuant to the Insurance Code, Chapter 5, Subchapter L

As required by the Insurance Code, Article 5.96 and 5.97, the ***Texas Register*** publishes notice of proposed actions by the Texas Board of Insurance. Notice of action proposed under Article 5.96 must be published in the ***Texas Register*** not later than the 30th day before the board adopts the proposal. Notice of action proposed under Article 5.97 must be published in the ***Texas Register*** not later than the 10th day before the Board of Insurance adopts the proposal. The Administrative Procedure Act, the Government Code, Chapters 2001 and 2002, does not apply to board action under Articles 5.96 and 5.97.

The complete text of the proposal summarized here may be examined in the offices of the Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas 78714-9104.)

This notification is made pursuant to the Insurance Code, Article 5.96, which exempts it from the requirements of the Administrative Procedure Act.

Texas Department of Insurance

Adopted Action

The Commissioner of Insurance has adopted the revised Texas Workers' Compensation Classification Relativities (Classification Relativities) and the revised table to amend the Texas Basic Manual of Rules, Classifications, and Experience Rating Plan for Workers' Compensation and Employers' Liability Insurance (Manual). The revised Classification Relativities replace those adopted in Commissioner's Order No. 96-1038. The revised table concerns the Expected Loss Rates and Discount Ratios used in experience rating. The revisions were proposed by the Texas Department of Insurance staff (TDI staff) in a petition filed on July 2, 1998. Notice of the proposal (Reference No. W-0798-17-I) was published in the July 17, 1998 issue of the *Texas Register* (23 TexReg 7446). The revisions were considered at a public hearing under Docket No. 2372, held on August 18, 1998 at 9:00 a.m. in Room 100 of the Texas Department of Insurance Building, 333 Guadalupe Street in Austin, Texas.

No comments to the revisions were received.

The Commissioner adopted the revised Classification Relativities and the revised Expected Loss Rates and Discount Ratios without changes to the proposal as noticed in the *Texas Register*.

The Commissioner has determined that the revisions to the Classification Relativities and the revisions to the Expected Loss Rates and Discount Ratios contained in the Manual are necessary to more accurately reflect the changes in experience due to enactment of legislation as well as the changes that occur with the passage of time due to occurrences such as technological advances and improvement in safety programs. The Commissioner has also determined that the TDI staff should review, and revise if necessary, the Classification Relativities and the Expected Loss Rates and Discount Ratios on an annual basis to ensure that they reflect the experience in Texas as accurately as possible.

The Commissioner has jurisdiction of this matter pursuant to Articles 5.60 and 5.96 of the Texas Insurance Code.

The revised Classification Relativities and the revised Expected Loss Rates and Discount Ratios are on file in the Chief Clerk's Office of the Texas Department of Insurance under Reference No. W-0798-17-I and are incorporated by reference into Commissioner's Order No. 98-0998.

This notification is made pursuant to the Insurance Code, Article 5.96, which exempts action taken under Article 5.96 from the requirements of the Administrative Procedure Act (Government Code, Title 10, Ch. 2001).

Consistent with the Insurance Code, Article 5.96(h), prior to the effective date of this action, the Texas Department of Insurance will notify all insurers affected by this action.

This agency hereby certifies that the adopted revised Classification Relativities and the revised Expected Loss Rates and Discount Ratios contained in the Manual have been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

TRD-9813726
Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Effective date: January 1, 1999
Proposed Action publication date: July 17, 1998
Filed: August 28, 1998

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REVIEW OF AGENCY RULES

This Section contains notices of state agency rules review as directed by the 75th Legislature, Regular Session, House Bill 1 (General Appropriations Act) Art. IX, Section 167. Included here are: (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption*, which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the ***Texas Administrative Code*** on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the ***Texas Register*** office.

Proposed Reviews

State Office of Administrative Hearings

Title 1, Part VII

The State Office of Administrative Hearings (SOAH) files this notice of intention to review Chapter 159, concerning administrative license suspension hearings, commonly known as the Administrative License Revocation (ALR) Program, pursuant to the Appropriations Act of 1997, HB 1, Article IX, Section 167 (Section 167).

As part of this review process, SOAH is proposing amendments to §§ 159.5, 159.7, 159.11, 159.13, 159.15, 159.17, 159.19, 159.21, 159.23, and 159.25, 159.27, 159.29, 159.33, 159.35, 159.37, 159.39, and 159.41. In addition to this review process, SOAH is proposing a new section, § 159.4 Computation of Time. The new section is proposed to provide a time guideline for anyone that files documents or is taking other actions under this Chapter. The proposed amendments and new rule may be found in the Proposed Rules section of the *Texas Register*. SOAH will accept comments on the Section 167 requirement as to whether the reason for adopting the rules continues to exist in the comments filed on the proposed amendments.

SOAH is not proposing any changes to §§ 159.1, 159.3, or 159.31. SOAH's reason for adopting these sections continues to exist. Comments regarding the Section 167 requirement as to whether the reason for adopting these sections of Chapter 159 continues to exist may be submitted to Debra Anderson, Legal Assistant, State Office of Administrative Hearings, 300 West 15th St., Suite 502, P. O. Box 13025, Austin, Texas 78711-3025 within 20 days after publication of this notice of intention to review.

Any questions pertaining to this notice of intention to review should be directed to Debra Anderson, Legal Assistant, Legal Services Unit, State Office of Administrative Hearings, 300 West 15th Street, Suite 502, P. O. Box 13025, Austin, Texas 78711-3025 or via facsimile (512) 936-0770.

TRD-9813707
Amalija J. Hodgins
Deputy Chief Administrative Law Judge
State Office of Administrative Hearings
Filed: August 28, 1998

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Texas Alcoholic Beverage Commission

Title 16, Part III

The Texas Alcoholic Beverage Commission files its notice of intention to review its rules contained in Title 16, Texas Administrative Code, Chapter 31, governing administration functions of the commission. This review is conducted pursuant to Appropriations Act, 1997, House Bill 1, Article IX, §167.

The commission will receive comments on whether the need for any rule contained within this chapter still exists and whether any of these rules require amendment. Amendments or repeal of existing rules proposed by the commission will appear in the proposed rules section of the *Texas Register* and will be acted on in accordance with normal state rule making procedures.

Comments may be directed to Lou Bright, General Counsel, Texas Alcoholic Beverage Commission, P. O. Box 13127, Austin, Texas 78711.

TRD-9813686
Doyne Bailey
Administrator
Texas Alcoholic Beverage Commission
Filed: August 28, 1998

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The Texas Alcoholic Beverage Commission files its notice of intention to review its rules contained in Title 16, Texas Administrative Code, Chapter 33, governing licensing functions of the commission. This review is conducted pursuant to Appropriations Act, 1997, House Bill 1, Article IX, §167.

The commission will receive comments on whether the need for any rule contained within this chapter still exists and whether any of these rules require amendment. Amendments or repeal of existing rules proposed by the commission will appear in the proposed rules section of the *Texas Register* and will be acted on in accordance with normal state rule making procedures.

Comments may be directed to Lou Bright, General Counsel, Texas Alcoholic Beverage Commission, P. O. Box 13127, Austin, Texas 78711.

TRD-9813687

Doyne Bailey
Administrator
Texas Alcoholic Beverage Commission
Filed: August 28, 1998

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Automobile Theft Prevention Authority

Title 43, Part III

In accordance with the General Appropriations Act, Article IX, Section 167, 75th Legislature, the Automobile Theft Prevention Authority proposes to review the entirety of its rules under Title 43 of the Texas Administrative Code for re-adoption, repeal, or amendment beginning September 1, 1998, through May 31, 1999. The rules to be reviewed are located at Title 43 of the Texas Administrative Code, Chapter 57, Automobile Theft Prevention Authority.

Comments pertaining to this notice of intention to review may be directed to Agustin De La Rosa, Director, Automobile Theft Prevention Authority, 200 East Riverside Drive, Austin, Texas 78704, for a period of 30 days following publication in this issue of the *Texas Register*.

TRD-9813827
Agustin De La Rosa
Director
Automobile Theft Prevention Authority
Filed: August 31, 1998

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Texas Board of Chiropractic Examiners

Title 22, Part III

The Texas Board of Chiropractic Examiners proposed to readopt Chapter 73. Texas Board of Chiropractic Examiners in accordance with the Appropriations Act, section 167.

The agency's reason for adopting the rules contained in this chapter continues to exist.

Comments on the proposals may be submitted to Joyce Kershner, Director of Licensure, Texas Board of Chiropractic Examiners, 333 Guadalupe, Tower III, Suite 825, Austin, Texas 78701, (512)305-6709.

TRD-9813597
Gary K. Cain, Ed.D.
Executive Director
Texas Board of Chiropractic Examiners
Filed: August 26, 1998

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Interagency Council on Early Childhood Intervention

Title 25, Part VIII

The Interagency Council on Early Childhood Intervention (ECI) proposes to review the following sections from Chapter 621 pursuant to the Appropriations Act of 1997, HB 1, Article IX, Section 167:

§621.1

§621.2

§621.3

§621.5

§621.61

§621.62

§621.63

§621.64

The ECI is contemporaneously proposing amendments to §§621.1-621.3, 621.5, 621.61 and 621.63 elsewhere in this issue of the *Texas Register*.

Comments on the review of these proposed rules may be submitted to Alex Porter, General Counsel, Interagency Council on Early Childhood Intervention, 4900 North Lamar Boulevard, Austin, Texas 78751-2399.

TRD-9813719
Donna Samuelson
Deputy Executive Director
Interagency Council on Early Childhood Intervention
Filed: August 28, 1998

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Texas Board of Professional Land Surveying

Title 22, Part XXIX

The Texas Board of Professional Land Surveying proposes to review Chapter 664, Continuing Education, pursuant to the Appropriations Act of 1997, HB 1, Article IX, Section 167.

Comments on the review of this chapter may be submitted to Sandy Smith, Texas Board of Professional Land Surveying, 7701 North Lamar, Suite 400, Austin, Texas 78752.

TRD-9813777
Sandy Smith
Executive Director
Texas Board of Professional Land Surveying
Filed: August 31, 1998

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Texas State Board of Examiners of Psychologists

Title 22, Part XXI

The Texas State Board of Examiners of Psychologists commenced its review of Chapter 465. Rules of Practice, §465.33 and §465.36, in accordance with the Appropriations Act, Section 167, at its July 30-31, 1998, Board meeting. It was the decision of the Board to continue this review process at its next regularly scheduled meeting on September 10-11, 1998.

Comments on the review may be submitted to Janice Alvarez, Texas State Board of Examiners of Psychologists, 333 Guadalupe, Suite 2-450, Austin, Texas 78701.

TRD-9813709
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Filed: August 28, 1998

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Public Utility Commission of Texas

Title 16, Part II

The Public Utility Commission of Texas files this notice of intention to review Procedural Rules, Subchapter F (relating to Parties), §§22.101 relating to Representative Appearances; 22.102 relating to Classification of Parties; 22.103 relating to Standing to Intervene; 22.104 relating to Motions to Intervene; and 22.105 relating to Alignment of Parties pursuant to the Appropriations Act of 1997, HB 1, Article IX, Section 167 (Section 167). Project Number 17709 has been assigned to this proceeding.

As part of this review process, the commission is proposing an amendment to §§22.102, 22.103 and 22.105. The proposed amendments may be found in the Proposed Rules section of the *Texas Register*. The commission will accept comments on the Section 167 requirement as to whether the reason for adopting these sections continues to exist in the comments filed on the proposed amendment.

The commission is not proposing any changes to §22.101 and §22.104. Comments regarding the Section 167 requirement as to whether the reason for adopting these sections continues to exist may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 N. Congress Avenue, P. O. Box 13326, Austin, Texas 78711-3326 within 30 days after publication of this notice of intention to review. All comments should refer to Project Number 17709.

Any questions pertaining to this notice of intention to review should be directed to Rhonda Dempsey, Rules Coordinator, Office of Regulatory Affairs, Public Utility Commission of Texas, 1701 N. Congress Avenue, Austin, Texas 78711-3326 or at voice telephone (512) 936-7308.

TRD-9813651
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 27, 1998

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Texas Department of Transportation

Title 43, Part 1

The Texas Department of Transportation files this notice of intention to review Title 43, TAC, Part I, Chapter 30 (relating to Aviation) in accordance with the General Appropriations Act of 1997, House Bill 1, Article IX, §167.

As required by §167, the department will accept comments regarding whether the reason for adopting each of the rules in Chapter 30 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 in writing to Bob Jackson, Acting General Counsel, Texas Department of Transportation, 125 E. 11th Street, Austin, Texas 78701-2483, or at (512) 463-8630.

TRD-9813621
Bob Jackson
Acting General Counsel
Texas Department of Transportation
Filed: August 26, 1998

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Adopted Rule Reviews

Texas Board of Professional Land Surveying

Title 22, Part XXIX

The Texas Board of Professional Land Surveying adopts the review of Chapter 663, Standards of Responsibility and Rules of Conduct, pursuant to the Appropriations Act of 1997, HB 1, Article IX, Section 167, published in the April 17, 1998, issue of the *Texas Register* (23 TexReg 3883). The Texas Board of Professional Land Surveying finds that the reason for adopting Chapter 663, Standards of Responsibility and Rules of Conduct, continues to exist.

As a result of the review process, the Texas Board of Professional Land Surveying proposed amendments to the following sections: §§663.5, 663.7, 663.10, 663.16, 663.17 and 663.19. Comments suggested that the sections be amended to provide clarification. The board agreed with the comments and has provided clarification. The proposed amendments were published in the July 17, 1998, issue of the *Texas Register* (23 TexReg 7326). The adopted amendments are published contemporaneously in this issue of the *Texas Register*.

The Texas Board of Professional Land Surveying concludes the review of Chapter 663, Standards of Responsibility and Rules of Conduct.

TRD-9813776
Sandy Smith
Executive Director
Texas Board of Professional Land Surveying
Filed: August 31, 1998

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Texas State Board of Examiners of Psychologists

Title 22, Part XXI

The Texas State Board of Examiners of Psychologists (TSBEP) adopts the review of 22 TAC Chapter 467, Announcements and Listings, 22 TAC Chapter 469, Specialty Certification, 22 TAC Chapter 471, Renewals, and 22 TAC Chapter 473, Fees, pursuant to the Appropriations Act of 1997, HB 1, Article IX, Section 167, published in the May 29, 1998, issue of the *Texas Register* (23 TexReg 5742).

The TSBEP received no comments related to the rule review requirement as to whether the reason for adopting the rules continues to exist. As the result of its review process, the TSBEP adopts amendments to §469.1, §471.1-471.2, §471.4-471.5 and §473.1-473.5. The adopted amendments may be found in the Adopted Rules section of the August 21, 1998, issue of the *Texas Register*. The Board does not readopt and is repealing §467.1, §471.3 and §473.6 in the August 21, 1998, issue of the *Texas Register*. The Board finds that the reasons for adopting the remaining rules, §467.2, §473.7 and §473.8, continues to exist and readopts these rules.

TRD-9813710
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Filed: August 28, 1998

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TABLES & GRAPHICS

Graphic material from the emergency, proposed, and adopted sections is published separately in this tables and graphics section. Graphic material is arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic material is indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word “Figure” followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on. Multiple graphics in a rule are designated as “Figure 1” followed by the TAC citation, “Figure 2” followed by the TAC citation.

Figure: 30 TAC §303.35(d)

Violation	1st time noted within previous 24 months	2nd time noted with in previous 24 months	3rd time noted with in previous 24 months
1. Diversion without a watermaster approved diversion certification (applicable to water right holders only)	On-site inspection notice (warning)	Citation/fine of $200 for minors*; $500 for majors**	Initiation of formal enforcement action
2. Failure to provide a measuring device or alternative method of measurement	On-site inspection notice (warning)	Citation/fine of $200 for minors; $500 for majors unless corrected within 30 days	Initiation of formal enforcement action
3. Water right holder does not pass water which the holder is not entitled to hold or impound in accordance with special conditions of water rights or watermaster (applicable to water right holders located between Fort Quitman and Amistad reservoir and water right holders on tributaries of the Rio Grande only)	On-site inspection notice (warning)	Citation/fine of $200 for minors; $500 for majors	Initiation of formal enforcement action
4. Late pump operation reports	On-site inspection notice (warning)	Citation/fine of $200 for minors; $500 for majors	Initiation of formal enforcement action

*minor: A water right of 5000 acre-feet or less

**major: A water right of greater than 5000 acre-feet

Figure: 30 TAC §304.34(d)

Violation	1st time noted within previous 24 months	2nd time noted within previous 24 months	3rd time noted within previous 24 months
1. Diversion without a watermaster approved declaration of intent (applicable to water right holders only)	On-site inspection notice (warning)	Citation/fine of $200 for minors*; $500 for majors**	Referral for formal enforcement action
2. Failure to provide a measuring device or alternative method of measurement	On-site inspection notice (warning)	Citation/fine of $200 for minors; $500 for majors unless corrected within 30 days	Referral for formal enforcement action
3. Water right holder does not pass water which the holder is not entitled to hold or impound in accordance with special conditions of water rights or watermaster	On-site inspection notice (warning)	Citation/fine of $200 for minors; $500 for majors	Referral for formal enforcement action
4. Late report of diversion, release, or impoundment	On-site inspection notice (warning)	Citation/fine of $200 for minors; $500 for majors	Referral for formal enforcement action

*minor: A water right of 5000 acre-feet or less

**major: A water right of greater than 5000 acre-feet

FIGURE 43 TAC 4.37(b)(2)(B)

DRUG	CONFIRMATORY TEST LEVEL (ng/ml)
Marijuana metabolite (Delta-9-tetrahydrocannabinol-9-carboxylic acid)	15
Cocaine metabolite (Benzoylecgonine)	150
Opiate metabolite (25 ng/ml if immunoassay specific for free morphine)	300
Phencyclidine	25
Amphetamines (including methamphetamines)	500

FIGURE 43 TAC §21.56

APPENDIX A

LENGTH

3"	.076 m (Meters)
6"	.152 m
8"	.203 m
12" or 1'	.305 m
18"	.457 m
24" or 2'	.610 m
30"	.762 m
36" or 3'	.914 m
42"	1.067 m
48" or 4'	1.219 m
50"	1.270 m
54"	1.372 m
60" or 5'	1.524 m
72" or 6'	1.829 m
84" or 7'	2.134 m
10'	3.048 m
16'	4.877 m
18'	5.486 m
22'	6.706 m
30'	9.144 m
76'	23.165 m
150'	45.720 m
300'	91.440 m

SPEED

40 mph	62.372 km/h (Kilometers per hour)
45 mph	72.419 km/h
50 mph	80.465 km/h

WEIGHT

175 lbs.	79.380 kg (Kilograms)
4 U.S. short tons	3628.800 kg or 3.6t (Metric Tons)
16 U.S. short tons	14515.200 kg or 14.4t

PRESSURE

60 psi	414 kPa (Kilopascals)

OPEN MEETINGS

Agencies with statewide jurisdiction must give at least seven days notice before an impending meeting. Institutions of higher education or political subdivisions covering all or part of four or more counties (regional agencies) must post notice at least 72 hours before a scheduled meeting time. Some notices may be received too late to be published before the meeting is held, but all notices are published in the ***Texas Register***.

Emergency meetings and agendas. Any of the governmental entities listed above must have notice of an emergency meeting, an emergency revision to an agenda, and the reason for such emergency posted for at least two hours before the meeting is convened. All emergency meeting notices filed by governmental agencies will be published.

Posting of open meeting notices. All notices are posted on the bulletin board at the main office of the Secretary of State in lobby of the James Earl Rudder Building, 1019 Brazos, Austin. These notices may contain a more detailed agenda than what is published in the ***Texas Register***.

Meeting Accessibility. Under the Americans with Disabilities Act, an individual with a disability must have an 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 summary several days prior to the meeting by mail, telephone, or RELAY Texas (1-800-735-2989).

Texas State Board of Public Accountancy

Wednesday, September 16, 1998, 9:00 a.m.

333 Guadalupe Street, Tower, III, Suite 900, Room 910

Austin

Qualifications Committee

AGENDA:

A. Consideration of proposed Board and staff assignments.

B. Review of staff interpretation of management information systems courses in meeting the accounting course requirement of board rule 511.57

C. Consideration of AICPA's invitation to comment on issues pass/ fail grades on the Uniform CPA Examination.

D. Review of success rates of Texas candidates on the CPA examination

NASBA correspondence.

All discussion of investigative files will be in Executive Session

Contact: Amanda G. Birrell, 333 Guadalupe, Tower III, Suite 900, Austin, Texas 78701–3900, 512/305–7848.
Filed: September 2, 1998, 10:26 a.m.

TRD-9813933

♦ ♦ ♦

Wednesday, September 16, 1998, 1:00 p.m.

333 Guadalupe Street, Tower, III, Suite 900, Room 950G

Austin

Rules Committee

AGENDA:

1. Rules 523.1, 523.32, 511.161, 511.163: Ethics Course required of candidates.

2. Rules 501.24. Expressly incorporating SSAE and SSARS as professional standards.

3. Rule 501.14. Commissioners and attest.

4. Rule 501. 11. Incorporating AICPA interpretations on independence.

5. Revise Chapter 519. Mediation and ex parte communications.

6. Address return of tax or other work papers by alternate practice unit.

7. Review of other Rules issues that are on the Board's agenda.

Contact: Amanda G. Birrell, 333 Guadalupe, Tower III, Suite 900, Austin, Texas 78701–3900, 512/305–7848.
Filed: September 2, 1998, 10:26 a.m.

TRD-9813932

♦ ♦ ♦

Wednesday, September 16, 1998, 1:00 p.m.

333 Guadalupe Street, Tower III, Suite 900, Room 910

Austin

Quality Review Committee

AGENDA:

A. Consideration of a report from the Quality Review Oversight Board

B. Consideration of amendments to the Quality Review Rules.

C. Consideration of comments made by reviewed firms.

D. Review of Quality Review statistics.

Contact: Amanda G. Birrell, 333 Guadalupe, Tower III, Suite 900, Austin, Texas 78701–3900, 512/305–7848.
Filed: September 2, 1998, 10:26 a.m.

TRD-9813929

♦ ♦ ♦

Wednesday, September 16, 1998, 3:30 p.m.

333 Guadalupe Street, Tower III, Suite 900, Room 910

Austin

Executive Committee

AGENDA:

A. Consultation to seek the advise of the Board's attorney concerning pending or contemplated litigation and ratification of Major Case Enforcement Committee's selection of outside counsel (Executive Session).

B. Review of AICPA/NASBA matters.

1. Discussion on the revised Investor Questionnaire.

2. Review of request for forum for CPA examination vendors .

C. Review of correspondence

All discussion of investigative files will be in Executive Session.

Contact: Amanda G. Birrell, 333 Guadalupe, Tower III, Suite 900, Austin, Texas 78701–3900, 512/305–7848.
Filed: September 2, 1998, 10:26 a.m.

TRD-9813930

♦ ♦ ♦

Wednesday, September 16, 1998, 4:00 p.m.

333 Guadalupe Street, Tower III, Suite 900, Room 910

Austin

Regulatory Compliance Committee

AGENDA:

A. Report on the July 29, 1998, Regulatory Compliance Committee meeting (via teleconference).

1. Discussion of the Legislative Appropriations Request for Fiscal Years 2000–2001.

B. Report on Joint Budget Hearing-Monday, August 10, 1998. .

C. Review and approval of Fiscal Year 1999 Operating Budget. .

D. Approval of the Board's financial statements.

All discussion of investigative files will be in Executive Session.

Contact: Amanda G. Birrell, 333 Guadalupe, Tower III, Suite 900, Austin, Texas 78701–3900, 512/305–7848.
Filed: September 2, 1998, 10:26 a.m.

TRD-9813931

♦ ♦ ♦

State Office of Administrative Hearings

Monday, September 14, 1998, 1:30 p.m.

1700 North Congress, 11th Floor of the Stephen F. Austin Building

Austin

Utility Division

AGENDA:

A Prehearing will be conducted at the above date and time in SOAH Docket No. 473–98–1546–Complaint of Linda Mitchell against Southwestern Bell Telephone Company (PUC Docket No. 19381)

Contact: William G. Newchurch, 300 West 15th Street, Suite 502, Austin, Texas 78701–1649, (P.O. Box 13025), 512/936–0728.
Filed: September 1, 1998, 12:49 p.m.

TRD-9813848

♦ ♦ ♦

Tuesday, September 15, 1998, 9:00 a.m.

State Office of Administrative Hearings, 1700 North Congress, 1100

Austin

AGENDA:

Administrative hearing before the State Office of Administrative Hearings regarding SOAH Docket No. 551–98–1166 in the Matter of Texas Department of Agriculture vs. Home Depot #582, concerning alleged violation of Texas seed laws.

Contact: Delores Alvarado Hibbs, P.O. Box 12847, Austin, Texas 78711, 512/463–7541.
Filed: September 1, 1998, 9:44 a.m.

TRD-9813835

♦ ♦ ♦

Tuesday, September 15, 1998, 9:00 a.m.

State Office of Administrative Hearings, 1700 North Congress, 1100

Austin

AGENDA:

Administrative hearing before the State Office of Administrative Hearings regarding SOAH Docket No. 551–98–1032 in the Matter of Texas Department of Agriculture vs. Joseph Ronald Savoie, concerning alleged violation of Texas pesticide laws.

Contact: Delores Alvarado Hibbs, P.O. Box 12847, Austin, Texas 78711, 512/463–7541.
Filed: September 2, 1998, 9:58 a.m.

TRD-9813922

♦ ♦ ♦

Wednesday, September 16, 1998, 10:00 a.m.

8918 Tesoro Drive, Suite 120

San Antonio

AGENDA:

Administrative hearing to review alleged violation of Texas Department of Agriculture Code Annotated §§103.001–103.015 (Vernon Supp. 1998) by Hill Country Produce, Inc., as petitioned by River City Produce Co. Inc.

Contact: Delores Alvarado Hibbs, P.O. Box 12847, Austin, Texas 78711, 512/463–7541.
Filed: September 1, 1998, 3:44 p.m.

TRD-9813873

♦ ♦ ♦

State Bar of Texas

Thursday, September 9, 1998, 1:30 p.m.

Texas Law Center, 1414 Colorado Street, Room 206/7

Austin

Executive Committee

AGENDA:

Call to order/roll call/minutes/reports from: the president; legislative issues/appeals; executive director/other report may be heard from the following: the president-elect; the immediate past president; the general counsel; the president of the Texas Young Lawyer's Association; and the supreme court liaison/adjourn.

Contact: Pat Hiller, P.O. Box 12487, Austin, Texas 78711, 1/800/204–2222.
Filed: September 1, 1998, 4:08 p.m.

TRD-9813877

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Texas Boll Weevil Eradication Foundation

Thursday, September 10, 1998, 1:00 p.m.

Federal Building, 1205 Texas Avenue

Lubbock

Technical Advisory Committee

AGENDA:

Chairman's opening comments and approval of the minutes of the last meeting; Program update report; Blacklands Zone Proposal; Closing remarks and discussion of next meeting.

Contact: Katie Dickie Stavinoh, P.O. Box 12847, Austin, Texas 78711, 512/463–7593.
Filed: September 1, 1998, 3:44 p.m.

TRD-9813872

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Texas Bond Review Board

Tuesday, September 8, 1998, 10:00 a.m.

State Capitol, Capitol Extension, Room E1.012

Austin

Planning Session

AGENDA:

I. Call to order

II. Approval of Minutes

III. Discussion on Proposed Issues

A. Texas Department of Housing and Community Affairs Residential Mortgage Revenue Bonds, Series 1998A (New Money)

B. Texas Department of Housing and Community Affairs Residential Mortgage Revenue Refunding Bonds, Series 1998B (Refunding of Series A Commercial Paper Notes)

C. Texas Department of Housing and Community Affairs Residential Mortgage Revenue Refunding Bonds, Series 1998C (Refunding of Series B Commercial Paper Notes)

D Texas Department of Housing and Community Affairs Residential Mortgage Revenue Refunding Bonds, Series 1999A (Refunding of Series 1987A and 1987D Bonds)

E. Texas State Affordable Housing Corporation-A Servicing Release Premium Line of Credit (for use with the Texas Department of Housing and Community Affairs' bond issue 54, Series 1998A).

IV. Other Business

V. Adjourn

Contact: Jose A. Hernandez, 300 West 15th Street, Suite 409, Austin, Texas 78701, 512/463–1741.
Filed: August 31, 1998, 3:34 p.m.

TRD-9813825

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State Cemetery Committee

Thursday, September 17, 1998, 10:00 a.m.

909 Navasota

Austin

AGENDA:

I. call to order; II. staff, guests and members present; III. approval of minutes; IV. consideration of the following agenda items: Item 1. consideration and potential action on requests for burial and cenotaphs. Item 2. consideration and potential action on the Gold Star Mothers. Item 3. consideration and potential action on the Medal of Honor Project. Item 4. old business/completed projects:-"Avenue of the Flags" Program on Highway 165,-Front of Building Sign,-Warranty Letter to Contractor regarding Signage Project,-Cemetery Annex,-Blake Monument,-Blade Technology,-Grass Section C,-Concrete Paths Item 5. consideration and potential action on Saturday office hours. Item 6. consideration and potential action on Texas State Cemetery Budget. Item 7. consideration and potential action on Architect Report for the Plaza and 7th Street. Item 8. consideration and potential action on waxing of the Cemetery bronzes. V. Program issues. Informational items, no action requested. VI. Scheduling of next open meeting. VII. Executive Session to consider personnel matters pursuant to the provisions of Texas Government Code Section 551.074: Personnel Action VII. Adjournment.

Contact: Ann Dillon, 1711 San Jacinto Boulevard, Austin, Texas 78701, 512/463–3960.
Filed: September 2, 1998, 10:26 a.m.

TRD-9813935

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Texas Board of Chiropractic Examiners

Thursday, September 10, 1998, 9:00 a.m.

333 Guadalupe, Tower III, Suite 825

Austin

Licensure and Educational Standards Committee

AGENDA:

The Licensure and Educational Standards Committee of the Texas Board of Chiropractic Examiners will meet on Thursday, September 10, 1998, at 9:00 a.m. to consider, discuss, take and appropriate action/or approve: B.1. Review of licensees who passed August 6, 1998, jurisprudence examination. 2. Request for reinstatement of license Jesus A. Rodriguez, D.C. 3. Cancellation of licenses for non-renewal.

Contact: Joyce Kershner, 333 Guadalupe, Tower III, Suite 825, Austin, Texas 78701, 512/305–6709.
Filed: August 27, 1998, 11:29 a.m.

TRD-9813656

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Thursday, September 10, 1998, 9:00 a.m.

333 Guadalupe, Tower III, Suite 825

Austin

Licensure and Educational Standards Committee

REVISED AGENDA:

The Licensure and Educational Standards Committee of the Texas Board of Chiropractic Examiners will meet on Thursday, September 10, 1998, at 9:00 a.m. to consider, discuss, take and appropriate action/or approve: B.1. Review of licensees who passed August 6, 1998, jurisprudence examination. 2. Request for reinstatement of license Jesus A. Rodriguez, D.C., Nancy Zini Jones, D.C. 3. Cancellation of licenses for non-renewal. 4. Review of Facility Renewal form.

Contact: Joyce Kershner, 333 Guadalupe, Tower III, Suite 825, Austin, Texas 78701, 512/305–6709.
Filed: August 31, 1998, 12:07 p.m.

TRD-9813795

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Thursday, September 10, 1998, 9:00 a.m.

333 Guadalupe, Tower III, Suite 825

Austin

Technical Standards Committee

AGENDA:

The Technical Standards Committee of the Texas Board of Chiropractic Examiners will meet on Thursday, September 10, 1998, at 9:00 a.m. to consider, discuss, take and appropriate action/or approve: D.1. Scope of practice: Ordering of myelogram by D.C. 2. Myopractic: Complaint against Robert Petteway, Massage Therapist.

Contact: Vera Gonzales, 333 Guadalupe, Tower III, Suite 825, Austin, Texas 78701, 512/305–6702.
Filed: August 27, 1998, 11:29 a.m.

TRD-9813658

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Thursday, September 10, 1998, 10:00 a.m.

333 Guadalupe, Tower III, Suite 825

Austin

Enforcement Committee

AGENDA:

The Enforcement Committee of the Texas Board of Chiropractic Examiners will meet on Thursday, September 10, 1998, at 10:00 a.m. to consider, discuss, take and appropriate action/or approve: A.1. Administrative fines and penalties. 2. Review cases 98–01 through 98–185 3. Expunction of records.

Contact: John Zavala, 333 Guadalupe, Tower III, Suite 825, Austin, Texas 78701, 512/305–6708.
Filed: August 27, 1998, 11:29 a.m.

TRD-9813655

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Thursday, September 10, 1998, 10:00 a.m.

333 Guadalupe, Tower III, Suite 825

Austin

Rules Committee

AGENDA:

The Rules Committee of the Texas Board of Chiropractic Examiners will meet on Thursday, September 10, 1998, at 10:00 a.m. to consider, discuss, take and appropriate action/or approve:

1. Proposed New Rule-Approval of Continuing Education Courses and Sponsors: Chapter 73 and 75.

2. Proposed Amendments to Chapter 79–Provisional Licensure (Reciprocity)

3. Position Statement: Unlicensed practice of chiropractic

4. Proposed Amendment to Chapter 71–Applications and Applicants.

Contact: Joyce Kershner, 333 Guadalupe, Tower III, Suite 825, Austin, Texas 78701, 512/305–6709.
Filed: August 27, 1998, 11:29 a.m.

TRD-9813659

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Thursday, September 10, 1998, 11:00 a.m.

333 Guadalupe, Tower III, Suite 825

Austin

Executive Committee

AGENDA:

The Executive Committee of the Texas Board of Chiropractic Examiners will meet on Thursday, September 10, 1998, at 11:00 a.m. to consider, discuss, take and appropriate action/or approve: C.1. Proposed board meeting dates for 1999; 2. Approval of the revised Strategic Plan for the Fiscal Years 1999–2003; 3. approval of the revised Legislative appropriations Request for Fiscal Year 2000 and 2001.

Contact: Joyce Kershner, 333 Guadalupe, Tower III, Suite 825, Austin, Texas 78701, 512/305–6709.
Filed: August 27, 1998, 11:29 a.m.

TRD-9813657

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Thursday, September 10, 1998, 1:30 p.m.

333 Guadalupe, Tower III, Suite 102

Austin

Board Meeting

AGENDA:

The Texas Board of Chiropractic Examiners will consider and act, if necessary, on matters within the jurisdiction of the agency which are listed in the complete agenda, as follows: Approval of minutes of last meeting. President's report. Report of the Executive Director on administration, budget, internal policy and procedure, personnel and general information on licensees. A. Enforcement Committee: 1. Administrative fines and penalties; 2. Review cases 98–01 thru 98–185; 3. Expunction of records; B. Licensure and Education Standards Committee: 1. Review of licensees who passed August 6, 1998 jurisprudence examination; 2. Request for reinstatement of license: Jesus A. Rodriguez, D.C. 3. Cancellation of licenses for non-renewal; C. Executive Committee; 1. Proposed Board meeting dates for 1999; 2. Approval of the revised Strategic Plan for the Fiscal Years 1999–2003; 3. Approval of the revised Legislative Appropriations Request for Fiscal Year 2000 and 2001. D. Technical Standards Committee; 1. Scope of Practice: Ordering of myelogram by D.C.; 2. Myopractic: Complaint against Robert Petteway Massage Therapist; E. Rules Committee: 1. Proposed new Rule-Approval of Continuing Education Courses and Sponsors: Chapter 73 and 75; 2. Proposed amendments to Chapter 79: Provisional Licensure (Reciprocity) 3. Position Statement: Unlicensed practice of chiropractic ; 4. Proposed amendment to Chapter 71: Applications and applicants. Open forum for licensees or the general public to address the Board. Items to be discussed for future agenda. Pending litigation: Cause No. G-97; Seabolt, et al. V. Texas Board of Chiropractic Examiners, et al.: In the U.S. District Court, Southern District of Texas, Galveston Division. The Board may meet from time to time in Executive Session with respect tot he above items authorized by The Texas Open Meeting Act, Chapter 551 of the Government Code. Adjournment.

Contact: Joyce Kershner, 333 Guadalupe, Tower III, Suite 825, Austin, Texas 78701, 512/305–6709.
Filed: August 27, 1998, 11:28 a.m.

TRD-9813654

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Thursday, September 10, 1998, 1:30 p.m.

333 Guadalupe, Tower III, Suite 102

Austin

Board Meeting

REVISED AGENDA:

The Texas Board of Chiropractic Examiners will consider and act, if necessary, on matters within the jurisdiction of the agency which are listed in the complete agenda, as follows: Approval of minutes of last meeting. President's report. Report of the Executive Director on administration, budget, internal policy and procedure, personnel and general information on licensees. A. Enforcement Committee: 1. Administrative fines and penalties; 2. Review cases 98–01 thru 98–185; 3. Expunction of records; B. Licensure and Educational Standards Committee: 1. Review of licensees who passed August 6, 1998 jurisprudence examination; 2. Request for reinstatement of license: Jesus A. Rodriguez, D.C. 3. Cancellation of licenses for non-renewal; 4. Review of Facility Renewal form C. Executive Committee; 1. Proposed Board meeting dates for 1999; 2. Approval of the revised Strategic Plan for the Fiscal Years 1999–2003; 3. Approval of the revised Legislative Appropriations Request for Fiscal Year 2000 and 2001. D. Technical Standards Committee; 1. Scope of Practice: Ordering of myelogram by D.C.; 2. Myopractic: Complaint against Robert Petteway Massage Therapist; E. Rules Committee: 1. Proposed new Rule-Approval of Continuing Education Courses and Sponsors: Chapter 73 and 75; 2. Proposed amendments to Chapter 79: Provisional Licensure (Reciprocity) 3. Position Statement: Unlicensed practice of chiropractic ; 4. Proposed amendment to Chapter 71: Applications and applicants. Open forum for licensees or the general public to address the Board. Items to be discussed for future agenda. Pending litigation: Cause No. G-97; Seabolt, et al. V. Texas Board of Chiropractic Examiners, et al.: In the U.S. District Court, Southern District of Texas, Galveston Division. The Board may meet from time to time in Executive Session with respect tot he above items authorized by The Texas Open Meeting Act, Chapter 551 of the Government Code. Adjournment.

Contact: Joyce Kershner, 333 Guadalupe, Tower III, Suite 825, Austin, Texas 78701, 512/305–6709.
Filed: August 31, 1998, 12:07 p.m.

TRD-9813796

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Comptroller of Public Accounts

Tuesday, September 29, 1998, 10:00 a.m.

LBJ Building, Room 114, 111 East 17th Street

Austin

Medicaid and Public Assistance Fraud Oversight Task Force

AGENDA:

I. Presentations on Advanced Fraud Detection Computer Technology; II. Update on Food Stamp Fraud Detection Initiatives; III. Report from Health and Human Service Commission on Medicaid Fraud; IV. Update on Finger Imaging Projects; V. White Paper on Finger Imaging Projects in Texas; VI. Comments from the Audience; VII. Adjourn.

Contact: Theresa Poon, 111 East 17th Street, Room 507, Austin, Texas 78774, 512/936–6070.
Filed: September 1, 1998, 3:05 p.m.

TRD-9813862

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Wednesday, September 30, 1998, 11:30 a.m.

William P. Hobby, Jr., State Office of Building, Tower II, Suite 2–225, 333 Guadalupe Street

Austin

Interagency Task Force on EBT

AGENDA:

I. Report on National EBT Issues; II. Update on Lone Star Program; III. WIC Smart Card Presentation; IV. New State Initiatives; V. Legislative Issues; VI. Comments from the Audience; VII. Adjourn.

Contact: Theresa Poon, 111 East 17th Street, Room 507, Austin, Texas 78774, 512/936–6070.
Filed: September 1, 1998, 3:05 p.m.

TRD-9813863

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Texas Department of Criminal Justice

Wednesday, September 9, 1998, 10:00 a.m.

Conference Room, LaQuinta Inn, 1407–I-45

Huntsville

Correctional Managed Health Care Advisory Commission

AGENDA:

(This meeting will be held jointly with the TBCJ Health Care Committee)

A. Call to order

B. Introduction/recognitions

C. Approval of minutes, June 30, 1998, CMHCAC Meeting

D. Chairman's Report

E. Medical Director's Reports

1. Texas Department of Criminal Justice

2. University of Texas Medical Branch

3. Texas Tech University

F. Status Report: SAO Action Plan

G. Employee TB Testing

H. Update on HIV/AIDS Initiatives

1. Status report on seroprevalence study design

2. HIV Peer Educators

I. Hepatitis C

J. Dialysis

K. Update: Pharmacy and Therapeutics Committee

L. Update: Actuarial Review of Health Care Costs/Projections

M. Discussion-Date/Location Next CMHCAC Meeting

Person with disabilities who plan to attend this meting and who need auxiliary aids or services as interpreters for person who are deaf or hearing impaired, readers, large print or Braille, are required to contact the agency prior tot he meeting so that appropriate arrangements can be made.

Contact: Allen Sapp, P.O. Box 99, Huntsville, Texas 77342–0099, 512/251–3702.
Filed: August 28, 1998, 4:45 p.m.

TRD-9813731

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Wednesday, September 9, 1998, 10:00 a.m.

Conference Room, LaQuinta Inn, 1407–I-45

Huntsville

Correctional Managed Health Care Advisory Commission

AGENDA:

I. Call to order

II. Welcome/Introductions

III. Approval of the Minutes from the July 17, 1997, November 3, 1997, and November 20, 1997, TBCJ Health Care Committee

IV. Participation in the Correctional Managed Health Care Advisory Committee Meting

V. Public Comment

VI. Adjourn

Person with disabilities who plan to attend this meting and who need auxiliary aids or services as interpreters for person who are deaf or hearing impaired, readers, large print or Braille, are required to contact the agency prior tot he meeting so that appropriate arrangements can be made.

Contact: Meredith Johnson, P.O. Box 13084, Austin, Texas 78711, 512/475–3250.
Filed: August 31, 1998, 12:34 p.m.

TRD-9813806

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Wednesday, September 9, 1998, 10:00 a.m.

Conference Room, LaQuinta Inn, 1407–I-45

Huntsville

TBCJ Health Care Committee

AGENDA:

(This meeting will be held jointly with the TBCJ Health Care Committee)

A. Call to order

B. Introduction/recognitions

C. Approval of minutes, June 30, 1998, CMHCAC Meeting

D. Chairman's Report

E. Medical Director's Reports

1. Texas Department of Criminal Justice

2. University of Texas Medical Branch

3. Texas Tech University

F. Status Report: SAO Action Plan

G. Employee TB Testing

H. Update on HIV/AIDS Initiatives

1. Status report on seroprevalence study design

2. HIV Peer Educators

I. Hepatitis C

J. Dialysis

K. Update: Pharmacy and Therapeutics Committee

L. Update: Actuarial Review of Health Care Costs/Projections

M. Discussion-Date/Location Next CMHCAC Meeting

Person with disabilities who plan to attend this meting and who need auxiliary aids or services as interpreters for person who are deaf or hearing impaired, readers, large print or Braille, are required to contact the agency prior tot he meeting so that appropriate arrangements can be made.

Contact: Allen Sapp, P.O. Box 99, Huntsville, Texas 77342–0099, 512/251–3702.
Filed: August 28, 1998, 4:49 p.m.

TRD-9813732

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Wednesday, September 9, 1998, 1:30 p.m.

Conference Room, LaQuinta Inn, 1407–I-45

Huntsville

Programs Committee

AGENDA:

I. Call to order

II. Report on Aggression Among Youthful Offenders

III. Personation on the Youthful Offender Program

IV. Presentation on the Sex Offender Treatment Program

V. Presentation on the In-Cell Video Program

VI. Community Service Projects Update

VII. Update on the Cognitive Intervention Program

VIII. Public Comment

Person with disabilities who plan to attend this meting and who need auxiliary aids or services as interpreters for person who are deaf or hearing impaired, readers, large print or Braille, are required to contact the agency prior tot he meeting so that appropriate arrangements can be made.

Contact: Meredith Johnson, P.O. Box 13084, Austin, Texas 78711, 512/475–3250.
Filed: August 31, 1998, 12:34 p.m.

TRD-9813807

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Wednesday, September 9, 1998, 3:00 p.m.

La Quinta Inn, Ballroom, 1407–I-45

Huntsville

Management Information System Committee

AGENDA:

I. Call to order

II. Approval of the July 16, 1998, Meeting Minutes

III. Tour of TDJC Data Service-1 Financial Plaza, Suite 400B

IV. Adjourn

Person with disabilities who plan to attend this meting and who need auxiliary aids or services as interpreters for person who are deaf or hearing impaired, readers, large print or Braille, are required to contact the agency prior tot he meeting so that appropriate arrangements can be made.

Contact: Meredith Johnson, P.O. Box 13084, Austin, Texas 78711, 512/475–3250.
Filed: August 31, 1998, 12:34 p.m.

TRD-9813808

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Wednesday, September 9, 1998, 3:00 p.m.

La Quinta Inn, Ballroom, 1407–I-45

Huntsville

Management Information System Committee

REVISED AGENDA:

I. Call to order

II. Approval of the July 16, 1998, Meeting Minutes

III. Tour of TDJC Data Service-1600 Financial Plaza, Suite 400B

IV. Adjourn

Person with disabilities who plan to attend this meting and who need auxiliary aids or services as interpreters for person who are deaf or hearing impaired, readers, large print or Braille, are required to contact the agency prior tot he meeting so that appropriate arrangements can be made.

Contact: Meredith Johnson, P.O. Box 13084, Austin, Texas 78711, 512/475–3250.
Filed: August 31, 1998, 2:23 p.m.

TRD-9813810

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Thursday, September 10, 1998, 8:30 a.m.

La Quinta Inn, Ballroom, 1407–I-45

Huntsville

Victims Services Committee

AGENDA:

I. Call to order

II. Approval of the July 16, 1998, Meeting Minutes

III. Proposed Resolution for Inclusion of Victim Service in the Agency's Mission Statement

IV. Update on Automatic Victim Notification System (AVNS)

V. Report from Victim Participant of the Sycamore Tree Project, Jester II InnerChange Program

VI. Public Comment

VII. Adjourn

Person with disabilities who plan to attend this meting and who need auxiliary aids or services as interpreters for person who are deaf or hearing impaired, readers, large print or Braille, are required to contact the agency prior tot he meeting so that appropriate arrangements can be made.

Contact: Meredith Johnson, P.O. Box 13084, Austin, Texas 78711, 512/475–3250.
Filed: September 1, 1998, 4:29 p.m.

TRD-9813897

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Thursday, September 10, 1998, 9:00 a.m.

La Quinta Inn, Ballroom, 1407–I-45

Huntsville

Audit and Finance Committee

AGENDA:

I. Call to order

II. Approval of the July 17, 1997, and September 18, 1997 Meeting

III. Report on Internal Audit Peer Review

IV. Update on the 1998 Internal Audit Plan

V. Review and Committee Approval of the 1999 Internal Audit Plan

VI. Public Comment

VII. Adjourn

Person with disabilities who plan to attend this meting and who need auxiliary aids or services as interpreters for person who are deaf or hearing impaired, readers, large print or Braille, are required to contact the agency prior tot he meeting so that appropriate arrangements can be made.

Contact: Meredith Johnson, P.O. Box 13084, Austin, Texas 78711, 512/475–3250.
Filed: September 1, 1998, 4:29 p.m.

TRD-9813896

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Thursday, September 10, 1998, 10:00 a.m.

La Quinta Inn, Ballroom, 1407–I-45

Huntsville

Facilities Committee

AGENDA:

I. Call to order

II. Approval of the July 16, 1998, Facilities Committee Meeting Minutes

III. Committee Approval of the Ramsey Wastewater Treatment Plan Change Order

IV. Update on Trusty Camp Additions and High Security Construction Projects

V. Public Comment

VI. Adjourn

Person with disabilities who plan to attend this meting and who need auxiliary aids or services as interpreters for person who are deaf or hearing impaired, readers, large print or Braille, are required to contact the agency prior tot he meeting so that appropriate arrangements can be made.

Contact: Meredith Johnson, P.O. Box 13084, Austin, Texas 78711, 512/475–3250.
Filed: September 1, 1998, 4:29 p.m.

TRD-9813895

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Thursday, September 10, 1998, 10:30 a.m.

La Quinta Inn, Ballroom, 1407–I-45

Huntsville

Support Operations Committee

AGENDA:

I. Call to order

II. Approval of the July 7, 1998, Support Operations Committee Minutes

III. Update on the Texas Correctional Industries (TCI) State Auditor's Report

IV. Presentation on the TCI Cost Accounting Model

V. Update on the TCI Sunset Recommendations

VI. Public Comment

VII. Adjourn

Person with disabilities who plan to attend this meting and who need auxiliary aids or services as interpreters for person who are deaf or hearing impaired, readers, large print or Braille, are required to contact the agency prior tot he meeting so that appropriate arrangements can be made.

Contact: Meredith Johnson, P.O. Box 13084, Austin, Texas 78711, 512/475–3250.
Filed: September 1, 1998, 4:29 p.m.

TRD-9813894

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Thursday, September 10, 1998, 11:00 a.m.

La Quinta Inn, Ballroom, 1407–I-45

Huntsville

Windham School District Board of Trustees

AGENDA:

I. Regular Session

A. Introduction of Staff

B. Consent Items

1. Minutes of the July 16, 1998, Meeting

2. Multiple Employment Requests

3. Bi-Monthly Investment Report

C. Public Comment

Person with disabilities who plan to attend this meting and who need auxiliary aids or services as interpreters for person who are deaf or hearing impaired, readers, large print or Braille, are required to contact the agency prior tot he meeting so that appropriate arrangements can be made.

Contact: Meredith Johnson, P.O. Box 13084, Austin, Texas 78711, 512/475–3250.
Filed: September 1, 1998, 4:29 p.m.

TRD-9813893

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Thursday, September 10, 1998, 1:30 p.m.

La Quinta Inn, Ballroom, 1407–I-45

Huntsville

Texas Board of Criminal Justice

AGENDA:

I. Executive Session

A. Discussion with attorneys concerning: Bagby v. TDCJ; Crenshaw v. TDCJ; Ruiz v. Scott; Terrell v. TDCJ; and Van Dine v. TDCJ Cases. (Closed in accordance with Section 551.071, Government Code.)

B. Discussion of potential litigation made confidential under State Board Disciplinary Rules of Professional Conduct. (Closed in accordance with Section 5510.071, Government Code.)

Person with disabilities who plan to attend this meting and who need auxiliary aids or services as interpreters for person who are deaf or hearing impaired, readers, large print or Braille, are required to contact the agency prior tot he meeting so that appropriate arrangements can be made.

Contact: Meredith Johnson, P.O. Box 13084, Austin, Texas 78711, 512/475–3250.
Filed: September 1, 1998, 4:55 p.m.

TRD-9813909

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Friday, September 11, 1998, 9:00 a.m.

La Quinta Inn, Ballroom, 1407–I-45

Huntsville

Texas Board of Criminal Justice

AGENDA:

II. Regular Session

A. Recognitions

B. Consent Items

C. Approval of the 70th Board of Criminal Justice Meeting Minutes

D. Election of Texas Board of Criminal Justice Officers

E. Board Liaison and Committee Reports

F. Report from the Board of Pardons and Paroles

G. Approval of Purchase/Contracts Over One Million Dollars

H. Approval of the 1999 Internal Audit Plan

I. Approval of TDCJ Full Time Equivalent (FTE) Requirements

J. Proposed Revisions to board Policy 01.02–Texas Board of Criminal Justice Operating Policy

K. Proposed Revisions to Board Policy 03.77–Offender Grievances

L. Proposed Revisions to Board Policy 16.02–Internal Affairs Policy Statement

M. Adoption of the Proposed Amendments to Community Justice Assistance Division Standards for CSCD's (37 TAC §163.39, §163.40)

N. Adoption of the Proposed Modifications of State Jail Regions (37 TAC §157.4)

O. Proposed Amendment to the Eligibility Criteria for Admission into a Substance Abuse Felony Punishment Facility (37 TAC §159.1)

P. Report on Agency Strategic Planning

Q. Facilities Issues

R. Approval of the Resolution Requesting the Texas Legislature to Incorporate Victim Services into the TDCJ Mission Statement

S. Update on Security Threat Groups

T. Presentation by the Texas Parks and Wildlife

Person with disabilities who plan to attend this meting and who need auxiliary aids or services as interpreters for person who are deaf or hearing impaired, readers, large print or Braille, are required to contact the agency prior tot he meeting so that appropriate arrangements can be made.

Contact: Meredith Johnson, P.O. Box 13084, Austin, Texas 78711, 512/475–3250.
Filed: September 1, 1998, 4:55 p.m.

TRD-9813910

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Texas Education Agency

Thursday, September 10, 1998, 11:00 a.m.

Room 1–1.04, William B. Travis Building, 1701 North Congress Avenue

Austin

State Board of Education (SBOE) Committee on Instruction

REVISED AGENDA:

The agenda has been revised by: (1) the deletion of an item entitled, "Review of 19 TAC Chapter 89, Subchapter E, Migrant Education Program" and (2) addition of an action item entitled, "Repeal of 19 TAC Chapter 89, Adaptions for Special Populations, Subchapter E, Migrant Education Program." There no other changes to the agenda as originally posted and as follows: Public testimony: Consideration of an amendment to Proclamation 1996; Proclamation 1998 of the State of Board Education Advertising for Bids on Instructional Materials; Amendment to 19 TAC §§74.11(d)(9), 74.12(b)(11), and 74.13(a)(1)(K) possible addition to list of Speech courses; Review of 19 TAC Chapter 89, Subchapter B, Adult Basic and Secondary Education; Review of 19 TAC Chapter 89, Subchapter C, General Education Development; Setting standards on the English II and U.S. History end-of-course tests.

Contact: Criss Cloudt, 1701 North Congress Avenue, Austin, Texas 78701, 512/463–9701.
Filed: August 31, 1998, 3:01 p.m.

TRD-9813817

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Friday, September 11, 1998, 9:00 a.m.

Room 1–1.04, William B. Travis Building, 1701 North Congress Avenue

Austin

State Board of Education (SBOE)

REVISED AGENDA:

The agenda has been revised by the addition of an action item entitle, "Repeal of 19 TAC Chapter 89, Adoptions for Special Populations, Subchapter E, Migrant Education." There are no other changes to the agenda as originally posted and as follows: Invocation; Pledge of Allegiance; Roll call; Approval of May 8, 1998, and July 10, 1998, SBOE minutes; Public testimony; Resolutions of the SBOE; Second quarter 1998 Permanent School Fund investment managers' performance report; Legislative recommendations for the 76th Texas Legislature; Consideration of an amendment to Proclamation 1996; Proclamation 1998 of the State Board of Education Advertising for Bids on Instructional Materials; Amendment to 19 TAC §§74.11(d)(9), 74.12(b)(11), and 74.13(a)(1)(K) possible addition to list of Speech courses: Setting standards on the English II and U.S. History end-of-course tests; Review of proposed new 19 TAC Chapter 241, Principal Certificate; Review of proposed new 19 TAC Chapter 242, Superintendent Certificate; Review of proposed amendments to 19 TAC Chapter 230, Subchapter V, Continuing Education; Update on approved open-enrollment charter schools and request for approval of charter amendments: Proposed selection of open-enrollment charter schools and open-enrollment charter schools to serve students at risk as defined by law by the Texas Education Code, §29.081; Approval of costs of administering the 1998–1999 Texas Assessment of Academic Skills (TAAS) and Texas end-of-course tests to private school students; Per capita appointment rate for the 1998–1999

school year; Proposed amendment to Chapter E of the Investment Procedures Manual of the Permanent School Fund relating to asset allocation rebalancing procedures; Approval of additional funds to the international equity portfolio of the Permanent School Fund: Ratification of the purchases and sales to the investment portfolio of the Permanent School Fund for the months of June and July 1998; Authorization for the issuance of a request for proposal for outside legal counsel. Information on agency administration.

Contact: Criss Cloudt, 1701 North Congress Avenue, Austin, Texas 78701, 512/463–9701.
Filed: August 31, 1998, 3:01 p.m.

TRD-9813816

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Sunday-Monday, September 13–14, 1998, 1:00 p.m. and 8:30 a.m. (respectively.)

University of Texas at Austin, Joe C. Thompson Conference Center, Dean Keeton (25th) and Red River Street, Room 2.120

Austin

Policy Committee on Public Education

AGENDA:

The agenda is as follows: opening comments; historical review of committee activities; future challenges for the Texas Education Agency Information Management; future role for the Policy Committee on Public Education Information (PCPEI); review of minutes from June 15, 1998, meeting; information systems news; June, July, August Information Task Force (ITF) Summary; open forum.

Contact: Nancy Vaughan, 1701 North Congress Avenue, Austin, Texas 78701, 512/463–8110.
Filed: September 2, 1998, 11:04 a.m.

TRD-9813940

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Texas Board of Professional Engineers

Thursday, September 10, 1998, 1:00 p.m.

1917 IH-35 South, Board Room

Austin

Licensing Committee

AGENDA:

Call to order; roll call; recognize visitors; consider and possibly act on the: licensing models; evaluation of experience records; applicants who fail examinations and subsequently request a waiver; policy statement concerning applicants with pending or completed enforcement actions; experience gained while attending school part-time; exemptions in Section 20; policy statement concerning the definition of " resident"; correspondence; and report on software engineering; adjourn.

Contact: John R. Speed, 1917 IH-35 South, Austin, Texas 78741, 512/440–7723.
Filed: August 31, 1998, 12:06 p.m.

TRD-9813793

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Thursday, September 10, 1998, 3:30 p.m.

1917 IH-35 South, Board Room

Austin

General Issues Committee

AGENDA:

Call to order; roll call; recognize visitors; discuss and possibly act on the: proposed rule review; legislative appropriation request and fiscal issues; proposal for self-directed, semi-independent staff function; residential foundation committee report; report of the Ad Hoc Committee on Materials Testing; coorrespondece; and licensing models; adjourn.

Contact: John R. Speed, 1917 IH-35 South, Austin, Texas 78741, 512/440–7723.
Filed: August 31, 1998, 12:07 p.m.

TRD-9813794

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Friday, September 11, 1998, 8:30 a.m.

1917 IH-35 South, Board Room

Austin

Nominating Committee

AGENDA:

1. A. meeting called to order by committee chair at 8:30 a.m.; B. roll call; C. welcome vistors;

2. select proposed state officers for fiscal year 1999

3. adjourn

Contact: John R. Speed, 1917 IH-35 South, Austin, Texas 78741, 512/440–7723.
Filed: August 31, 1998, 3:33 p.m.

TRD-9813823

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Friday, September 11, 1998, 9:00 a.m.

1917 IH-35 South, Board Room

Austin

AGENDA:

Call to order; roll call; recognize visitors; discuss and approve minutes of the June 16 and 17, 1998, regular quarterly board meeting; June 16, 1998, licensing committee meeting; and June 17 and 18, 1998 general issues committee meeting; receive board member activity reports; discuss and possibly act on: directors' reports on financial matters, applications and examinations; staff members' activity reports; disciplinary matters including administrative report, status of court cases, individual disciplinary matters, cease and desist order, and injunction/default judgments; correspondence and communication matters; personal appearances by various applicants; old business including future meeting dates, discussion and possible action on reports from the general issues, licensing and advisory committees, discussion and possible adoption of board rule 131.54, receive reports on NCEES annual meeting, TDCJ enforcement issues, and the residential foundation committee; consider and possibly act on new business including election of board officers and appointment of committee assignments by new board chair, proposed rule review, legislative appropriation request and fiscal issues, proposal for self-directed, semi-independent staff function, contracts, issues from board members, direct board member contact with applicants and enforcement respondents, and report on ad hoc committee on materials testing;

discuss and possibly act on applications requiring board ruling; automatic non-approvals; reconfirm votes on applications; adjourn.

Contact: John R. Speed, 1917 IH-35 South, Austin, Texas 78741, 512/440–7723.
Filed: August 31, 1998, 3:33 p.m.

TRD-9813824

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General Services Commission

Friday, September 11, 1998, 9:00 a.m.

1711 San Jacinto, Central Services Bldg., Rm. 300A

Austin

Uniform General Conditions Advisory Committee

AGENDA:

Call to Order, Review and Accept Minutes, Consideration and Potential Action on Subcommittees I, II, and III Reports concerning the Uniform General Conditions areas that are their responsibility, Consideration and Potential Action on Setting Next Meeting Agenda, Adjourn.

Contact: Judy Ponder
Filed: August 26, 1998

TRD-9813622

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Office of the Governor

Friday, September 11, 1998, 9:30 a.m.

State Insurance Building, 1100 San Jacinto Boulevard, Suite 400

Austin

Texas Strategic Economic Development Planning Commission

AGENDA:

Call to order-Chairman Steven Stephens

1. Briefing on proposed workforce section of report.

2. Discussion of methodology, format, and organization of report.

3. Review of revised recommendations from Commission members

4. Discussion on level of detail for possible legislative recommendations.

5. Development of objectives and agenda for Commission's meeting on October 7, 1998.

Adjourn

Contact: Terry Karow or Stuart Holliday, P.O. Box 12428, Austin, Texas 78701, 512/463–2198.
Filed: September 1, 1998, 3:58 p.m.

TRD-9813875

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Texas Health Care Information Council

Thursday, September 10, 1998, 9:00 a.m.

Brown-Healty Building Room 6302

Austin

Health Maintenance Organization Technical Advisory Committee

AGENDA:

The Texas Health Care Information Council's Health Maintenance Organization Technical Advisory Committee will convene in open session, deliberate, and possibly take formal action on the following items: call to order; approval of minutes; review of HEDIS 3.0/1997 data collection process; review of the data submission tool and discussion of how data should be collected in 1999; discussion about service areas, data collection and aggregation for reporting purposes; 1999 HEDIS Reporting Measures; and Adjourn.

Contact: Jim Loyd, 4900 North Lamar Boulevard, Austin, Texas 78751, 512/424–6490 or fax 512/424–6491.
Filed: September 2, 1998, 10:05 a.m.

TRD-9813925

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Texas Department of Health

Thursday, September 10, 1998, 3:30 p.m.

Moreton Building, Room M-739, Texas Department of Health, 1100 West 49th Street

Austin

Texas Board of Health Strategic Planning Steering Committee

AGENDA:

The committee will meet to discuss and possibly act on: approval of the minutes of the July 16, 1998, meeting draft vision statements resulting from the July 16, 1998, meeting, update on regional piloting of local public health services; individual committee members' interviews with stateside partners; and a review of the Texas Department of Health's strategic timeline.

To request an accommodation under the ADA, please contact Suzzanna C. Currier, ADA, Coordinator in the Office of Civil Rights at 512/458–7627 or TDD at 512/458–7708 at least four days to the meeting.

Contact: Kris Lloyd, 512/458–7484 or Rick Danko 512/458–7261, 1100 West 49th Street, Austin, Texas 78756.
Filed: September 1, 1998, 3:22 p.m.

TRD-9813864

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Friday, September 11, 1998, 10:00 a.m.

Main Building, Room G-107, Texas Department of Health, 1100 West 49th Street

Austin

Children with Special Health Care Needs Advisory Committee

AGENDA:

The committee will meet to discuss and possibly act on: approval of the minutes of the June 5, 1998, meeting; directions for children with special health care needs (CSHCN) services (Children's Health Insurance Plan (CHIP) and CHIP's impact on CSHCN and chronically ill and disabled children (CIDC); title V performance measurers; CIDC rule changes; community-based funding/request for proposals (family resource centers; resource mapping/needs assessment; and medically supervised day care/respite); Children with Special Health Care Needs Advisory Committee (CSHCNAC) Title V Subcommittee report; and recommendations. At 12:00 p.m. the committee will break for lunch and at approximately 12:20 p.m. the meeting

will resume and the committee will discuss and possible action: revitalization; On the Right Track (Centers for Disease Control and Prevention Grant); nomination process for new members; updates on interagency activities (Senate Bill 1165; CSHCNAC response to Senate Bill 1165 questions; and STAR PLUS); Sunset process/legislative session; CSHCNAC rules; future CSHCNAC Subcommittee activities and future meeting agenda items.

To request an accommodation under the ADA, please contact Suzzanna C. Currier, ADA, Coordinator in the Office of Civil Rights at 512/458–7627 or TDD at 512/458–7708 at least four days to the meeting.

Contact: Lesa Walker, 1100 West 49th Street, Austin, Texas 78756, 512/458–7111, Ext. 2567.
Filed: September 1, 1998, 3:22 p.m.

TRD-9813866

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Texas Department of Human Services

Friday, September 11, 1998, 10:00 a.m.

701 West 51st Street, West Tower, 360W

Austin

Aged and Disabled Advisory Committee Meeting

AGENDA:

1. open comments. 2. deputy commissioner's comments. 3. approval of the minute. Action items: 4. amendments to the licensing standards for intermediate care facilities for persons with mental retardation and related conditions (ICF/MR/RC), Chapter 90. 5. change to client cost ceiling for the community based alternative (CBA) program. Information/Technical Rules: 6. repeal of obsolete rules. 7. repeal of rules for the transition to life in the community program. 8. deletion of 40 TAC Chapters 41 and 43. Reports: proceedings of the subcommittee on services to persons with disabilities. Proceedings of the nurse facility subcommittee. 9. open discussion by members. 10. next meeting/adjournment.

Contact: Jim Tennison, P.O. Box 149030, Austin, Texas 78714–9030, 512/438–3151.
Filed: September 1, 1998, 3:44 p.m.

TRD-9813871

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Texas Department of Insurance

Thursday, September 3, 1998, 10:00 a.m.

William P. Hobby Building, Room 102, 333 Guadalupe Street,

Austin

EMERGENCY MEETING AGENDA:

The Commissioner of Insurance will hold a public hearing under Docket No 2381, to consider adoption of an emergency basis amendments to 28 TAC §5.4008, concerning building code specifications fro windstorm resistant construction.

Reason for emergency: Due to presence of hurricanes in the Atlantic Ocean and the threat of hurricanes of the Texas Gulf Coast which present an imminent peril to the public health, safety or welfare of residents of the Texas Coast, it is necessary to adopt the amendments on an emergency basis.

Contact: Sylvia Gutierrez, 333 Guadalupe Street, Austin, Texas 78701, 512/463–6327.
Filed: August 28, 1998, 1:08 p.m.

TRD-9813705

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Monday, September 28, 1998, 9:00 a.m.

Stephen F. Austin Building, 1700 North Congress, Suite 1100

Austin

AGENDA:

Docket No. 454–98–1112.C To consider whether disciplinary action should be taken against Richard Alan Smith, San Antonio, Texas who holds a Group I Insurance Agent's License and Local Recording Agent's License issued by the Texas Department of Insurance (reset from August 3, 1998).

Contact: Bernice Ross, 333 Guadalupe Street, Mail Code #113–2A, Austin, Texas 78701, 512/463–6328.
Filed: September 1, 1998, 11:30 a.m.

TRD-9813843

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Tuesday, September 29, 1998, 9:00 a.m.

Stephen F. Austin Building, 1700 North Congress, Suite 1100

Austin

AGENDA:

Docket No. 454–98–0288.F In the matter of Security National Insurance Company (reset from June 1, 1998).

Contact: Bernice Ross, 333 Guadalupe Street, Mail Code #113–2A, Austin, Texas 78701, 512/463–6328.
Filed: September 1, 1998, 11:31 a.m.

TRD-9813844

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Thursday, October 1, 1998, 9:00 a.m.

Stephen F. Austin Building, 1700 North Congress, Suite 1100

Austin

AGENDA:

Docket No. 454–98–0076.C To consider the application of Ram Vepa, Dallas, Texas for a Life, Accident, Health and HMO Agents' License to be issued by the Texas Department of Insurance (cont. April 15, 1998).

Contact: Bernice Ross, 333 Guadalupe Street, Mail Code #113–2A, Austin, Texas 78701, 512/463–6328.
Filed: September 1, 1998, 11:31 a.m.

TRD-9813845

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Friday, October 2, 1998, 9:00 a.m.

Stephen F. Austin Building, 1700 North Congress, Suite 1100

Austin

AGENDA:

Docket No. 454–98–1357.C To consider whether disciplinary action should be taken against Henry L. Shaw, Houston, Texas who holds a

solicator's license issued by the Texas Department of Insurance (reset from August 1, 1998).

Contact: Bernice Ross, 333 Guadalupe Street, Mail Code #113–2A, Austin, Texas 78701, 512/463–6328.
Filed: September 1, 1998, 11:31 a.m.

TRD-9813846

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Texas Judicial Council

Wednesday, September 23, 1998, 10:00 a.m.

Capitol Extension Building, Room E2.020

Austin

Committee on Juvenile Reform/Impact on the Courts

AGENDA:

I. Commencement of Meeting; II. Attendance of Member; II. Overview of Background Resources; IV. Discuss Proposed Legislation and Other Issues to be Addressed by Committee; V. Invited and Public Testimony; VI. Other Business; and Adjourn.

Contact: Slad Cutter, Capitol Extension Building, Room E2.020, Austin, Texas 78701, 512/463–1461.
Filed: September 1, 1998, 3:44 p.m.

TRD-9813869

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Tuesday, September 29, 1998, 8:30 a.m.

State Bar Building, 1414 Colorado, Room 101

Austin

Committee on Juvenile Reform/Impact on the Courts

AGENDA:

I. Commencement of Meeting; II. Attendance of Member; II. Overview of Background Resources; IV. Discuss Proposed Legislation and Other Issues to be Addressed by Committee; V. Invited and Public Testimony; VI. Other Business; and Adjourn.

Contact: Slad Cutter, Capitol Extension Building, Room E2.020, Austin, Texas 78701, 512/463–1461.
Filed: September 1, 1998, 3:44 p.m.

TRD-9813870

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Tuesday, September 29, 1998, 10:00 a.m.

State Bar Building, 1414 Colorado, Room 101

Austin

Texas Judicial Council

AGENDA:

I. Commencement of Meeting; II. Attendance of Member; III. Minutes of June 25, 1998 Meeting; IV. Presentation by Office of Court Administration; V. Presentation on Court Interpreter Certification; VI. Legislative Update; VII. Reports from the Council Committees—Discussion and Action by the Council; A. Committee on Trail Court Reorganization; B. Committee on Judicial Selection; C. Committee on Judicial Redistricting; D. Committee on Court Records; E. Committee on Visiting and Retired Judges; F. Committee on Juvenile Reform/Impact on the Courts; VIII. Other Business; IX. Date of Next Meeting; X. Adjournment.

Contact: Slad Cutter, Capitol Extension Building, Room E2.020, Austin, Texas 78701, 512/463–1461.
Filed: September 1, 1998, 3:44 p.m.

TRD-9813868

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Texas Board of Professional Land Surveying

Friday, September 11, 1998, 9:00 a.m.

7701 North Lamar, Site 400

Austin

Board Meeting

REVISED AGENDA:

Public Hearing to receive comments regarding Chapter 664

Call to order and introductions

The Board will consider and act upon the following matters:

1. Comments from the Public

The Board will consider fully all written and oral submissions concerning Chapter 664 and possible adopt, readopt and/or propose changes to Chapter 664.

2. Approval of the June 11 and 12, 1998 and August 21 and 22, 1998 Minutes.

3. Directors Report

4. Active Complaints and Show Cause Action (Exhibit A)

5. Committee Reports

A. RPLS Examination Committee-Andy Sikes

B. LSLC Examination Committee-Robert Pounds

C. Continuing Education Committee-Paul Kwan

D. Highway Issues Committee-Raul Wong

E. Boil Well Issues Committee-Art Osborn

F. Legislative Needs-Jerry Goodson

G. Rules-Ben Thompson

i. Review and Possible Proposal of Rule Referred to Committee

ii. Review of 661.123

6. Correspondence

A. Active/Inactive Status Changes (E.C. Jones)

B. Retired Status (Martin Collis)

C. Inquires Regarding Applications and Examinations

7. Other Business

A. Clarifications of Act (Section 3A)

B. Policy Issues

C. Volunteer Investigator Program

D. Review of Proposed Compliance Check List

E. Self Directed, Semi Independent Agency Pilot Program

F. Initial Application Charge

8. Future Agenda Items

9. Comments from the Public

The Board may go into Executive Session on any of the foregoing agenda items if authorized by Chapter 155 of the Government Code.

Adjournment

To request ADA accommodation, contact Sandy Smith at 512/452–9427 at least four days prior to the meeting.

Contact: Sandy Smith, 7701 North Lamar Boulevard, Suite 400, Austin, Texas 78752, 512/452–9427.
Filed: August 31, 1998, 9:58 a.m.

TRD-9813740

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Board of Law Examiners

Thursday, September 10, 1998, 8:30 a.m.

Capitol Extension, Room E1.012

Austin

Panel Hearings

AGENDA:

The hearings panel will hold public hearings and conduct deliberations, on the character and fitness of the following applicants, declarants and/or probationary John Toland, Jeffery Lieu; Jason Lewis; Kevin Woltjen; Kevin Murphy; John Sullivan; Arturo McDonald and Gabriel Sterling (character and fitness deliberations may be conducted in executive session, pursuant to Section 82.003(a), Texas Government Code).

Contact: Rachel Martin, P.O. Box 13486, Austin, Texas 78711–3486, 512/463–1621.
Filed: August 31, 1998, 11:44 a.m.

TRD-9813786

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Friday, September 11, 1998, 8:30 a.m.

Capitol Extension, Room E1.012

Austin

Panel Hearings

AGENDA:

The hearings panel will hold public hearings and conduct deliberations, on the character and fitness of the following applicants, declarants and/or probationary John D. Bammel; Chung H. Pham; William G. Zachary; Jon A. Haslett; Carmen C. Urias; Fredericks O. Haiman; Lawrence J. Gibbons; Laura Alderman; Maria Villagomez and Sara Morrison (character and fitness deliberations may be conducted in executive session, pursuant to Section 82.003(a), Texas Government Code).

Contact: Rachel Martin, P.O. Box 13486, Austin, Texas 78711–3486, 512/463–1621.
Filed: August 31, 1998, 11:44 a.m.

TRD-9813785

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Texas State Library and Archives Commission

Monday, September 14, 1998, 1:00 p.m.

Lorenzo de Zavala State Archives and Library Building, Room 314, 1201 Brazos Street

Austin

Audit Committee

AGENDA:

1. Discuss and approve Internal Audit of the Sam Houston regional Library and Research Center.

2. Discuss and approve Internal Audit of the Housing Public Library.

3. Discuss and adopt the Internal Audit Plan, Risk Assessment, and Internal Audit Guidelines for FY 1999.

4. Discuss and approve Internal Audit Report on the Status of FY 1997/1998 Internal Audit Recommendations.

Contact: Michele Lamb, 512/463–5460, michele.lamb@tsl.state.tx. us.
Filed: August 27, 1998, 9:00 a.m.

TRD-9813630

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Monday, September 14, 1998, 1:30 p.m.

Lorenzo de Zavala State Archives and Library Building, Room 314, 1201 Brazos Street

Austin

AGENDA:

1. Approve minutes of the July 13, 1998 Commission meeting.

2. Report of the Director and Librarian.

3. Approve contracts greater than $100,000.

4. Approve acceptance of gifts greater that $500.

5. Discuss and approve recommendations of the Audit Committee on:

a. Internal Audit of the Sam Houston regional Library and Research Center

b. Internal Audit of the Houston Public Library

c. Internal Audit Plan, Risk Assessment, and Internal Audit Guidelines of FY 1999.

d. Internal Audit Report on the Status of FY 1997/1998 Internal Audit Recommendations.

6. Approve appointments to the Library System Advisory Board.

7. Approve appointments to the TexShare Board.

8. Discuss amendments to the Legislative Appropriation Request.

9. Discuss and adopt Information Resources Biennial Operating Plan, FY 2000–2001.

10. Discuss and approve publication of proposed new administrative rules on Establishment Grants, 13 TAC §§2.140–2.145.

11. Discuss and approve publication of proposed new administrative rules on technical Assistance Negotiated Grants, 13 TAC §2.119(d).

12. Discuss and approve publication of proposed amendment to administrative rule on Federal Priorities, 13 TAC §1.67.

13. Discuss and approve publication of proposed amendment to administrative rule on public library: Legal Establishment, 13 TAC §1.73.

14. Discuss and approve publication of proposed amendment to administrative rule on Library Annual Reports, 13 TAC §1.85.

15. Public Comment.

Contact: Michele Lamb, 512/463–5460, michele.lamb@tsl.state.tx. us.
Filed: August 27, 1998, 9:00 a.m.

TRD-9813631

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Texas Department of Licensing and Regulation

Thursday, September 10, 1998, 9:30 a.m.

920 Colorado, E.O. Thompson Building, 4th Floor Conference Room

Austin

Board of Boiler Rules

REVISED AGENDA:

Submitted as Revised Agenda to comply with posting requirements. Previously filed TRD-9813183

1. call to order

2. roll call

3. introduction of visitors

4. adoption of agenda

5. approval of minutes of meeting on April 23, 1998

6. administrative report

7. Task Force Reports

a. controls and safety devised for automatically fired boilers

b. nonwelded boilers

c. boiler law rewrite

d. unfired steam boilers

e. heating boiler inspection intervals

8. new business

a. alternative stresses-code cases

b. portable water heater-inspection

c. notification of "Year 2000"issues for boilers

9. next meeting

10. adjournment

Persons who plan to attend this meeting and required ADA assistance are requested to contact Caroline Jackson at 512/463–7348 two working days prior to the meeting so that appropriate arrangements can be made.

Contact: George Bynog, E.O. Thompson Building, 920 Colorado, Austin, Texas 78701, 512/463–7365.
Filed: August 31, 1998, 3:26 p.m.

TRD-9813819

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Thursday, September 10, 1998, 9:30 a.m.

920 Colorado, E.O Thompson Building, 4th Floor

Austin

Enforcement Division, Air Conditioning

AGENDA:

According to the complete agenda, the Department will hold an Administrative Hearing to consider the possible denial or issuance of an air conditioning and refrigeration contractors license to the Applicant, David B. Flores, pursuant to 16 TAC Chapter 75; Texas Government Code, Chapter 2001; Texas Revised Civil Statutes Annotated Article 8861 and 9100; and 16 Texas Administrative Code Chapter 60.

Contact: Jackie Sager or Richard Wootton, 920 Colorado, E.O. Thompson Building, Austin, Texas 78711, 512/463–3192.
Filed: August 27, 1998, 12:06 p.m.

TRD-9813663

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Friday, September 18, 1998, 1:30 p.m.

920 Colorado, E.O Thompson Building, 4th Floor Conference Room

Austin

Elevator Advisory Board

AGENDA:

1. call to order

2. introduction of visitors

3. record of attendance

4. adoption of agenda

5. approval of minutes of meeting on April 3, 1998

6. department briefing

a. staff introductions

b. enforcement update

7. new business

a. applicability of code to "dust covers" at hoistway openings

b. door restrictors

c. definition for the term "industrial facility", as used in exemption noted in §754.014(i)

d. proposed changes to elevator law

e. notification of "Year 2000" issues for elevators

8. old business

a. test tag update

9. public comment

10. schedule next meeting

11. adjournment

Persons who plan to attend this meeting and required ADA assistance are requested to contact Caroline Jackson at 512/463–7348 two working days prior to the meeting so that appropriate arrangements can be made.

Contact: Jimmy G. Martin, E.O. Thompson Building, 920 Colorado, Austin, Texas 78701, 512/463–7356.
Filed: August 31, 1998, 3:26 p.m.

TRD-9813820

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Friday, September 25, 1998, 1:30 p.m.

920 Colorado, E.O Thompson Building, 4th Floor Conference Room

Austin

Air Conditioning and Refrigeration Contractors Advisory Board

AGENDA:

1. call to order

2. record of attendance

3. adoption of agenda

4. approval of minutes

5. public comment

6. staff report

a. rule and enforcement

b. exams given and licenses issued

c. administration

7. old business

a. proposal to add definitions to Rule Section 75.10–reconsideration has been requested

b. request for clarification and recommendations for possible changes to Rule Section 75.100(c)(1)-Fuel Gas Piping

8. new business

a. proposal from the American Heart Association

b. proposal to add a subparagraph to rule 75.70, Responsibilities of the Licensee, to describe responsibilities when contracting for a home warranty company or a builder

c. discussion of rule Section 75.40 concerning insurance requirements

d. discuss of Rule Section 75.80 concerning fees

e. notification of "Year 2000" issues for air conditioning and refrigeration equipment

f. discussion of policy on licensing requirements for installation and service on leased equipment

9. next meeting

10. adjournment

Persons who plan to attend this meeting and required ADA assistance are requested to contact Caroline Jackson at 512/463–7348 two working days prior to the meeting so that appropriate arrangements can be made.

Contact: Jimmy G. Martin, 920 Colorado, E.O. Thompson Building, Austin, Texas 78711, 512/463–7356.
Filed: August 31, 1998, 3:26 p.m.

TRD-9813821

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Texas State Board of Medical Examiners

Thursday, September 3, 1998, 2:00 p.m.

333 Guadalupe, Tower 3, Suite 610

Austin

Disciplinary Panel

EMERGENCY MEETING AGENDA:

call to order; roll call; consideration of the application for temporary suspension of the license of Ira Mark Levin, M.D. license J-3142; and adjourn.

Executive session under the authority of the Open Meetings act, Section 551.071 of Government Code, and Article 4495b, Sections 2.07(b), 2.09(o), Texas Revised Civil Statutes, to consult with counsel regarding pending or contemplated litigation.

Reason for emergency: Information has been received by the agency and requires prompt consideration.

Contact: Pat Wood, P.O. Box 2018, MC-901, Austin, Texas 78768–2018, 512/305–7016 or fax 512/305–7008.
Filed: September 2, 1998, 11:03 a.m.

TRD-9813938

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Midwifery Board

Monday, September 14, 1998, 9:30 a.m.

Tower Building, Room T-607, Texas Department of Health, 1100 West 49th Street

Austin

AGENDA:

The board will meet to discuss and possibly act on: approval of the minutes of the July 20, 1998, meeting; acceptance of the resignation of Irma Garcia; letter from Board of Health member Ruth Stewart; address to the board Commissioner of Health, Dr. William R. Archer, III, M.D.; Grievance Committee report (accept/reject recommendation complaint); approval of a waiver for Kelly Baumgartner; draft oxygen rules, education rules, and complaint review rules (25 TAC, Chapter 37); vote on the midwife and obstetrician gynecologist positions; letter from the president of North Texas Midwives; transferring care; update on the Spanish translation of midwifery standards of practice and the Midwifery Act; and adoption of the midwifery board mission statement.

To request an accommodation under the ADA, please contact Suzzanna C. Currier, ADA, Coordinator in the Office of Civil Rights at 512/458–7627 or TDD at 512/458–7708 at least four days to the meeting.

Contact: Belva Alexander, 1100 West 49th Street, Austin, Texas 78756, 512/458–7111.
Filed: September 1, 1998, 3:22 p.m.

TRD-9813865

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Texas Natural Resource Conservation Commission

Thursday, September 10, 1998, 8:30 a.m.

Building E, Room 201S, 12100 Park 35 Circle

Austin

AGENDA:

The Commission will consider approving the following matters on the attached agenda: Executive Session.

Contact: Doug Kitts, 12100 Park 35 Circle, Austin, Texas 78753, 512/239–3317.

Filed: August 31, 1998, 10:33 a.m.

TRD-9813754

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Thursday, September 10, 1998, 9:30 a.m.

Building E, Room 201S, 12100 Park 35 Circle

Austin

AGENDA:

The Commission will consider approving the following matters on the attached agenda: District Matter; Industrial Hazardous Waste Enforcement Agreed Order; Air Enforcement Agreed Orders; Air Enforcement Default Order; Designation of Single Property; Petroleum Storage Tank Enforcement Agreed Orders; Public Water Supply Default Order; Agricultural Enforcement Agreed Orders; Municipal Solid Waste Enforcement Default Order; Municipal Waste Discharge Enforcement Agreed Orders; Rules; Executive Session; the Commission will consider items previously posted for open meeting and at such meeting verbally postponed or continued to this date. With regard to any item, the Commission may take various actions, including but not limited to rescheduling an item in its entirety or for particular action at a future date or time. (Registration for 9:30 a.m. agenda starts 8:45 until 9:25)

Contact: Doug Kitts, 12100 Park 35 Circle, Austin, Texas 78753, 512/239–3317.
Filed: August 31, 1998, 10:36 a.m.

TRD-9813756

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Thursday, September 10, 1998, 9:30 a.m.

Building E, Room 201S, 12100 Park 35 Circle

Austin

REVISED AGENDA:

The Commission will consider approving the following matters on the attached agenda: Rule.

Contact: Doug Kitts, 12100 Park 35 Circle, Austin, Texas 78753, 512/239–3317.
Filed: September 1, 1998, 4:29 p.m.

TRD-9813900

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Thursday, September 10, 1998, 1:00 p.m.

Building E, Room 201S, 12100 Park 35 Circle

Austin

AGENDA:

The Commission will consider approving the following matters on the attached agenda: Proposal for Decision. (Registration for the 1:00 p.m. will start at 12:30 until 12:55 p.m.)

Contact: Doug Kitts, 12100 Park 35 Circle, Austin, Texas 78753, 512/239–3317.
Filed: August 31, 1998, 10:34 a.m.

TRD-9813755

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Wednesday, September 23, 1998, 9:30 a.m.

Building E, Room 201S, 12118 North Interstate Highway 35

Austin

AGENDA:

For a hearing before the Texas Natural Resource Conservation Commission (TNRCC) on an application filed by Texas Department of Transportation-El Paso District, (TxDOT), 125 East 11th street, Austin, Texas 78701 for a temporary order (Proposed designation 98–1042–MWD) to authorize the discharge 0.3 million gallons per day (MGD) as a daily maximum of ground water to the City of El Paso storm sewer system; thence to the Rio Grande above International Dam in Segment No. 2314 of the Rio Grande Basin. Authorization to discharge under the Order would terminate (180) days from the date of issuance of the Order.

TxDOT proposes a highway improvement project to install a storm sewer system along Doniphan Drive in the City of El Paso, El Paso County, Texas. The work would include trenching and dewatering of infiltrated groundwater in two areas with previously documented groundwater contamination.

Contact: Steven Shepherd, P.O. Box 13087, Austin, Texas 78711–3087, 512/239–0464.
Filed: August 31, 1998, 8:10 a.m.

TRD-9813734

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Board of Nurse Examiners

Thursday-Friday, September 117–18, 1998, 8:30 a.m.

333 Guadalupe, Tower 2, Room 225

Austin

AGENDA:

The Board of Nurse Examiners will discuss and possible act on: approval of the minutes from the July 1998 board meeting; consider operations including financial statements and LAR; and consider proposals for distance education initiatives from Stephen F. Austin State University and Del Mar College. The Board will consider a proposal for an advanced practice nursing program at Prairie View A&M University; a public hearing will be held at 10:00 a.m. The Board will receive information from various board, outside agency, and advisory committees, and hold an open forum from 1:30–2:00 p.m. September 17, 1998 to allow interested parties an opportunity to address the board. The Board will consider and possibly act on proposed withdrawal of amendments to §217.3 and §217.12. The Board will consider and possibly act on the repeal and new proposed §215 and proposed new §222.1 and §222.4(3)(A). The Board will consider a request from TOBGNE for recognition of CCNE as a board approved accrediting body. The Board will consider Agreed Orders for Marilou Aquino Camancho, TX #624420; Anna-Marie Gass, TX #592466; Barbara Ann Hascall, TX #599130; Glenda R. Haydel, TX #630700; Mercy Hernandez, TX #611675; Sherry Larann Henderson, TX #230579; Melanie Jane Hill, TX #634854; Gloria D. Jones, TX #534100; Sandra Ann Monroe, TX #572934; Karan Mulkey, TX #596104; Rosita C. Okoro, TX #610672; Mary C. Pruneda, TX #541282; Linda Bartlett Ruebsamen, TX #623176; Patsy Lou Stutte, TX #464914; Sonya Taylor, TX #629765; Barbara R. Vaughn, TX #245385; Jan Watkins, TX #578610; Catherine Bourn Willis, TX #645411; Connie Lynn Young, TX #246108.

Contact: Erlene Fisher, P.O. Box 430, Austin, Texas 78767, 512/305–6811.
Filed: August 27, 1998, 3:07 p.m.

TRD-9813672

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Thursday-Friday, September 17–18, 1998, 8:30 a.m.

333 Guadalupe, Tower 2, Room 225

Austin

REVISED AGENDA:

The Board will receive information regarding the recent TPAPN Audit report at 2:00 p.m. on September 17, 1998, and will receive an overview of the State of Administrative Hearings.

Correction tot he agenda previously filed: The Board will consider a proposal for an Advanced Practice Nursing program at Prairie View A&M University; a public hearing will be held at 10:00 a.m., September 17, 1998. The date of the public hearing was inadvertently omitted in our first submission.

Contact: Erlene Fisher, P.O. Box 430, Austin, Texas 78767, 512/305–6811.
Filed: September 2, 1998, 8:43 a.m.

TRD-9813915

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Texas Optometry Board

Thursday-Friday, September 10-11, 1998, 2:30 p.m. and 9:00 a.m. (respectively.)

333 Guadalupe Street, Suite 2–225

Austin

AGENDA:

At 2:30 p.m. on September 10, the Rules Committee will meet, followed by the Continuing Education Committee at 3:30, Vision Screening Ad Hoc Committee at 3:45, Administrative/Licensing Committee at 4:00, and Managed Care Committee at 4:15. All Investigation-Enforcement Subcommittees will meet with the Executive Director beginning at 3:30 p.m. and continuing throughout the afternoon. On the following morning. September 11, 1998, a special meeting of the Board will be held to discuss and approve Minutes of July 9–10, 1998; discuss and take possible action on final adoption of Rule 277.1 regarding complaints; discuss and receive report regarding financial status, budget for FY 99, Legislative Appropriations Request and Health Professions Council; discuss and take possible action regarding attendance at Citizen Advocacy Center Seminar and Antitrust Litigation in regard to disposable contact lenses; and discuss and take action regarding committee reports regarding approval or disapproval of proposed rules relating to rehabilitative optometry, standards of care, definition of surgery within scope of practice, and Rule amendment 271.1 regarding corrective language to definition of Administrative Procedure Act and other rules required by the Review of Rules Plan; discuss examination, managed care, licensing, vision screening, and licensing matters; consider reports of legal counsel, executive director, committee chairperson; Executive Session may be held in compliance with 551 of the Government Code with possible vote on matters discussed in Executive Session.

Contact: Lois Ewald, 333 Guadalupe, Suite 2–420, Austin, Texas 78701, 512/305–8500.
Filed: September 1, 1998, 11:14 a.m.

TRD-9813842

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Texas Pecan Producers Board

Wednesday, September 9, 1998, 10:00 a.m.

Stephen F. Austin Building, 1700 North Congress, 9th Floor, Room 911

Austin

AGENDA:

Call to order

Action: Swearing in of board members; Drawing of lots for two, four and six terms; Election of Officers.

Discussion and Action: On officer position (board will elect a president, vice president, either a secretary and a treasurer or a secretary/treasurer, plus any other officers board deems necessary); Approval of correspondence with collection points; Approve collection procedure; On determining a proposed budget to file with the Texas Agriculture Commissioner; To set assessment rate (maximum=one half cent per pound); On future meeting schedule.

Discussion: Regarding notification of collection points; other business

Adjourn

Contact: Cindy Loggins Wise, P.O. Drawer CC, College Station, Texas 77841, 512/463–7541.
Filed: September 1, 1998, 8:45 a.m.

TRD-9813833

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Texas State Board of Pharmacy

Wednesday, September 16, 1998, 1:00 p.m.

William P. Hobby Building, 333 Guadalupe, Room 225, Tower II

Austin

Task Force to Develop a List of Narrow Therapeutic Index Drugs

AGENDA:

Task Force to Develop a List a Narrow Therapeutic Index Drugs will meet to review the list of drugs, receive public testimony regarding this list and make any recommendations regarding the list. Public testimony will be accepted from 1:00 to 2:00 p.m. Written comments may be provided prior to the meeting.

Contact: Gay Dodson, 333 Guadalupe, Suite 3–600, Box 21, Austin, Texas 78701, 512/305–8000.
Filed: September 2, 1998, 11:05 a.m.

TRD-9813942

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Texas Board of Physical Therapy Examiners

Thursday, September 10, 1998, 8:30 a.m.

333 Guadalupe, Suite 2–510

Austin

AGENDA:

I. Call to order

II. Public comment

III. Approval of minutes from June 9, 1998, meeting

IV. Discussion and possible action on establishing the Foreign Credentials Commission on Physical Therapy as the board-approved prescreening certification agency.

V. Discussion and possible action on adopting §344.1. Administrative Fines and Penalties

VI. Discussion and possible action on adopting changes to §321.1. Definition (physical therapy aide)

VII. Discussion and possible action on adopting changes to §343.3. Referral Requirements and Exceptions to Referral Requirement.

VIII. Investigations Committee Report.

A. Discussion and possible action on Agreed Order 98095; 98131; 98138; 97199 and 98111

B. Discussion of committee meeting of August 24, 1998

C. Discussion of FY 98 investigative activities

IX. Discussion and possible action on Rules Committee Report

X. Discussion and possible action on Education Committee Report

XI. Discussion and possible action on Applications Review Committee Report

XII. Discussion and possible action on Coordinator's Report

XIII. Discussion and possible action on Executive Director's Report

XIV. Discussion and possible action on Presiding Officer's Report

XV. Discussion and possible action on future meeting dates and agenda items

XVI. Adjournment

Contact: Nina Hunter, 333 Guadalupe, suite 2–510, Austin, Texas 78701, 512/305–6900.
Filed: August 31, 1998, 3:26 p.m.

TRD-9813822

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Texas Polygraph Examiners

Monday-Wednesday, September 14–16, 1998, 8:00 a.m.

DPS Building C, 5805 North Lamar Boulevard, Academy Administration Commission Room

Austin

Board

AGENDA:

1. Call to order.

2. Discussion possible approval and vote on June 9-10th, 1998 meeting minutes.

3. Discussion possible approval and vote on December Board meeting date.

4. Progress report regarding Attorney General's request RQ-923.

5. Discussion possible approval and vote on issues relating to long range planning committee.

6. Discussion possible approval and vote legislative changes (legislative committee).

7. Discussion possible approval and vote on licensing issues relating to active federal examiners.

8. Discussion possible approval and vote on licensing criteria with other states (reciprocity issues).

9. Administer license and examination to qualified applicants.

10. Discussion, clarification, possible approval and vote on changes to performance measures.

11. Executive Officer's report.

12. Report from professional association.

13. Open meeting/discussion to public inquiry

14. Adjournment.

The Board may go into Executive Session on any of the foregoing agenda items if authorized by Chapter 551 of the Government Code.

Contact: Ramona Pavlas, P.O. Box 4087, Austin, Texas 78773, 512/424–2058.
Filed: September 2, 1998, 11:02 a.m.

TRD-9813936

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Produce Recovery Fund Board

Monday-Tuesday, September 21–22, 1998, 2:00 p.m. and 9:00 a.m. (respectively.)

1700 North Congress, Room 911

Austin

AGENDA:

Administrative review of appeals filed in the following dockets under Texas Agriculture Code Annotated §§103.001–103.015 (Vernon Suppl. 1998):

Monday, September 21, 1998 at 2:00 p.m. TDA Docket #57–97–APA, Kay Dee Produce, Petitioner v. Celso Alvarado, Respondent 4:00 p.m. TDA Docket #15–98–APA, Thomas Produce, Petitioner v. Marcelino Davila, Jr., Respondent

Tuesday, September 22, 1998 at 9:00 a.m. TDA Docket #14–98–APA, William E. McBryde, Inc., Petitioner v. J&B Farms, Respondent

Contact: Dolores Alvarado Hibbs, P.O. Box 12847, Austin, Texas 78711, 512/463–7583.
Filed: September 2, 1998, 8:56 a.m.

TRD-9813917

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Texas State Board of Examiners of Psychologists

Wednesday, September 9, 1998, 9:00 a.m.

333 Guadalupe, Suite 2-400A

Austin

AGENDA:

Disciplinary Review Panel #4 of the Board will meet to discuss, consider and vote on recommendation for disposition of various complaints. The Panel will also go into Executive Session to take confidential interviews concerning pending complaints pursuant to §551.084, Texas Government Code, VTCS, 1996, as well as Executive Session to seek legal advice pursuant to §551.071, Texas Government Code, VTCS, 1996.

Contact: Sherry L. Lee, 333 Guadalupe, Suite 2–450, Austin, Texas 78701, 512/305–7700.
Filed: August 27, 1998, 11:49 a.m.

TRD-9813661

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Thursday-Friday, September 10–11, 1998, 8:30 a.m.

333 Guadalupe, Suite 2-400A

Austin

AGENDA:

The Board will meet to consider public comments, minutes of the last meeting; legal matters; planning for future meetings; a report from the Board liaison to the Psychological Associate Advisory Committee; and reports from the chair of the Board, the Executive Director and the following committees; Applications, Budget, Complaint and Enforcement, Continuing Education, Evaluation, Oral Examination, Personnel, Public Information, Rules, and Written Examinations. The Board will consider dismissals, of allegations for ratification, agreed orders, proposed and adopted rules and a rule review of various Board rules. The Board will hold and executive session to seek legal advice, and the Board will hold an executive session to discuss personnel and hold interviews with applicants for General Counsel.

Contact: Sherry L. Lee, 333 Guadalupe, Suite 2–450, Austin, Texas 78701, 512/305–7700.
Filed: August 27, 1998, 11:49 a.m.

TRD-9813660

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Public Utility Commission of Texas

Wednesday, September 9, 1998, 9:30 a.m.

1701 North Congress Avenue

Austin

AGENDA:

There will be an Open Meeting for discussion, consideration, and possible action regarding: Electric utility reliability and customer service; Docket Numbers 19795, 16705, 18290, 18741, 17751, 18459, 18078, 19291, 17740 and 17432; Project Numbers 17549 and 16251; Docket Numbers 19000, Project Numbers 18702, 18515, and 18516; Docket Numbers 19520 and 19584, Project Numbers 18886, 18438, 19699, 16899, 16900, 16901, 8290, 17510, 13928, and 12941, Federal Telecommunications Act of 1996 and other actions taken by the Federal Communications Commission; Activities in local telephone markets, including but not limited to correspondence and implementation of interconnection agreements approved by the Commission pursuant to PURA and FTA; Customer service issues, including but not limited to correspondence and complaint issues; Operating Budget, Appropriations Request, Agency Business Plan, project assignments, correspondence staff reports, agency administrative issues, fiscal matters and personnel policy; Project No. 18491, Year 2000 Project; Adjournment for closed session to consider litigation and personnel matters; Reconvene for discussions for decisions on matters considered in closed session.

Contact: Diane Prior, 1701 North Congress Avenue, Austin, Texas 78701, 512/936–7007.
Filed: September 1, 1998, 2:18 p.m.

TRD-9813856

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Wednesday, September 9, 1998, 9:30 a.m.

1701 North Congress Avenue

Austin

REVISED AGENDA:

There will be an Open Meeting for discussion, consideration, and possible action regarding: Electric utility reliability and customer service; Docket Numbers 19795, 16705, 18290, 18741, 17751, 18459, 18078, 19291, 17740 and 17432; Project Numbers 17549 and 16251; Docket Numbers 19000, Project Numbers 18702, 18515, and 18516; Docket Numbers 19520 and 19584, Project Numbers 18886, 18438, 19699, 16899, 16900, 16901, 8290, 17510, 13928, and 12941, Federal Telecommunications Act of 1996 and other actions taken by the Federal Communications Commission; Activities in local telephone markets, including but not limited to correspondence and implementation of interconnection agreements approved by the Commission pursuant to PURA and FTA; Universal Service Fund Audit Report for 1997; Customer service issues, including but not limited to correspondence and complaint issues; Operating Budget, Appropriations Request, Agency Business Plan, project assignments, correspondence staff reports, agency administrative issues, fiscal matters and personnel policy; Project No. 18491, Year 2000 Project; Adjournment for closed session to consider litigation and personnel matters; Reconvene for discussions for decisions on matters considered in closed session.

Contact: Diane Prior, 1701 North Congress Avenue, Austin, Texas 78701, 512/936–7007.
Filed: September 1, 1998, 2:18 p.m.

TRD-9813867

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Recycling Market Development Board

Thursday, September 17, 1998, 10:00 a.m.

William B. Travis Building, 1701 North Congress, Room 1.111

Austin

AGENDA:

I. call to order. II. announcements; III. old business: (1) RMBD Internet home page status report; IV. new business: (1) status report on Legislative Policy Recommendations; (2) Report on Texas Recycling Summit; (4) Report on Sate Purchaser's Workshop in October, hosted by the General Land Office; (5) Discussion of publicity event for RMBD member agency "buy recycled" policies: (6) Report on Lemark Optra S Prebate program for laser printer toner cartridges; V. Public comment; VI. Adjourn.

Contact: Robert Cox, 1700 North Congress Avenue, Room 620, Austin, Texas 78701, 512/463–5381.
Filed: September 2, 1998, 11:05 a.m.

TRD-9813945

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Texas Rehabilitation Commission

Thursday-Friday, September 24–25, 1998, 9:30 a.m.

4900 North Lamar Boulevard, Brown-Heatly Building, Public Hearing Room, First Floor

Austin

Board of Texas Rehabilitation Commission

AGENDA:

9:30 a.m. Thursday, September 24, 1998–Roll call; introduction of guests; invocation; approval of minutes; Board meeting of June 25, 1998; Commissioner's Comments; Update on Reauthorization of the Rehabilitation Act, Federal Appropriations, and Upcoming Texas Legislative Session; Update on TRC Legislative Appropriations Request; Update on HHSC Consolidate Budget; Update on HHSC Coordinated Strategic Plan; Update on Sunset Staff Report; Update on TRC Contracted Administrative Support to HHSC; Survey of Organizational Excellence; Update on SSA/DDS Automated Systems; Update on Computers for Clients; Management Audit Update; Approval of Proposed FY 1999 Audit Plan; Approval of Dates for the 1999 TRC Board Meeting; Public Comments

Executive Session: Review of potential litigation, personnel practices, and staff presentations involving the Texas Rehabilitation Commission, Disability Determination Services and Management Audit. These subjects will be discussed in Executive Session pursuant to Sections 551.071, 551.074 and 551.075 of the Open Meetings Act (Texas Government Code Annotated §551).

Adjournment. If all agenda items have been completed, the Board will adjourn. If all agenda items have not been completed, the Board will recess until 9:30 a.m. Friday, September 25, 1998, to reconvene in the Public Hearing Room, First Floor, Brown-Heatly Building, 4900 North Lamar, Austin, Texas.

9:30 a.m. Friday September 25, 1998–Toll call; Introduction of guests; continuation of Board Agenda from September 24, 1998

Executive Session: Review of potential litigation, personnel practices, and staff presentations involving the Texas Rehabilitation Commission, Disability Determination Services and Management Audit. These subjects will be discussed in Executive Session pursuant to Sections 551.071, 551.074 and 551.075 of the Open Meetings Act (Texas Government Code Annotated §551).

Contact: Renee Johnston, 4900 North Lamar Boulevard, Austin, Texas 78751, 512/424–4002.
Filed: August 27, 1998, 10:11 a.m.

TRD-9813637

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Secretary of State

Wednesday, September 9, 1998, 10:00 a.m.

Reagan State Office Building, Room 109

Austin

Elections Advisory Committee

AGENDA:

Welcome remarks; roll call of members introductory remarks; overview of secretary of state election night returns for the November 3, 1998 election; overview of process/introduction of key personnel; features of the system; charges for election night returns service; approval of operations manual designation of one or more elections advisory committee members to be present on election night; closing remarks.

Contact: Kim Sutton P.O. Box 12060, Austin, Texas 78711, 512/463–5650.
Filed: August 27, 1998, 10:10 a.m.

TRD-9813632

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Telecommunication Infrastructure Fund Board

Thursday, September 10, 1998, 2:30 p.m.

2004 19th Street

Lubbock

AGENDA:

The Telecommunications Infrastructure Fund Board will convene in open session to deliberate and possibly take formal action on the following items:

I. The Board Members will tour the Lubbock ISD to view their Internet Connectivity Projects funded by TIF

II. Tour of Texas Tech University Healthnet Center and Library

Contact: Dawn Efaw, 1000 Red River, Suite E208, Austin, Texas 78701, 512/344–4314.
Filed: August 28, 1998, 4:51 p.m.

TRD-9813733

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Friday, September 11, 1998, 9:00 a.m.

West 3rd and Avenue G, Muleshoe High School Auditorium

Muleshoe

Finance and Audit Committee

AGENDA:

The Finance and Audit Committee of the Telecommunications Infrastructure Fund Board will convene in open session to deliberate and possibly take formal action on the following items:

I. Call Committee Meeting to Order Open Meeting/Quorum Call-Roger Benavides, Chair

II. Minutes from Prior Meetings

III. Financial Report/Operating Budget

IV. Quality Assurance-Grant Programs

V. Summary of Site Visits

VI. Future Agenda Items

VII. Adjourn Committee Meeting

Contact: Dawn Efaw, 1000 Red River, Suite E208, Austin, Texas 78701, 512/344–4314.
Filed: August 31, 1998, 12:08 p.m.

TRD-9813797

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Friday, September 11, 1998, 9:00 a.m.

322 West 2nd Street, Muleshoe Area Public Library

Muleshoe

Libraries and Telemedicine Committee

AGENDA:

The Libraries and Telemedicine Committee of the Telecommunications Infrastructure Fund Board will convene in open session to deliberate and possibly take formal action on the following items:

I. Call Committee Meeting to Order Open Meeting/Quorum Call-John Collins, Chair

II. Minutes from Prior Meetings

III. Reports from Advisory Committees

IV. Future Agenda Items

V. Adjourn Committee Meeting

Contact: Dawn Efaw, 1000 Red River, Suite E208, Austin, Texas 78701, 512/344–4314.
Filed: August 31, 1998, 12:08 p.m.

TRD-9813798

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Friday, September 11, 1998, 10:00 a.m.

West 3rd and Avenue G, Muleshoe High School Auditorium

Muleshoe

AGENDA:

The Telecommunications Infrastructure Fund Board will convene in open session to deliberate and possibly take formal action on the following items

I. Call to Order Open Meeting/Quorum Call-Chairman Bill Mitchell

II. Minutes from Prior Meetings

III. Update on Progress of GSC/TEA Memorandum of Understanding: Steve Parker, GSC and Nancy Vaugh, TEA

IV. Presentation by Muleshoe ISD: Bill Moore, Superintendent

V. Presentation by Texas Statewide Telephone Coop., Inc. (TSTCI): Denise Rose

VI. Board Committee Reports: Finance and Audit Committee-Roger Benavides, Chair; Libraries and Telemedicine Committee-John Collins, Chair; Curriculum, Training and Evaluating Committee-Joe Randolph, Chair

VII. Agency Working Group Updates: State Agencies Working Group-Sandy Kress, Board Member: Arnold Viramontes, Executive Director; Education Working Group-Hal Guthrie, Board Member, Kay Karr, Board Member and Gary Grogran, Director of Programs; Training Working Group-Joe Randolph, Board Member, Gary Grogran, Director of Programs

VIII. Public Information and Media Relations Report-Cling Formby, Board Member

IX. Western Governor's University Update-Hal Guthrie, Board Member

X. Executive Director's Report: Administration and Programs

XI. Chairman of the Board Report

XII. Board Meeting Schedule

XIII. Public Input

XIV. Future Agenda Items

XV. Adjourn Open Meeting

The Board may go into Executive Session on any agenda item if authorized by the Open Meetings Law, Government Code, Chapter 551

Contact: Dawn Efaw, 1000 Red River, Suite E208, Austin, Texas 78701, 512/344–4314.
Filed: August 31, 1998, 12:08 p.m.

TRD-9813799

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Texas Association of Counties

Thursday, September 3, 1998, 1:30 8.

1204 San Antonio

Austin

County Government Risk Management Pool, Litigation Subcommittee

EMERGENCY MEETING AGENDA:

Call to order-1:30 p.m. September 3, 1998

Deliberate and Take Action on the following Items

Closed Session: Consultation with Attorneys on Pending Matagorda County Litigation with Pool to receive advice (Gov't Code 551.071) and adjourn.

Reason for emergency: Update board on lawsuit.

Contact: James W. Jean, 1204 San Antonio, Austin, Texas 78701, 512/478–8753.
Filed: August 31, 1998, 9:31 a.m.

TRD-9813739

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Texas Tech University and Texas Tech University Health Sciences Center

9/1/98, 9/3/98, 9/4/98, 9/8/98–9/12/98, 9/14/98–9/18/98, 9/21/98–9/25/98, 9/28/98–10/2/98, 10/5/98–10/9/98, 10/12/98–10/16/98, 10/19/98–10/21/98, 10/23/98, 10/26/98–10/30/98, 11/2/98–11/6/98; 11/9/98–11/12/98, 11/16/98–11/20/98, 11/23/98–11/25/98, 11/30/98, 11:00 a.m.

4800 Albany Avenue

El Paso

Board of Regents Pricing Committee

AGENDA:

The Pricing Committee of the Board of Regents of Texas Tech University will consider and act upon the following: a resolution by the Pricing Committee approving the issuance and sale of the Board of Regents of Texas Tech University Revenue Financing System Refunding bonds, Sixth Seres (1998), in an aggregate principal amount not to exceed $60,000,000, and resolving other matters relating to the issuance and sale of said bonds.

Note: A special called meeting of the Board of Regents Pricing Committee is necessary to take immediate action in order to obtain the most favorable terms relative tot he boards to be sold and to execute the necessary documents relative thereto. It is impossible to convene a quorum of the Pricing Committee members at one location on the numerous dates which the Pricing Committee must be available to meet. Therefore, in order to properly exercise its duty of governance of the Universities, meetings by telephone conference call are initiated.

The telephone conference call will be hosted in the Board of Regents Meeting Room #201, Texas Tech University Campus, Lubbock, Texas.

Contact: James L. Crowson, P.O. Box 42013, Lubbock, Texas 79409–2013.

Filed: August 27, 1998, 8:48 a.m.

TRD-9813629

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University Interscholastic League

Monday, August 31, 1998, 8:30 a.m.

University Interscholastic League Office, 1701 Manor Road

Austin

Waiver Review Board

AGENDA:

AA. Request for a waiver of the Parent Residence Rule by Jack Brandon Harris representing Colmesneil High School in Colmesneil, Texas.

BB. Request for waiver of the Four Year Rule by Jeremiah Koch representing Floresville High School in Floresville, Texas.

CC. Request for waiver of Parent Residence Rule by Kelly Michele Schwartz representing Westfield High School in Houston, Texas.

DD. Request for waiver of Parent Residence Rule by Jonathan Kuntz representing Colleyville-Heritage High School in Colleyville, Texas.

EE. Request for waiver of Parent Residence Rule Robert Garza representing Hillsboro High School in Hillsboro, Texas.

FF. Request for waiver of the Four Year Rule by David Diosdado, Jr., representing Edison High School in San Antonio, Texas.

GG. Request for waiver of Parent Residence Rule by Corey M. Botkin representing Amarillo High School in Amarillo, Texas.

HH. Request for waiver of Parent Residence Rule by Joe Daniel Samaniego representing Brackett High School in Brackettville, Texas.

Contact: Sam Harper, 3001 Lake Austin Boulevard, Austin, Texas 78713, 512/471–5883.
Filed: August 27, 1998, 3:37 p.m.

TRD-9813674

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Monday, August 31, 1998, 9:00 a.m.

University Interscholastic League Building, 1701 Manor Road

Austin

State Executive Committee

REVISED AGENDA:

AA. Appeal of District 21–A Executive Committee Decision Ruling a Student Athlete at Tenaha High School Ineligible

BB. Case Transferred by District 30–A Executive Committee with Recommendation of Public Reprimand to Coach Carl Wieburg, Christoval High School, for Violation of Section 1209(c) Regarding Summer Camps

CC. Appeal of District 16–A Executive Committee Decision Ruling a Student Athlete at Valley View High School Ineligible

DD. Case Transferred by District 27–AAAA Executive Committee with Recommendation of Public Reprimand to Coach Bruce Bush, San Marcos High School, for Violation of Off-season Regulations in Football

EE. Request for District 11–AAA Executive Committee for Clarification of Section 351 Regarding Conference Enrollment Projections for North Crowley High School.

FF. Alleged Recruiting Violations by Coach Dean Jackson, Allen High School.

Contact: Sam Harper, 3001 Lake Austin Boulevard, Austin, Texas 78713, 512/471–5883.
Filed: August 28, 1998, 2:37 p.m.

TRD-9813718

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Texas Windstorm Insurance Association

Monday, August 31, 1998, 2:30 p.m.

Texas Windstorm Insurance Association Office, (Teleconference)

Austin

Board of Directors

EMERGENCY MEETING AGENDA:

I. Call to order-reminder of the anti-trust statement

II. Action on Commissioner Bomer's request for extension of increased coverage-Increase Cost of Construction

III. Adjourn

Reason for emergency: Commissioner of Insurance has requested T.W.I.A. to provide increased cost of construction coverage to be effective coincide with the new building code which is effective September 1, 1998.

Contact: Charles F. MCCullough, 2028 East Ben White Boulevard, Suite 200, Austin, Texas 78741, 512/444–9612.
Filed: August 28, 1998, 11:32 a.m.

TRD-9813702

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Texas Workforce Commission

Tuesday, September 8, 1998, 9:00 a.m.

Room 644, TWC Building, 101 East 15th Street

Austin

AGENDA:

Approval of prior meeting notes; vote on minutes dates July 21, 1998, and July 29, 1998; Public comment; consideration action on Tax Liability Cases listed on Texas Workforce Commission Docket 36; Discussion, consideration and possible action: (1) on acceptance of pledges of Child Care Matching Funds; (2) on the adoption of the adoption of the Food Stamp, Employment and Training Rules (Chapter 813); (3) regarding potential and pending applications for certification and recommendations to the Governor of Local Workforce Development Boards for Certification; (4) regarding recommendations to TCWEC and status of strategic and operational plans submitted by Local Workforce Development Board; and (5) regarding approval of Local Workforce Board or Private Industry Council Nominees; General discussion and staff report concerning the Employment Service and related functions at the Texas Workforce Commission; Discussion, consideration and possible action relating to House Bill 2777 and the development and implementation of a plan for the integration of service and functions relating to eligibility determination and service delivery the Health and Human Service Agencies and TWC; Staff

report and discussion-update on activities relating to: Administrative Support Division, Technology and Facilities Management Division, Unemployment Insurance and Regulation Division, Workforce Development Division, and Welfare Reform Initiatives Division; Executive Session pursuant to: Government Code §551.074 to discuss the duties and responsibilities of the executive staff and other personnel; Government Code §551.071(1) concerning the pending or contemplated litigation of the Texas AFL-CIO v. TWC; Pat McCowan, Betty McCoy, Ed Carpenter, and Lydia DeLeon Individually and on Behalf of Others Similarly Situated v. TWC et al; TSEU/CWA Local 6186, AFL-CIO Lucinda Robles, and Maria Roussett V. TWC et al; Midfirst Bank v. Reliance Health Care et al (Enforcement of Oklahoma Judgment); Gene E. Merchant et al. v. TWC; and Carolyn Harris v. TEC; Government Code §551.071(2) concerning all matters identified in this agenda where the Commissioners seek the advice of their attorney as Privileged Communications under the Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas and to discuss the Open Meetings Act and the Administrative Procedure Act; Action, if any, resulting from executive session; Consideration, discussion, questions, and possible action on: (1) whether to assume continuing jurisdiction on Unemployment Compensation cases and reconsideration of Unemployment Compensation cases, if any; and (2) higher level appeals in Unemployment Compensation cases listed on Texas Workforce Commission Docket 35 and 36.

Contact: J. Randel (Jerry) Hill, 101 East 15th Street, Austin, Texas 78778, 512/463–8812.
Filed: August 31, 1998, 2:24 p.m.

TRD-9813811

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Regional Meetings

Meeting filed August 26, 1998

Hickory Underground Water Conservation District No. One, Board and Advisors met at 111 East Main, Brady, September 1, 1998, at 7:00 p.m. Information may be obtained from Stan Reinhardt, P.O. Box 1214, Brady, Texas 76825, 915/597–2785. TRD-9813618.

Lower Neches Valley Authority, Business and Development Committee met at 7850 Eastex Freeway, Beaumont, September 1, 1998, at 3:00 p.m. Information may be obtained from A.T. Hebert, Jr., P.O. Box 5117, Beaumont, Texas 77726–5117, 409/892–4011. TRD-9813617.

North Central Texas Council of Governments (NCTCOG) Transportation Department, Regional Transportation Council will meet at the Dallas County Commissioner's Court, Dallas County Administration Building, 411 Elm Street, Dallas, September 14, 1998, at 3:00 p.m. Information may be obtained from Michael Morris, P.O. Box 5888, Arlington, Texas 76005–5888, 817/695–9240. TRD-9813602.

North Central Texas Council of Governments (NCTCOG) Transportation Department, Regional Transportation Council will meet at the Fort Worth City Hall, City Council Chambers, 1000 Throckmorton, Fort Worth, September 16, 1998, at 10:00 a.m. Information may be obtained from Michael Morris, P.O. Box 5888, Arlington, Texas 76005–5888, 817/695–9240. TRD-9813603.

North Central Texas Council of Governments (NCTCOG) Transportation Department, Regional Transportation Council will meet at the Carrollton City Hall, City Council Chambers, 1945 Jackson Road, Carrollton, September 16, 1998, at 7:00 p.m. Information may be obtained from Michael Morris, P.O. Box 5888, Arlington, Texas 76005–5888, 817/695–9240. TRD-9813604.

Meetings filed August 27, 1998

Bastrop Central Appraisal District, Board of Directors met at 1200 Cedar Street, Bastrop, September 1, 1998, at 7:30 p.m. Information may be obtained from Dana Ripley, 1200 Cedar Street, Bastrop, Texas 78602, 512/303–3536. TRD-9813653.

Bell-Milam-Falls WSC, Board met at FM 485 West, Corporation Office, Cameron, September 3, 1998, at 8:30 a.m. Information may be obtained from Dwayne Jekel, P.O. Drawer 150, Cameron, Texas 76520–0150, 254/697–4016. TRD-9813665.

Brazos Valley Council of Governments, Brazos Valley Regional Committee on Aging met at 1706 East 29th Street, Bryan, September 1, 1998, at 2:30 p.m. Information may be obtained from A.D. Rychlik, P.O. Drawer 4128, Bryan, Texas 77805–4128, 409/775–4244. TRD-9813673.

Brazos Valley Council of Governments, Brazos Valley Council of Governments Board of Director Meeting met at 3232 East Briarcrest Drive, Bryan, September 3, 1998, at 6:00 p.m. Information may be obtained from Nelda Thompson, P.O. Drawer 4128, Bryan, Texas 77805–4128, 409/775–4244, Ext. 102. TRD-9813634.

Capital Area Planning Council, Executive Committee Meeting met at 3401 South IH-35, Austin, September 2, 1998, at 10:00 a.m. Information may be obtained from Betty Voights, 2512 South IH-35, Suite #220, Austin, Texas 78704, 512/443–7653. TRD-9813638.

Dawson County Central Appraisal District, Board of Directors met at 920 North Dallas Avenue, Lamesa, September 2, 1998, at 7:00 a.m. Information may be obtained from Tom Anderson, P.O. Box 97, Lamesa, Texas 79331, 806/872–7060. TRD-9813670.

East Texas Council of Governments, CEO Board of Directors met at 1306 Houston Street, Kilgore, September 2, 1998, at 11:30 a.m. Information may be obtained from Glynn Knight, 3800 Stone Road, Kilgore, Texas 75662, 903/984–8641. TRD-9813679.

Erath County Appraisal District, Appraisal Review Board met at 1390 Harbin Drive, Stephenville, September 3, 1998, at 9:00 a.m. Information may be obtained from Lisa Chick, 1390 Harbin Drive, Stephenville, Texas 76401, 254/965–5434. TRD-9813664.

Fisher County Appraisal District, Fisher CAD Board of Directors met at Junction at Highway 180 and 70, Fisher County Courthouse/ Concho Street, Roby, September 10, 1998, at 8:00 a.m. Information may be obtained from Betty Mize, P.O. Box 516, Roby, Texas 79543, 915/776–2733. TRD-9813671.

50th Judicial District, Juvenile Board met the District Courtroom, Cottle County Courthouse, Panducah, September 3, 1998, at Noon. Information may be obtained from David W. Hajek, P.O. Box 508, Seymour, Texas 76380, 940/888–2852. TRD-9813623.

Martin County Appraisal District, MCAD Board Meeting met at Rita's Restaurant, 612 West Front, Stanton, September 2, 1998, at Noon. Information may be obtained from Doris Holland, P.O. Box 1349, Stanton, Texas 79782, 915/756–2823 or 915/756–2825. TRD-9813667.

Shackleford Water Supply Corporation, Director's Meeting met at Ft. Griffin Restaurant, Highway 180 West, Albany, September 2, 1998, at Noon. Information may be obtained from Gaynell Perkins, Box 11, Albany, Texas 76430, 940/345–6868 or 915/762–2575. TRD-9813666.

Tyler County Appraisal District, Board of Directors met at 806 West Bluff, Woodville, September 8, 1998, at 10:00 a.m. Information may be obtained from Eddie Chalmers, P.O. Drawer 9, Woodville, Texas 75979, 409/283–3736. TRD-9813636.

Wheeler County Appraisal, Board of Directors will meet at 117 East Texas, Courthouse Square, Wheeler, September 14, 1998, at 6:00 p.m. Information may be obtained from Larry Schoenhals, P.O. Box 1200, Wheeler, Texas 79096, 806/826–5900. TRD-9813635.

Wheeler County Appraisal, Board of Directors will meet at 117 East Texas, Courthouse Square, Wheeler, September 14, 1998, at 6:00 p.m. Information may be obtained from Larry Schoenhals, P.O. Box 1200, Wheeler, Texas 79096, 806/826–5900. TRD-9813633.

Meetings filed August 28, 1998

Bexar Appraisal District, Appraisal Review Board met at 535 South Main Street, San Antonio, September 4, 1998, at 9:00 a.m. Information may be obtained from Ann Elizondo, P.O. Box 830248, San Antonio, Texas 78283–0248, 210/224–8511. TRD-9813697.

Bluebonnet Trails Community MHMR Center, Board of Trustees met at the Bluebonnet Trail Community MHMR Center, 555–A Round Rock West Drive, Round Rock, September 3, 1998, at 4:00 p.m. Information may be obtained from Rosemary E. Wissinger, Bluebonnet Trails Community MHMR 512/244–8335. TRD-9813680.

East Texas Council of Governments, Executive Committee met at 3800 Stone Road, Kilgore, September 3, 1998, at 12:30 p.m. Information may be obtained from Glynn Knight, 3800 Stone Road, Kilgore, Texas 75662, 903/984–8641. TRD-9813695.

Golden Crescent Workforce Development Board, Transportation Ad Hoc Committee met at 2401 Houston Highway, Victoria, September 3, 1998, at 11:45 a.m. Information may be obtained from Laura Sanders 2401 Houston Highway, Victoria, Texas 77901, 512/576–5872. TRD-9813723.

Harris County Appraisal, Appraisal Review Board met at 2800 North Loop West, Houston, September 4, 1998, at 8:00 a.m. Information may be obtained from Bob Gee, 2800 North Loop West, Houston, Texas 77092, 713/957–5222. TRD-9813696.

Heart of Texas Region MHMR Center, Board of Trustees met at 110 South 12th Street, Waco, August 31, 1998, at 1:15 p.m. Information may be obtained from Helen Jasso, P.O. Box 890, Waco, Texas 76703, 254/752–3451, Ext. 290. TRD-9813706.

Heart of Texas Region MHMR Center, Board of Trustees met at 110 South 12th Street, Waco, September 1, 1998, at 11:45 a.m. Information may be obtained from Helen Jasso, P.O. Box 890, Waco, Texas 76703, 254/752–3451, Ext. 290. TRD-9813725.

Johnson County Central Appraisal District, Appraisal Review Board met at 109 North Main, ARB Conference Room, Cleburne, September 2–3, 1998, at 9:00 a.m. Information may be obtained from Don Gilmore, 109 North Main, Cleburne, Texas 76031, 817/645–3986. TRD-9813698.

Lampasas County Appraisal District, Board of Directors met at 109 East 5th Street, Lampasas, September 3, 1998, at 7:00 p.m. Information may be obtained from Katrina S. Perry, P.O. Box 175, Lampasas, Texas 76550–0175, 512/556–8058. TRD-9813717.

Martin County Appraisal District, MCAD Board Meeting met at Rita's Restaurant, 612 West Front, Stanton, September 2, 1998, at Noon. Information may be obtained from Doris Holland, P.O. Box 1349, Stanton, Texas 79782, 915/756–2823 or fax 915/756–2825. TRD-9813724.

Panhandle Ground Water Conservation District Number Three, Board of Director Public Hearing met at 201 West 3rd Street, White Deer, September 2, 1998, at 8:00 p.m. Information may be obtained from C.E. Williams, Box 637, White Deer, Texas, 79097, 806/883–2501. TRD-9813688.

Panhandle Ground Water Conservation District Number Three, Board of Director Public Hearing met at the District Office, 201 West 3rd Street, White Deer, September 2, 1998, at 8:30 p.m. Information may be obtained from C.E. Williams, Box 637, White Deer, Texas, 79097, 806/883–2501. TRD-9813689.

Panhandle Information Network, Board of Directors met at 415 West 8th Street, Panhandle Regional Planning Commission, Amarillo, September 2, 1998, at 1:30 p.m. Information may be obtained from Dr. LaVelle Mills, P.O. Box 30698, Amarillo, Texas 79120, 806/379–7644, Ext. 216. TRD-9813694.

Riceland Regional Mental Health Authority, Board of Trustees met at 624 Preston, Columbia, September 3, 1998, at 9:00 a.m. Information may be obtained from Marjorie Dornak, P.O. Box 869, 3007 North Richmond Road, Wharton, Texas 77488, 409/532–3098. TRD-9813730.

Stephens County Rural WSC, Regular Monthly Board Meeting met at 206 FM 3099, Breckenridge, September 3, 1998, at 6:00 p.m. Information may be obtained from Mary Barton, P.O. Box 1621, Breckenridge, Texas 76424, 254/559–6180. TRD-9813701.

Wheeler County Appraisal, Board of Directors will meet at 117 East Texas, Courthouse Square, Wheeler, September 14, 1998, at 6:00 p.m. Information may be obtained from Larry Schoenhals, P.O. Box 1200, Wheeler, Texas 79096, 806/826–5900. TRD-9813703.

Meetings filed August 31, 1998

Bexar-Medina-Atascosa Counties Water Control and Improvement District One, Board of Directors met at Kearney and 8th Street, Natalia High School Cafetorium, Natalia, September 3, 1998, at 7:00 p.m. Information may be obtained from John W. Ward, III, P.O. Box 170, Natalia, Texas 78059, 210/663–2132. TRD-9813826.

Dallas Central Appraisal District, Board of Director's Regular Meeting met at 2949 North Stemmons Freeway, Second Floor Community Room, Dallas, September 9, 1998, at 7:30 a.m. Information may be obtained from Rick Kuehler, 2949 North Stemmons Freeway, Dallas, Texas 75247, 214/631–0520. TRD-9813757.

District Judges' Meetings 36th 156th and 343rd District Courts met at 400 West Sinton Street Room B-16, Sinton, September 4, 1998, at 8:30 a.m. Information may be obtained from Ronald M. Yeager, 400 West Sinton Street, Room 207, Sinton, Texas 78387, 512/364–6200. TRD-9813818.

Gillespie Central Appraisal District, Board of Directors will meet at 101 West Main, Gillespie County Courthouse, Basement Suite 104–C, Fredericksburg, September 14, 1998, at 8:00 a.m. Information may be obtained from Wendy J. Garza, P.O. Box 429, Fredericksburg, Texas 78624, 830/997–9807. TRD-9813809.

Hays County Appraisal District, Board of Directors met at 21001 North IH 35, Kyle, September 8, 1998, at 6:00 p.m. Information may be obtained from Pete T. Islas, 21001 North IH 35, Kyle, Texas 78640, 512/268–2522. TRD-9813812.

Hays County Appraisal District, Board of Directors met at 21001 North IH 35, Kyle, September 8, 1998, at 6:30 p.m. Information may be obtained from Pete T. Islas, 21001 North IH 35, Kyle, Texas 78640, 512/268–2522. TRD-9813814.

Millersview-Doole Water Supply Corporation, Board of Directors met One Block West of FM Highway 765 and FM Highway 2134, at Corporation's Office, Millersview, September 8, 1998, at 8:00 p.m.

Information may be obtained from Glenda M. Hampton, P.O. Box 130, Millersview, Texas 76862–0130. TRD-9813738.

Meetings filed September 1, 1998

Central Texas Council of Governments, K-TUTS Transportation Planning Policy Board met at 302 East Central Avenue, Belton, September 9, 1998, at 8:30 a.m. Information may be obtained from Jim Reed, P.O. Box 729, Belton, Texas 76513, 254/933–7075, Ext. 203. TRD-9813858.

Central Texas Water Supply Corporation, Workshop met at 4020 Lakecliffe Drive, Harker Heights, September 10, 1998, at 10:00 p.m. Information may be obtained from Delores Hamilton, 4020 Lake Cliff Drive, Harker Heights, Texas 76548, 254/698–2779. TRD-9813857.

Colorado County Appraisal District, Board of Directors met at CAD Office Building, 106 Cardinal Lane, Columbus, September 8, 1998, at 1:30 p.m. Information may be obtained from Billy Youens, P.O. Box 10, Columbus, Texas 78934, 409/732–8222. TRD-9813874.

Deep East Texas Local Workforce Development Board, Planning/ Budget/Education Advisory met at 300 East Shepherd, Lufkin City Hall, Room 202, Lufkin, September 8, 1998, at 1:30 p.m. Information may be obtained from Sydney Murphy, Route 9, Box 1898, Livingston, Texas 77351, 409/634–2247. TRD-9813832.

Deep East Texas Local Workforce Development Board, met at 300 East Shepherd, Lufkin City Hall, Room 202, Lufkin, September 8, 1998, at 2:30 p.m. Information may be obtained from Sydney Murphy, Route 9, Box 1898, Livingston, Texas 77351, 409/634–2247. TRD-9813831.

Gregg Appraisal District, Board of Directors met at 1333 East Harrison Road, Longview, September 8, 1998, at 11:00 a.m. Information may be obtained from Marvin F. Hahn, Jr., 1333 East Harrison Road, Longview, Texas 75604, 903/238–8823. TRD-9813849

High Plains Underground Water Conservation District No. One, Board Meeting met at 2930 Avenue Q, Board Room, Lubbock, September 8, 1998, at 10:00 a.m. Information may be obtained from A. Wayne Wyatt, 2930 Avenue Q, Lubbock, Texas 79405, 806/762–0181. TRD-9813839.

Lavaca County Central Appraisal District, Appraisal Review Board met at 113 North Main Street, Hallettsville, September 10, 1998, 2:00 p.m. Information may be obtained from Diane Munson, P.O. Box 386, Halletsville, Texas 77964, 512/798–4396. TRD-9813908.

Limestone County Appraisal District, Board of Directors met at 200 West State Street, Groesbeck, September 8, 1998, at 1:30 p.m. Information may be obtained from Karen Wietzikoski, 200 West State Street, Groesbeck, Texas 76642, 254/729–3009. TRD-9813837.

Middle Rio Grande Development Council, Executive Committee Meeting met in an emergency meeting at the Town House Restaurant, 2501 East Main Street, Uvalde, September 3, 1998, at Noon. Reason for emergency: Due to the cancellation of our regular Board of Director Meeting on August 26, 1998 (weather related i.e. flooding) action items need Executive Approval. Information may be obtained from Leodoro Martinez, Jr., P.O. Box 1199, Carrizo Springs, Texas 78834, 830/876–3533. TRD-9813899.

Middle Rio Grande Development Council, Chief Elected Officials Board Meeting met in an emergency meeting at the Town House Restaurant, 2501 East Main Street, Uvalde, September 3, 1998, at 2:00 p.m. Reason for emergency: Approval of the Master Contract (Budget) which was just received needs to be submitted immediately. Information may be obtained from Leodoro Martinez, Jr., P.O. Box 1199, Carrizo Springs, Texas 78834, 830/876–3533. TRD-9813892.

Middle Rio Grande Development Council, Finance Committee Meeting met in an emergency meeting at the Town House Restaurant, 2501 East Main Street, Uvalde, September 3, 1998, at 2:00 p.m. Reason for emergency: Approval of the Aster Contract (Budget) which was just received needs to be submitted immediately. Information may be obtained from Leodoro Martinez, Jr., P.O. Box 1199, Carrizo Springs, Texas 78834, 830/876–3533. TRD-9813898.

Texas Association of Regional Council, Annual Business Meeting will meet at the Radisson Hotel, 500 Parde Boulevard, South Padre Island, September 11, 1998, at 1:00 p.m. Information may be obtained from Sheila Jennings or Jim Ray, 1305 San Antonio, Street, Austin, Texas 78701, 512/478–4715 or fax 512/478–1049. TRD-9813851.

Meetings filed September 2, 1998

Bi-County Water Supply Corporation met at Arch David Road FM 2254, Pittsburg, September 8, 1998, at 7:00 p.m. Information may be obtained from Janell Larson, P.O. Box 848, Pittsburg, Texas 75686, 903/856–5840. TRD-9813937.

Blanco County Central Appraisal District, 1998 Board of Directors Third Quarter met at 200 North Avenue G, Johnson City, September 8, 1998, at Noon. Information may be obtained from Hollis Boatright, P.O. Box 338, Johnson City, Texas 78636, 830/868–4013. TRD-9813918.

Central Texas Water Supply Corporation, Litigation Committee will meet at 4020 Lakecliff Drive, Harker Heights, September 15, 1998, at 10:00 a.m. Information may be obtained from Delores Hamilton, 4020 Lake Cliff Drive, Harker Heights, Texas 76548, 254/698–2779. TRD-9813928.

Central Texas Water Supply Corporation, Negotiating Committee will meet at CTWSC Main Office Conference Room, 4020 Lakecliff Drive, Harker Heights, September 15, 1998, at 1:00 p.m. Information may be obtained from Delores Hamilton, 4020 Lake Cliff Drive, Harker Heights, Texas 76548, 254/698–2779. TRD-9813927.

Jasper County Appraisal District, Board of Directors met at 137 North Main, Jasper, September 10, 1998, at 6:00 p.m. Information may be obtained from David W. Luther, 137 North Main, Jasper, Texas 75951, 409/384–2544. TRD-9813914.

Lavaca County Central Appraisal District, Board of Directors will meet at 113 North Main Street, Hallettsville, September 14, 1998, at 4:00 p.m. Information may be obtained from Diane Munson, P.O. Box 386, Hallettsville, Texas 77964, 512/798–4396. TRD-9813913.

Middle Rio Grande Development Council, Texas Review and Comment System Committee met in a emergency revised agenda meeting at 2105 East Main Street, Uvalde, September 3, 1998, at 4:00 p.m. (rescheduled from August 28, 1998). Reason for emergency: Meeting scheduled for August 28th was cancelled due to not having a quorum present. This was a direct result of the recent disaster (flooding) around MRGDC area. As a result of disaster, Committee, members have not been able to rescheduled until now. Moreover, a couple of the applications pending before TRACS have early September deadlines and can not wait until the regular scheduled September meeting at the end of the month, which is reason for the emergency meeting. Information may be obtained from Tim Trevino, 209 North Getty Street, Uvalde, Texas 78801, 830/278–4151 or fax 830/278–2929. TRD-9813949.

North Central Texas Council of Governments (NCTCOG) Transportation Department, Regional Transportation Council will meet at Farmers Branch City Hall, City Council Chambers, 13000 William Dodson Parkway, Farmers Branch, September 15, 1998, at 4:00 p.m. Infor-

mation may be obtained from Michael Morris, P.O. Box 5888, Arlington, Texas 76005–5888, 817/695–9240. TRD-9813916.

San Patricio Appraisal District, Board of Directors met at 1146 East Market, Sinton, September 10, 1998, at 10:00 a.m. Information may be obtained from Kathryn Vermillion, P.O. Box 938, Sinton, Texas 78387, 512/364–5402. TRD-9813943.

Tarrant Appraisal District, Tarrant Appraisal Review Board met and will meet at 2329 Gravel Road, Fort Worth, September 8–12, 14, 15, 24, 1998, at 8:00 a.m. Information may be obtained from Linda G. Smith, 2329 Gravel Road, Fort Worth, Texas 76118–6984, 817/284–8884. TRD-9813924.

Taylor County Central Appraisal District, Board of Directors met at 1534 South Treadaway, Abilene, September 9, 1998, at 3:30 p.m. Information may be obtained from Richard Petree, P.O. Box 1800, Abilene, Texas 79604, 915/676–9381, Ext. 24 or fax 915/676–7877. TRD-9813944.

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IN ADDITION

The ***Texas Register*** is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings, changes in interest rate and applications to install remote service units, and consultant proposal requests and awards.

To aid agencies in communicating information quickly and effectively, other information of general interest to the public is published as space allows.

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 501. Requests for federal consistency review were received for the following projects(s) during the period of August 26, 1998, through September 1, 1998:

FEDERAL AGENCY ACTIONS:

Applicant: Richard Gould, Trustee; Location: The project site is located on the west side of the West Sam Houston Tollway, approximately one-eighth mile south of Tanner Road and one-tenth mile north of Clay Road, in west Harris County, Texas; Project No.: 98-0406-F1; Description of Proposed Action: The applicant proposes to fill 6.878 acres of isolated wetlands to construct a multi-use commercial/industrial development. The project site is approximately 46 acres in size. To compensate for the wetland impacts, the applicant will perform mitigation on a 14-acre site located northeast of the Highway 90 and FM 2855 intersection, west of the City of Katy, in Waller County, Texas. The applicant will maintain the integrity of the wetland structure so as to inhibit its degradation due to structural erosion. The applicant will monitor the successional progress of the constructed wetlands on a quarterly (seasonal) basis for the first year following the completion of mitigation construction or until 70 percent vegetative cover with desired wetland plant species is achieved; Type of Application: U.S.C.O.E. permit application #21384 under §404 of the Clean Water Act (33 U.S.C.A. §§125-1387).

Applicant: City of Houston; Location: The effluent from the treatment plant is discharged into unnamed ditch; thence to Berry Creek; thence to Berry Bayou; thence to Sims Bayou; thence to the Houston Ship Channel in Segment No. 1007 of the San Jacinto River Basin. The discharge is located on that water at Latitude: 29 degrees 38’ 37" N, Longitude: 95 degrees 15’ 45" W.; Project No.: 98-0407-F1; Description of Proposed Action: The applicant requests issuance of a National Pollutant Discharge Elimination System permit to expire August 31, 2002; Type of Application: U.S. Environmental Protection Agency NPDES #TX0034886 under the Clean Water Act (33 U.S.C.A. §§125-1387).

Applicant: City of Houston; Location: The effluent from the treatment plant is discharged into a Harris County flood control drainage ditch; thence to an unnamed tributary; thence to Clear Creek in Segment No. 1102 of the San Jacinto-Brazos Coastal Basin. The discharge is located on that water at Latitude: 29 degrees 36’ 13" N, Longitude: 94 degrees 14’ 13" W.; Project No.: 98-0408-F1; Description of Proposed Action: The applicant requests issuance of a National Pollutant Discharge Elimination System permit to expire March 31, 2001; Type of Application: U.S. Environmental Protection Agency NPDES #TX0035009 under the Clean Water Act (33 U.S.C.A. §§125-1387).

Applicant: City of Houston; Location: The effluent from the treatment plant is discharged into an unnamed drainage ditch; thence to Berry Bayou; thence to Sims Bayou; thence to the Houston Ship Channel in Segment No. 1007 of the San Jacinto River Basin. The discharge is located on that water at Latitude: 29 degrees 38’ 51" W, Longitude: 95 degrees 13’ 19" N.; Project No.: 98-0409-F1; Description of Proposed Action: The applicant requests issuance of a National Pollutant Discharge Elimination System permit to expire August 31, 2002; Type of Application: U.S. Environmental Protection Agency NPDES #TX0063045 under the Clean Water Act (33 U.S.C.A. §§125-1387).

Applicant: City of South Houston; Location: The effluent from the treatment plant is discharged into Berry Bayou which leads to Sims Bayou and then to the Houston Ship Channel/Buffalo Bayou in Segment No. 1007 of the San Jacinto River Basin. The discharge is located on that water at the following coordinates: Latitude: 29 degrees 40’ 10" N, Longitude: 95 degrees 14’ 05" W.; Project No.: 98-0410-F1; Description of Proposed Action: The applicant requests issuance of a National Pollutant Discharge Elimination System permit; Type of Application: U.S. Environmental Protection Agency NPDES #TX0057304 under the Clean Water Act (33 U.S.C.A. §§125-1387).

Applicant: Laguna Madre Water District; Location: The effluent from the treatment plant is discharged into Laguna Madre in Segment No. 2494 of the Bays and Estuaries. The discharge is located on that water at Latitude 26 degrees 10’ 43" N and Longitude 97 degrees 10’ 33" in Cameron County Texas; Project No.: 98-0415-F1; Description

of Proposed Action: The applicant requests issuance of a National Pollutant Discharge Elimination System permit to expire June 30, 2000; Type of Application: U.S. Environmental Protection Agency NPDES #TX0023621 under the Clean Water Act (33 U.S.C.A. §§125-1387).

Applicant: City of Houston, Harris Co., TXDOT, Harris Co. Flood Control District; Location: The discharges from this municipal separate storm sewer system are made directly or indirectly into Cedar Bayou (Segments 0901, 0902); San Jacinto River (Segment 1001); Lake Houston (Segment 1002); Houston Ship Channel/San Jacinto River/Buffalo Bayou (Segments 1005, 1006, 1007); Spring Creek (Segment 1008); Cypress Creek (Segment 1009); Buffalo Bayou (Segment 1014); Greens Bayou (Segment 1016); White Oak Bayou (Segment 1017); Clear Creek (Segments 1101, 1102); Armond Bayou (Segment 1113); Upper Galveston Bay (Segment 2421); Clear Lake (Segment 2425); Tabbs Bay (Segment 2426); San Jacinto Bay (Segment 2427); Black Duck Bay (Segment 2428); Scott Bay (Segment 2429); Burnet Bay (Segment 2430); Bay Port Channel (Segment 2438) and tributaries thereto which are waters of the United States classified for: Trinity-San Jacinto Coastal Basin Segments 0901, San Jacinto River Basin Segments 1005, San Jacinto-Brazos Coastal Basin Segments 1102; and Bays and Estuaries Segments 2421. The discharges are located on those waters within 1) the unincorporated portion of Harris County, 2) the incorporated city limits of the city of Houston, and 3) within the corporate boundary of the city of Pasadena only those discharges from Harris County or Harris County Flood Control District separate storm sewers, in Harris County, Texas; Project No.: 98-0416-F1; Description of Proposed Action: The applicant requests issuance of a National Pollutant Discharge Elimination System; Type of Application: U.S. Environmental Protection Agency NPDES #TXS001201 under the Clean Water Act (33 U.S.C.A. §§125-1387).

Applicant: City of Corpus Christi; Location: The discharge from this municipal wastewater treatment plant is made into Nueces River Tidal in Segment Number 2101 of the Nueces River Basin; and, South Lake of the Nueces Bay, via an unclassified intermittent stream, in Segment Number 2482 of the Bays and Estuaries. The discharges are located at: Latitude 27 degrees 51' 35" N, Longitude 97 degrees 34' 05" W (Outfall 001) and Latitude 27 degrees 51' 44" N, Longitude 97 degrees 33' 36" W (Outfall 002); Project No.: 98-0417-F1; Description of Proposed Action: The applicant requests issuance of a National Pollutant Discharge Elimination System permit to expire April 30, 2000; Type of Application: U.S. Environmental Protection Agency NPDES #TX0047082 under the Clean Water Act (33 U.S.C.A. §§125-1387).

Applicant: City of Port Neches; Location: Discharges from this municipal wastewater treatment plant is made into a series of Jefferson County Drainage District No. 7 Drainage Canals; thence to Alligator Bayou; thence to Taylor Bayou; thence to Jefferson County Drainage District No. 7 Outfall Canal; thence to the Intercoastal Waterway in Segment No. 0702 of the Neches Trinity Coastal Basin, a water of the United States classified for contact recreation and high quality aquatic habitat. The discharge is located on that water at the following coordinates: Latitude 29 degrees 57' 14" N and Longitude 93 degrees 56' 34" W.; Project No.: 98-0418-F1; Description of Proposed Action: The applicant requests issuance of a National Pollutant Discharge Elimination System permit to expire June 30, 2001; Type of Application: U.S. Environmental Protection Agency NPDES #TX0022926 under the Clean Water Act (33 U.S.C.A. §§125-1387).

Applicant: City of Houston; Location: The discharge from this municipal wastewater treatment plant is made into Brays Bayou; thence to the Houston Ship Channel/Buffalo Bayou Tidal in Segment No. 1007 of the San Jacinto River Basin, a water of the United States classified for industrial water supply and navigation. The discharge is located on that water at Latitude 29 degrees 43' 07" N, Longitude 95 degrees 35' 28" W.; Project No.: 98-0419-F1; Description of Proposed Action: The applicant requests issuance of a National Pollutant Discharge Elimination System permit to expire August 31, 2002; Type of Application: U.S. Environmental Protection Agency NPDES #TX0088153 under the Clean Water Act (33 U.S.C.A. §§125-1387).

Applicant: City of Beaumont; Location: The discharges from this municipal separate storm sewer system are made into Segment No. 704 of the Neches-Trinity Coastal River Basin; Segment Nos. 601 and 607 of the Neches River Basin; and tributaries thereto which are waters of the United States classified for: contact recreation; intermediate quality aquatic habitat; and public water supply. The discharges are located on those waters within the corporate boundaries of the City of Beaumont, in Jefferson County, Texas; Project No.: 98-0420-F1; Description of Proposed Action: The applicant requests issuance of a National Pollutant Discharge Elimination System permit; Type of Application: U.S. Environmental Protection Agency NPDES #TXS000501 under the Clean Water Act (33 U.S.C.A. §§125-1387).

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451-1464), as amended, interested parties are invited to submit comments on whether a proposed action should be referred to the Coastal Coordination Council for review and whether the action is or is not consistent with the Texas Coastal Management Program goals and policies. All comments must be received within 30 days of publication of this notice and addressed to Ms. Janet Fatheree, Council Secretary, 1700 North Congress Avenue, Room 617, Austin, Texas 78701-1495.

TRD-9813921
Garry Mauro
Chairman
Coastal Coordination Council
Filed: September 2, 1998

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Comptroller of Public Accounts

Notice of Consultant Contract Award

In accordance with the provisions of Chapter 2254, Subchapter B of the Texas Government Code, the Comptroller of Public Accounts announce this notice of consultant contract award.

The consultant proposal request was published in the July 17, 1998, issue of the *Texas Register* (23 TexReg 7437).

The consultant will assist the Comptroller in conducting a management and performance review of the El Paso Independent School District and produce periodic progress reports and assist in producing a final report.

The contract is awarded to Empirical Management Services, 8323 Southwest Freeway, Suite 510, Houston, Texas 77074. The total dollar value of the contract is not to exceed $399,990.00. The contract was executed September 1, 1998, and extends through June 30, 1999. Empirical Management Services will assist the Comptroller in preparing a final report which is due on or about March 10, 1999.

TRD-9813919
Walter Muse
Legal Counsel

Comptroller of Public Accounts
Filed: September 2, 1998

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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 Articles 1D.003, 1D.005, 1D.008, 1D.009, and 1E.003, Title 79, Revised Civil Statutes of Texas, as amended (Articles 5069-1D.003, 1D.005, 1D.008, 1D.009, and 1E.003 Vernon's Texas Civil Statutes) and Section 346.101. Tex. Fin. Code.

The weekly ceiling as prescribed by Art. 1D.003 and 1D.009 for the period of 09/07/98-09/13/98 is 18% for Consumer[1]/Agricultural/Commercial[2]/credit thru $250,000.

The weekly ceiling as prescribed by Art. 1D.003 and 1D.009 for the period of 09/07/98-09/13/98 is 18% for Commercial over $250,000.

The monthly ceiling as prescribed by Art. 1D.005 and 1D.009[3] for the period of 09/01/98-09/30/98 is 18% for Consumer/Agricultural/Commercial/credit thru $250,000.

The monthly ceiling as prescribed by Art. 1D.005 and 1D.009 for the period of 09/01/98-09/30/98 is 18% for Commercial over $250,000.

The standard quarterly rate as prescribed by Art. 1D.008 and 1D.009 for the period of 10/01/98-12/31/98 is 18% for Consumer/Agricultural/Commercial/credit thru $250,000.

The standard quarterly rate as prescribed by Art. 1D.008 and 1D.009 for the period of 10/01/98 -12/31/98 is 18% for Commercial over $250,000.

The retail credit card quarterly rate as prescribed by Art. 1D.009[1]for the period of 10/01/98-12/31/98 is 18% for Consumer/Agricultural/Commercial/credit thru $250,000.

The lender credit card quarterly rate as prescribed by Sec. 346.101 Tex. Fin. Code[1] for the period of 10/01/98 -12/31/98 is 14% for Consumer/Agricultural/Commercial/credit thru $250,000.

The standard annual rate as prescribed by Art. 1D.008 and 1D.009[4] for the period of 10/01/98-12/31/98 is 18% for Consumer/Agricultural/Commercial/credit thru $250,000.

The standard annual rate as prescribed by Art. 1D.008 and 1D.009 for the period of 10/01/98-12/31/98 is 18% for Commercial over $250,000.

The retail credit card annual rate as prescribed by Art. 1D.009[1] for the period of 10/01/98-12/31/98 is 18% for Consumer/Agricultural/Commercial/credit thru $250,000.

The judgment ceiling as prescribed by Art. 1E.003 for the period of 09/01/98-09/30/98 is 10% for Consumer/Agricultural/Commercial/credit thru $250,000.

The judgment ceiling as prescribed Art. 1E.003 for the period of 09/01/98-09/30/98 is 10% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

[3]For variable rate commercial transactions only.

[4]Only for open-end credit as defined in Art. 5069-1B.002(14)V.T.C.S.

TRD-9813847
Leslie Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: September 1, 1998

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East Texas Council of Governments

Notice of Invitation for Offers of Consulting Services

1. This request for consulting services is filed under the provisions of the Government Code 2254.

2. Notice is given that the East Texas Council of Governments (ETCOG), grant recipient and administrative entity for the East Texas Workforce Development Board is requesting proposals for consultant services for the negotiation of a contract for the provision of one stop career center operations in the fourteen county East Texas Workforce Development Area. The specific services shall include identification of subcontract negotiation issues, cost reasonableness analysis, preparation for and participation in negotiation sessions, assistance in preparing a statement of work to be performed which will be incorporated into the subcontract with the career center operator.

3. Interested parties should contact Wendell Holcombe of ETCOG at (903) 984-8641. Requests for the Request for Proposals document should be addressed to: East Texas Council of Governments, 3800 Stone Road, Kilgore, Texas 75662 Attention: Wendell Holcombe.

4. The closing date for the receipt of proposals is 5:00 p.m. Central Daylight Time, September 15, 1998.

5. Proposals will be reviewed by a special task force comprised of representatives of the Chief Elected Officials Board of Directors, the Workforce Development Board and the ETCOG Executive Committee.

TRD-9813841
Wendell Holcombe
Director-Occupational Training Programs
East Texas Council of Governments
Filed: September 1, 1998

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Texas Education Agency

Request for Proposals Concerning Outside Counsel to Provide Advice Related to the Texas Education Agency's Administration and Management of the Permanent School Fund

Eligible Proposers. The Texas Education Agency (TEA) is requesting proposals under Request for Proposals (RFP) #701-98-027 from individuals, corporations and organizations for services of outside counsel to provide advice related to the Texas Education Agency's administration and management of the permanent school fund.

Description. Staff of the TEA, on behalf of the State Board of Education (SBOE), manage the $18 billion Permanent School Fund (PSF). During the ordinary course of managing the investment of assets for the PSF, legal questions arise that involve federal securities and New York State securities laws. In its capacity as guarantor of bonds issued by school districts throughout the state, the agency requires legal advisement regarding Securities and Exchange Commission Rules, notably Rule 15c2-12 related to bond disclosure. Services of outside legal counsel are required for the purpose of advising the agency with respect to various fiduciary issues and issues

involving federal securities laws, including general rights, limitations, indemnities and claims between the TEA, its securities lending agent, custodial bank, professional service providers, and various investment brokerage and investment advisory firms with whom the agency does business. In addition, services are required in connection with the guarantee program created pursuant to the Texas Education Code, Chapter 45, Subchapter C.

Dates of Project. All services and activities related to this proposal will be conducted within specified dates. Proposers should plan for a starting date of no earlier than December 15, 1998, and an ending date of no later than August 31, 1999.

Project Amount. One contractor will be selected. Subsequent project funding will be based on satisfactory progress of first-year objectives and activities and on general budget approval by the commissioner of education, the attorney general and the state legislature.

Selection Criteria. Proposals will be selected based on the ability of each proposer to carry out all requirements contained in this RFP. The TEA will base its selection on, among other things, the demonstrated competence and qualifications of the proposer and upon the reasonableness of the proposed fee. Counsel must be licensed to practice law in the state of Texas, be in good standing with the State Bar of Texas, have at least five years experience practicing law and at least three years experience in the field of federal securities law. The TEA reserves the right to select from the highest-ranking proposals those that address all requirements in this RFP and that are most advantageous to the project.

The TEA is not obligated to execute a resulting contract, provide funds, or endorse any proposal submitted in response to this RFP. This RFP does not commit TEA to pay any costs incurred before a contract is executed. The issuance of this RFP does not obligate TEA to award a contract or pay any costs incurred in preparing a response.

Requesting the Proposal. A complete copy of RFP #701-98-027 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, or by calling (512) 463-9304. Please refer to the RFP number in your request.

Further Information. For clarifying information about this RFP, contact Dean Murray, Executive Administrator, Permanent School Fund, Texas Education Agency, (512) 463-9169.

Deadline for Receipt of Proposals. Proposals must be received in the Document Control Center of the TEA by 5:00 PM(Central Time), Wednesday, October 14,1998, to be considered.

TRD-9813939
Criss Cloudt
Associate Commissioner, Policy Planning and Research
Texas Education Agency
Filed: September 2, 1998

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Fire Fighters' Pension Commission

Request for Proposal for Actuarial Services for the Texas Statewide Emergency Services Personnel Retirement Fund Administered by the Office of the Fire Fighters' Pension Commission.

Introduction. The Office of the Fire Fighters' Pension Commission (the Office) issues this notice of request for proposal seeking an actuary to provide ongoing actuarial consultation and advisory services on technical or policy issues related to the administration of the Texas Statewide Emergency Services Personnel Retirement Fund (the Fund) on an actuarially sound basis. The selected actuary shall perform the actuarial services necessary for the Commissioner and Board of Trustees of the Office to certify the actuarial soundness of the Fund every two years as required by Article 6243e.3, §24, Vernon's Texas Civil Statutes. The Principal Actuary and/or Support Actuary shall be readily accessible to the Commissioner of the Office, or his designee, and the Board of Trustees. The term of the contract will run from January 1, 1999 to August 31, 2003. At the end of the fiscal year 1998, the Fund had assets with a market value of approximately $28 million.

Services. The selected actuary shall prepare an actuarial valuation of the Fund at the end of each even numbered fiscal year. The Fund operates on the State of Texas fiscal year basis of September 1 through August 31. The selected actuary will prepare actuarial valuations for the fiscal years ending August 31, 2000 and 2002. If requested, the selected actuary will prepare an update of the 8/31/2000 actuarial valuation as of 2/28/2001 in support of the 2001 legislative session and an update of the 8/31/2002 actuarial valuation as of 2/28/2003 in support of the 2003 legislative session. The selected actuary shall monitor the Fund's actual experience and make recommendations to the Commissioner and the Board of Trustees of the Office regarding any significant trend deviations in expected to actual assumptions used in the valuation process.

The bi-annual and limited valuations must include a detailed analysis comparing experience factors to their actuarial assumptions. The analysis shall be developed and reported to identify significant variations in actual experience from what was assumed. A material variation should be the focus of an actuarial study. At a minimum, the bi-annual actuarial valuation must include and be based on the following: (1) the applicable provisions of the State of Texas statutes; (2) the characteristics of covered active members, inactive non-retired participants, and pensioners and beneficiaries; (3) the assets of the Fund; (4) actuarial assumptions regarding participant termination, retirement, disability, death, etc.; (5) the actuarial methodology to be used and any fiscal and accounting standards and assumptions to be applied; (6) the effect of Texas legislation that has become effective since the last valuation; (7) a presentation of the actuarial present value of future benefits in accordance with GASB 25 and GASB 27 and any subsequent future standards; (8) the provision of relevant actuarial information for GASB 25 disclosure and GASB 27 historical trend information for each Member Fire Department that participates in the Fund.

The valuation shall be presented in a final written report within 90 days following the fiscal year end, followed by an oral report to the Board of Trustees and must reflect the adequacy of current contribution levels, recommendations for future action, and any other items as may be directed by the Board of Trustees.

The selected actuary will serve on an ongoing basis in an advisory and review capacity to the Board of Trustees, the Commissioner and Office staff.

The selected actuary should anticipate attending four Board meetings annually, and additional meetings, if requested. As part of the on-going consulting services the selected actuary will be required, upon request, to provide: (1) the actuarial and administrative implications of particular interpretations of the statutes and administrative rules governing the Fund; (2) the effect of existing and proposed state and federal laws on the Fund; (3) general assistance to the Office regarding the ongoing administration of the Fund, including calculation of benefits, and the development of procedures and forms; (4) technical advice on state and federal tax issues affecting the Fund and its

members; (5) expert testimony to the Texas legislature or any body concerning the Fund in general, and, in particular, with regard to proposed funding or benefit modification; (6) special actuarial calculations required by the Board of Trustees or Commissioner; (7) actuarial analysis and technical evaluation, including pricing, of all proposed legislation, Attorney General opinions, or court cases that may affect the Fund; (8) periodic updates of tables and formulas needed to comply with IRS Section 401(a) qualification requirements;(9) other related special projects as requested including educational forums for Board members and the Commissioner.

Copies of the RFP. To receive a copy of the complete RFP, contact Morris E. Sandefer, Commissioner, Office of the Fire Fighters' Pension Commission, 920 Colorado Street, Eleventh Floor, Austin, Texas 78701, Telephone (512) 936-3473; facsimile no. (512) 936-3480.

Written Questions. Questions concerning the RFP may be submitted in writing, no later than September 17, 1998, to Morris E. Sandefer, Commissioner, Office of the Fire Fighters' Pension Commission, P. O. Box 12577, Austin, Texas 78711, Telephone (512) 936-3473; facsimile no. (512) 936-3480; e-mail morris.sandefer@ffpc.state.tx.us.

Closing Date for Receipt of Proposals. Fifteen copies of the proposal, including two unbound copies, must be submitted in accordance with Section III of the RFP to Morris E. Sandefer, Commissioner, Office of the Fire Fighters' Pension Commission, 920 Colorado Street, 11th floor, Austin, Texas 78701 no later than 12:00 noon, CDST, on September 29, 1998. Proposals received after the deadline will not be considered by the Office and will be returned unopened, to the proposer. Evaluation Process. Proposals meeting the minimum qualifications for consideration will be evaluated and scored by a committee of the Fund's Board of Trustees. The evaluation and scoring matrix will be provided to the evaluation committee, together with any written recommendations or comments. The top ranked three proposers, as scored by the committee, will be invited to make presentations to, and be interviewed by, the Board of Trustees at a meeting that probably will be held in Austin, Texas on December 3, 1998. Ultimate selection of an actuarial service provider for the Fund is the responsibility of the Board of Trustees.

The Office is not obligated to execute a contract as a result of the issuance of this RFP. The RFP does not commit the Office to pay any costs incurred before a contract is executed, nor does it obligate the Office to award a contract or pay any costs incurred in preparing a response to the RFP.

TRD-9813850
Morris Sandefer
Commissioner
Fire Fighters' Pension Commission
Filed: September 1, 1998

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Texas Department of Health

Designation of El Paso County Jail Annex Clinic as a Site Serving Medically Underserved Populations

The Texas Department of Health (department) is required under Texas Civil Statutes, Article 4495b, §3.06, to designate sites serving medically underserved populations. In addition, the department is required to publish notice of its designations in the *Texas Register* and to provide an opportunity for public comment on the designations.

Accordingly, the department has designated the following as a site serving medically underserved populations: El Paso County Jail Annex located at 12501 Montana Avenue, El Paso, Texas 79938. Designation is based on proven eligibility as a site serving a disproportionate number of clients eligible for federal, state or locally funded health care programs.

Oral and written comments on this designation may be directed to Ann Henry, Bureau of State Health Data and Policy Analysis, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756; (512) 458-7261. Comments will be accepted for 30 days from the publication date of this notice.

TRD-9813861
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: September 1, 1998

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Designation of El Paso County Main Jail Clinic as a Site Serving Medically Underserved Populations

The Department of Health (department) is required under Texas Civil Statutes, Article 4495b, §3.06, to designate sites serving medically underserved populations. In addition, the department is required to publish notice of its designations in the *Texas Register* and to provide an opportunity for public comment on the designations.

Accordingly, the department has designated the following as a site serving medically underserved populations: El Paso County Main Jail Clinic located at 601 East Overland, El Paso, Texas 79941. Designation is based on proven eligibility as a site serving a disproportionate number of clients eligible for federal, state or locally funded health care programs.

Oral and written comments on this designation may be directed to Ann Henry, Bureau of State Health Data and Policy Analysis, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756; (512) 458-7261. Comments will be accepted for 30 days from the publication date of this notice.

TRD-9813860
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: September 1, 1998

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Notice of Request for Proposals for Medical Transportation Services for Medicaid-Eligible Individuals to and from Allowable Medicaid Services

INTRODUCTION: The Texas Department of Health (department) requests proposals for medical transportation services for state fiscal year 1999. Proposals will be reviewed and contracts will be awarded on a competitive basis.

PURPOSE: The purpose of this program is to provide medical transportation services to Medicaid-eligible individuals who do not have any other means of transportation to and from an allowable Medicaid service. The department must ensure that transportation to and from Medicaid allowable medical services is available for all eligible clients in the state. The Medical Transportation Program (MTP) is responsible for providing necessary, nonemergency, ambulatory, and nonambulatory transportation services in a manner that is:

(1) similar in scope and duration for all eligible clients;

(2) consistent with the best interests of clients;

(3) appropriate to available resources, the client's and medical facility's geographic location, and limitations of clients;

(4) reasonably prompt;

(5) safe;

(6) cost-effective; and

(7) administratively efficient.

ELIGIBLE APPLICANTS: Public and private agencies, organizations, boards, educational institutions, and county and municipal governments are eligible to apply.

AVAILABLE FUNDS: Medical transportation funds are provided by both federal and state sources. The amount of state funds allocated to the department is determined by the Texas Legislature. Funds are then allocated among the department's public health regions.

DEADLINE: Proposals prepared according to the instructions in the Request for Proposals (RFP) must be received by the appropriate regional contact person on or before November 12, 1998, 5:00 p.m. central standard time. No facsimiles or electronic documents or devices will be accepted.

EVALUATION AND AWARD CRITERIA: Each proposal will be screened for minimum eligibility and completeness. Proposals which are deemed ineligible or incomplete will not be reviewed. Proposals which arrive after the deadline will not be reviewed. Proposals will be evaluated based upon the following criteria:

(1) client services (hours/days of operation, trip scheduling, accessibility, special needs, and experience);

(2) administration (budget, proposed unit rate(s), service description, communication, complaints and feedback procedures);

(3) vehicles (number per service area, number of nonambulatory per service area, location, condition of vehicles, communication equipment, child car seats, heater and air conditioner);

(4) drivers (number and location of drivers and training); and

(5) bonus points will be assigned for services above and beyond minimum requirements.

FOR A COPY OF THE RFP: To request a copy of the RFP, contact the appropriate MTP regional manager listed below:

Region 04, Tyler, Texas, Patsy Boggs (903) 533-5277;

Region 08, San Antonio, Lupe Reyes (210) 949-2021; or Region 10, El Paso, Texas, Marta E. Saldana (915) 774-6287

TRD-9813859
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: September 1, 1998

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Texas Department of Housing and Community Affairs

Notice of Administrative Hearing (MHD1998000353UI)

Manufactured Housing Division

Wednesday, September 16, 1998, 1:00 p.m.

State Office of Administrative Hearing, Stephen F. Austin Building, 1700 N. Congress, 11th Floor, Suite 1100

Austin, Texas

AGENDA

Administrative Hearing before an administrative law judge of the State Office of Administrative Hearings in the matter of the Texas Department of Housing and Community Affairs vs. Paul Staudenmyer dba G & G Mobile Homes to hear alleged violations of the Act, §7(d) and the Rules §80.125(e) regarding obtaining, maintaining or possessing a valid installer's license. SOAH 332-98-1522. Department MHD1998000353UI.

Contact: Jerry Schroeder, P.O. Box 12489, Austin, Texas 78711-2489, (512) 475-3589.

TRD-9813947
Daisy Stiner
Acting Executive Director
Texas Department of Housing and Community Affairs
Filed: September 2, 1998

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Notice of Public Hearing

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS SINGLE FAMILY MORTGAGE REVENUE REFUNDING TAX-EXEMPT COMMERCIAL PAPER NOTES SERIES A AND SERIES B

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS RESIDENTIAL MORTGAGE REVENUE AND REVENUE REFUNDING BONDS SERIES 1998A, SERIES 1998B, SERIES 1998C AND SERIES 1999A

Notice is hereby given of a public hearing to be held by the Texas Department of Housing and Community Affairs (the "Department") at 507 Sabine Street, Room 437, Austin, Texas, at 12:00 p.m. on Wednesday, October 7, 1998, with respect to (i) a plan of financing (the "Plan") that includes issues of single family mortgage revenue refunding tax- exempt commercial paper notes (the "Future Notes") the first of which is to be issued within one year of the date of the hearing described below and the last of which is to be issued no later than three years after the first issue of Future Notes under this Plan, and (ii) an issue of residential mortgage revenue bonds (the "Bonds") to be issued in four or more series in an aggregate face amount of not more than $165,060,000 by the Department.

The Future Notes will be issued by the Department in a maximum aggregate face amount not to exceed $75 million at any given time. The proceeds of the Future Notes will be used to refund certain single family mortgage revenue bonds of the Department and thereby to facilitate recycling prepayments of single family residential mortgage loans made to eligible very low, low and moderate income first-time home buyers with the proceeds of such single family mortgage revenue bonds. Only prepayments of mortgage loans financed with proceeds of tax-exempt mortgage revenue bonds issued within ten years from the date of receipt of the prepayments will be eligible for the recycling program.

A portion of the proceeds of the Bonds will be used to finance an estimated 2,000 single family residential mortgage loans made to eligible very low, low and moderate income first-time home buyers for the purchase of homes located within the State of Texas. Approximately $34,460,000 of the funds are being made available as a result of the refunding of the Department's previously-issued Single-Family Mortgage Revenue Refunding Tax-Exempt Commercial Paper Notes, Series A and Series B, thereby making funds available to make additional mortgage loans. A portion of the proceeds of the Bonds

will be used to refund all of the outstanding Texas Housing Agency (predecessor to the Department) Residential Mortgage Revenue Bonds, Series 1987A and Series 1987D.

For purposes of the Department's mortgage loan finance programs, eligible borrowers generally will include individuals and families whose family income does not exceed, (i) for families of three or more persons, 115% (140% in certain targeted areas) of the area median income, and (ii) for individuals and families of two persons, 100% (120% in certain targeted areas) of the area median income. The Department anticipates setting aside approximately 30% of the funds made available for borrowers of very low income (60% of area median income) for approximately one year. In addition, substantially all of the borrowers under the programs will be required to be persons who have not owned a principal residence during the preceding three years. Further, residences financed with loans under the programs will be subject to certain other limitations, including limits on the purchase prices of the residences being acquired. All the limitations described in this paragraph are subject to revision and adjustment from time to time by the Department pursuant to applicable federal law and Department policy.

All interested parties are invited to attend such public hearing to express their views with respect to the Department's mortgage loan finance program and the issuance of the Future Notes and the Bonds. Questions or requests for additional information may be directed to Ed Morris at the Texas Department of Housing and Community Affairs, 507 Sabine Street, 8th Floor, Austin, Texas 78701; (512) 475-3987.

Persons who intend to appear at the hearing and express their views are invited to contact Ed Morris in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Ed Morris prior to the date scheduled for the hearing.

TDHCA WEBSITE: www.tdhca.state.tx.us/hf.htm

Individuals who require childcare to be provided at the hearing should contact Dina Gonzalez at (512) 475-3757 at least five days before the hearing so that appropriate arrangements can be made.

Individuals who require auxiliary aids for the hearing should contact Gina Arenas, ADA Responsible Employee, at (512) 475-3943, or Relay Texas at 1-800-735-2989 at least two days before the hearing so that appropriate arrangements can be made.

This notice is published and the above-described hearing is to be held in satisfaction of the requirements of State law and Section 147(f) of the Internal Revenue Code of 1986, as amended, regarding the public approval prerequisite to the exclusion from gross income for federal income tax purposes of interest on the Future Notes and the Bonds.

TRD-9813950
Daisy Stiner
Acting Executive Director
Texas Department of Housing and Community Affairs
Filed: September 2, 1998

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Request for Proposals International Regional Economic Impact Study

The Texas Department of Housing and Community Affairs (TDHCA) is accepting proposals for a one year program to develop an International Regional Economic Study of economic development trends and indicators affecting housing and community development along the South Texas/Mexico border. The successful respondent will organize and analyze available information related to infrastructure and housing needs, as well as economic, labor, and business trends and indicators. The successful candidate will be required to conduct field surveys to establish future industry and business projections. The study should lead to the identification of an international regional economic development zone(s) encompassing both sides of the border and lay the foundation for a regional comprehensive economic development plan for the defined zone(s). TDHCA will utilize the study to develop policies for community development and affordable housing efforts along the South Texas/Mexico border and will share the results with the Texas Department of Economic Development for use particularly with the Texas Capital Fund.

The successful candidate will be required to research available literature and establish a catalog and index of available materials. The field surveys shall be conducted on both sides of the border and shall encompass the major industries, businesses, and the support service providers operating in the region. Reproducible maps identifying the zone and location of the major industries, and businesses will be required.

Interested parties should have urban planning and economic development experience, previous work experience in the region and with trans-border issues and considerable experience in developing regional community and economic development surveys and plans. TDHCA will make its selection based on the demonstrated competence, experience, knowledge and qualifications and on the reasonableness of the proposed fee for the services.

TDHCA reserves the right to negotiate all elements of the proposal to ensure the best possible consideration be afforded to all concerned. TDHCA is under no obligation to execute a contract or contracts on the basis of this RFP. TDHCA reserves the right to reject any and all proposals and to resolicit in such an event. TDHCA permits proposals utilizing joint ventures of any two or more firms, if appropriate.

The proposal must be received at TDHCA headquarters no later than 5 p.m. on September 30, 1998.

To obtain a copy of the Request For Proposals, contact Pam Knopp at (512) 475-3894.

TRD-9813752
Larry Paul Manley
Executive Director
Texas Department of Housing and Community Affairs
Filed: August 31, 1998

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Texas Department of Human Services

Public Notice-Intended Use Report

The Texas Department of Human Services (DHS) has published a report outlining the intended use of federal block grant funds during fiscal year 1999 for Title XX social services programs administered by DHS, the Texas Department of Health, the Texas Department of Mental Health and Mental Retardation, the Texas Department of Protective and Regulatory Services, the Texas Education Agency, and the Texas Workforce Commission. The report describes services funded through this federal source and includes a distribution-of-funds section which provides financial information on the allocation of funds to social services. Four public hearings were held around the state in April 1998 to obtain testimony on the recommended use of Title XX funds. These comments were taken into consideration by advisory committees, staff, and the Board of Human Services as they developed the operating plan for fiscal year 1999 and the legislative appropriation request for fiscal years 2000 and 2001. On July 17,

1998, the proposed Intended Use Report was made available to the public for review and comment. No written comments were received. On July 17, 1998, the Board of Human Services approved the fiscal year 1999 Operating Plan, including the use of block grant funds.

Summary of Public Comments on the Intended Use Report: Increased dental care for low-income adults and children; increased health care for low-income adults and children; increased in-home and support services to children with disabilities; increased family planning services; increased coordination of services to maximize utilization; increased services to immigrants; increased family violence services; increased protective services to adults and children; increased services to assist adults and children with disabilities remain in the community; increased community mental health services; increased services to persons with mental retardation; increased services to persons with epilepsy; increased teen pregnancy prevention programs; increased at-risk services to children and their families; increased agency staffing to provide direct services; increased prescriptions to low-income adults and children; increased health and social services in rural areas; increased funding to allow clinics to remain open after hours and on weekends; increased services to migrant farm workers; increased services to illegal immigrants and their children; increased respite care services; increased housing for low-income families; increased funds to eliminate waiting lists for community services; increased residential treatment services for children; increased services to grandparents caring for children; increased prenatal services to low-income women; and increased community services for substance abuse.

To obtain free copies of the report, send written requests to Chris Traylor, Federal Relations Director, Government Relations Division, Mail Code W-623, Texas Department of Human Services, P.O. Box 149030, Austin, Texas 78714-9030.

TRD-9813912
Glenn Scott
Agency Liaison
Texas Department of Human Services
Filed: September 2, 1998

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Texas Department of Insurance

Notice of Hearing

The Commissioner of Insurance will hold a public hearing under Docket 2375 on Wednesday, September 23, 1998, at 9:00 a.m. in Room 102 of the William P. Hobby, Jr. State Office Building, 333 Guadalupe Street in Austin, Texas. The purpose of this hearing is to receive comments regarding the proposed amendments to §5.14004 and §5.14005, Subchapter R, Temporary Rate Reduction for Certain Lines of Insurance, 28 Tex. Admin. Code. Individuals who wish to present comments at the hearing will be asked to register immediately prior to the hearing.

A formal notice of the proposed amendments to §5.14004 and §5.14005, was published in Volume 23, Number 34, of the *Texas Register*, on Friday, August 21, 1998. A hearing regarding the recommended percentage of rate reductions was held on Tuesday, August 25, 1998. Any comments received during the previous hearing will be considered part of the record regarding the proposed amendments.

The proposed amendments and the statutory authority for the proposed amendments, was published in the August 21, 1998, issue of the *Texas Register* (23 TexReg 8633)

TRD-9813838
Bernice Ross
Deputy Chief Clerk
Texas Department of Insurance
Filed: September 1, 1998

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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 Epitome, Inc., a foreign third party administrator. The home office is Lancaster, Pennsylvania.

Application for admission to Texas of Personal Insurance Administrators, Inc., a foreign third party administrator. The home office is Thousand Oaks, California.

TRD-9813926
Bernice Ross
Deputy Chief Clerk
Texas Department of Insurance
Filed: September 2, 1998

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Legislative Budget Board

Schedule for Joint Budget Hearings (for the period of September 10-25, 1998) on Appropriations Requests for the 2000-2001 Biennium

Schedule for Joint Budget Hearings (for the period of September 14 through 25, 1998) on Appropriations Requests for the 2000-2001 Biennium.s

Comptroller of Public Accounts			
Monday, September 14, 1998	10:00 AM	Capitol Extension, E1.010, 14th & Congress Ave.	Austin, Texas
Texas Education Agency			
Monday, September 14, 1998	2:00 PM	GSC Board Room, 402	Austin, Texas
Coastal Bend College			
Tuesday, September 15, 1998	10:00 AM	ACC District Administrative Offices, 2nd Floor Board Room 5930 Middle Fiskville Road	Austin, Texas
Texarkana College			
Tuesday, September 15, 1998	10:00 AM	ACC District Administrative Offices, 2nd Floor Board Room 5930 Middle Fiskville Road	Austin, Texas
South Plains College			
Tuesday, September 15, 1998	10:00 AM	ACC District Administrative Offices, 2nd Floor Board Room 5930 Middle Fiskville Road	Austin, Texas
Alamo Community College District			
Tuesday, September 15, 1998	10:00 AM	ACC District Administrative Offices, 2nd Floor Board Room 5930 Middle Fiskville Road	Austin, Texas
Panola College			
Tuesday, September 15, 1998	10:00 AM	ACC District Administrative Offices, 2nd Floor Board Room 5930 Middle Fiskville Road	Austin, Texas
Amarillo College			
Tuesday, September 15, 1998	10:00 AM	ACC District Administrative Offices, 2nd Floor Board Room 5930 Middle Fiskville Road	Austin, Texas
Frank Phillips College			
Tuesday, September 15, 1998	10:00 AM	ACC District Administrative Offices, 2nd Floor Board Room 5930 Middle Fiskville Road	Austin, Texas

Schedule for Joint Budget Hearings (for the period of September 14 through 25, 1998) on Appropriations Requests for the 2000-2001 Biennium.s

Paris Junior College Tuesday, September 15, 1998	10:00 AM	ACC District Administrative Offices, 2nd Floor Board Room 5930 Middle Fiskville Road	Austin, Texas
Western Texas College Tuesday, September 15, 1998	10:00 AM	ACC District Administrative Offices, 2nd Floor Board Room 5930 Middle Fiskville Road	Austin, Texas
Odessa College Tuesday, September 15, 1998	10:00 AM	ACC District Administrative Offices, 2nd Floor Board Room 5930 Middle Fiskville Road	Austin, Texas
Central Texas College District Tuesday, September 15, 1998	10:00 AM	ACC District Administrative Offices, 2nd Floor Board Room 5930 Middle Fiskville Road	Austin, Texas
College of the Mainland Tuesday, September 15, 1998	10:00 AM	ACC District Administrative Offices, 2nd Floor Board Room 5930 Middle Fiskville Road	Austin, Texas
Del Mar College Tuesday, September 15, 1998	10:00 AM	ACC District Administrative Offices, 2nd Floor Board Room 5930 Middle Fiskville Road	Austin, Texas
Northeast Texas Community College Tuesday, September 15, 1998	10:00 AM	ACC District Administrative Offices, 2nd Floor Board Room 5930 Middle Fiskville Road	Austin, Texas
Collin County Community College Tuesday, September 15, 1998	10:00 AM	ACC District Administrative Offices, 2nd Floor Board Room 5930 Middle Fiskville Road	Austin, Texas
Cisco Junior College Tuesday, September 15, 1998	10:00 AM	ACC District Administrative Offices, 2nd Floor Board Room 5930 Middle Fiskville Road	Austin, Texas

Galveston College Tuesday, September 15, 1998	10:00 AM	ACC District Administrative Offices, 2nd Floor Board Room 5930 Middle Fiskville Road	Austin, Texas
Howard County Junior College District Tuesday, September 15, 1998	10:00 AM	ACC District Administrative Offices, 2nd Floor Board Room 5930 Middle Fiskville Road	Austin, Texas
San Jacinto College District Tuesday, September 15, 1998	10:00 AM	ACC District Administrative Offices, 2nd Floor Board Room 5930 Middle Fiskville Road	Austin, Texas
Tarrant County Junior College District Tuesday, September 15, 1998	10:00 AM	ACC District Administrative Offices, 2nd Floor Board Room 5930 Middle Fiskville Road	Austin, Texas
Wharton County Junior College Tuesday, September 15, 1998	10:00 AM	ACC District Administrative Offices, 2nd Floor Board Room 5930 Middle Fiskville Road	Austin, Texas
Alvin Community College Tuesday, September 15, 1998	10:00 AM	ACC District Administrative Offices, 2nd Floor Board Room 5930 Middle Fiskville Road	Austin, Texas
Southwest Texas Junior College Tuesday, September 15, 1998	10:00 AM	ACC District Administrative Offices, 2nd Floor Board Room 5930 Middle Fiskville Road	Austin, Texas
Ranger College Tuesday, September 15, 1998	10:00 AM	ACC District Administrative Offices, 2nd Floor Board Room 5930 Middle Fiskville Road	Austin, Texas
Dallas County Community College District Tuesday, September 15, 1998	10:00 AM	ACC District Administrative Offices, 2nd Floor Board Room 5930 Middle Fiskville Road	Austin, Texas

Schedule for Joint Budget Hearings (for the period of September 14 through 25, 1998) on Appropriations Requests for the 2000-2001 Biennium.s

Vernon Regional Junior College Tuesday, September 15, 1998	10:00 AM	ACC District Administrative Offices, 2nd Floor Board Room 5930 Middle Fiskville Road	Austin, Texas
Trinity Valley Community College Tuesday, September 15, 1998	10:00 AM	ACC District Administrative Offices, 2nd Floor Board Room 5930 Middle Fiskville Road	Austin, Texas
Clarendon College Tuesday, September 15, 1998	10:00 AM	ACC District Administrative Offices, 2nd Floor Board Room 5930 Middle Fiskville Road	Austin, Texas
Temple Junior College Tuesday, September 15, 1998	10:00 AM	ACC District Administrative Offices, 2nd Floor Board Room 5930 Middle Fiskville Road	Austin, Texas
Brazosport College Tuesday, September 15, 1998	10:00 AM	ACC District Administrative Offices, 2nd Floor Board Room 5930 Middle Fiskville Road	Austin, Texas
Weatherford College Tuesday, September 15, 1998	10:00 AM	ACC District Administrative Offices, 2nd Floor Board Room 5930 Middle Fiskville Road	Austin, Texas
Hill College Tuesday, September 15, 1998	10:00 AM	ACC District Administrative Offices, 2nd Floor Board Room 5930 Middle Fiskville Road	Austin, Texas
Texas Southmost College Tuesday, September 15, 1998	10:00 AM	ACC District Administrative Offices, 2nd Floor Board Room 5930 Middle Fiskville Road	Austin, Texas
Midland College Tuesday, September 15, 1998	10:00 AM	ACC District Administrative Offices, 2nd Floor Board Room 5930 Middle Fiskville Road	Austin, Texas

Austin Community College			
	Tuesday, September 15, 1998	10:00 AM	ACC District Administrative Offices, 2nd Floor Board Room 5930 Middle Fiskville Road Austin, Texas
Kilgore College			
	Tuesday, September 15, 1998	10:00 AM	ACC District Administrative Offices, 2nd Floor Board Room 5930 Middle Fiskville Road Austin, Texas
Houston Community College System			
	Tuesday, September 15, 1998	10:00 AM	ACC District Administrative Offices, 2nd Floor Board Room 5930 Middle Fiskville Road Austin, Texas
North Central Texas College			
	Tuesday, September 15, 1998	10:00 AM	ACC District Administrative Offices, 2nd Floor Board Room 5930 Middle Fiskville Road Austin, Texas
Angelina College			
	Tuesday, September 15, 1998	10:00 AM	ACC District Administrative Offices, 2nd Floor Board Room 5930 Middle Fiskville Road Austin, Texas
Laredo Community College			
	Tuesday, September 15, 1998	10:00 AM	ACC District Administrative Offices, 2nd Floor Board Room 5930 Middle Fiskville Road Austin, Texas
Lee College			
	Tuesday, September 15, 1998	10:00 AM	ACC District Administrative Offices, 2nd Floor Board Room 5930 Middle Fiskville Road Austin, Texas
Navarro College			
	Tuesday, September 15, 1998	10:00 AM	ACC District Administrative Offices, 2nd Floor Board Room 5930 Middle Fiskville Road Austin, Texas
Victoria College			
	Tuesday, September 15, 1998	10:00 AM	ACC District Administrative Offices, 2nd Floor Board Room 5930 Middle Fiskville Road Austin, Texas

Schedule for Joint Budget Hearings (for the period of September 14 through 25, 1998) on Appropriations Requests for the 2000-2001 Biennium.s

McLennan Community College			
Tuesday, September 15, 1998	10:00 AM	ACC District Administrative Offices, 2nd Floor Board Room 5930 Middle Fiskville Road	Austin, Texas
Grayson County College			
Tuesday, September 15, 1998	10:00 AM	ACC District Administrative Offices, 2nd Floor Board Room 5930 Middle Fiskville Road	Austin, Texas
Blinn College			
Tuesday, September 15, 1998	10:00 AM	ACC District Administrative Offices, 2nd Floor Board Room 5930 Middle Fiskville Road	Austin, Texas
South Texas Community College			
Tuesday, September 15, 1998	10:00 AM	ACC District Administrative Offices, 2nd Floor Board Room 5930 Middle Fiskville Road	Austin, Texas
Tyler Junior College			
Tuesday, September 15, 1998	10:00 AM	ACC District Administrative Offices, 2nd Floor Board Room 5930 Middle Fiskville Road	Austin, Texas
El Paso Community College			
Tuesday, September 15, 1998	10:00 AM	ACC District Administrative Offices, 2nd Floor Board Room 5930 Middle Fiskville Road	Austin, Texas
North Harris Montgomery Community College District			
Tuesday, September 15, 1998	10:00 AM	ACC District Administrative Offices, 2nd Floor Board Room 5930 Middle Fiskville Road	Austin, Texas
Texas Workforce Commission			
Wednesday, September 16, 1998	9:00 AM	John H. Reagan, Room 109, 105 W. 15th Street,	Austin, Texas
The University of Texas at Tyler			
Wednesday, September 16, 1998	9:00 AM	UT-Dallas, Cecil & Ida Green Center 2nd Floor Conference Room 2601 1 N. Floyd Rd.	Richardson, Texas

Texas State Library and Archives Commission Wednesday, September 16, 1998	10:00 AM	Lorenzo de Zavala Bldg., Room 314, 1201 Brazos	Austin, Texas
The University of Texas at Austin Wednesday, September 16, 1998	10:00 AM	UT System-Ashbel Smith Hall Bldg., Ash 2 Conference Room 201 West 7th Street	Austin, Texas
The University of Texas System Wednesday, September 16, 1998	10:00 AM	UT System-Ashbel Smith Hall Bldg., Ash 2 Conference Room 201 West 7th Street	Austin, Texas
The University of Texas of the Permian Basin Wednesday, September 16, 1998	10:00 AM	UT System-Ashbel Smith Hall Bldg., Ash 2 Conference Room 201 West 7th Street	Austin, Texas
Texas Department of Criminal Justice Wednesday, September 16, 1998	1:30 PM	John H. Reagan, Room 109, 105 W. 15th Street,	Austin, Texas
Department of Information Resources Wednesday, September 16, 1998	2:30 PM	Clements Bldg., Committee Room 5, Fifth Floor 300 West 15th Street	Austin, Texas
Texas Lottery Commission Thursday, September 17, 1998	9:00 AM	GSC Board Room 402, 1711 San Jacinto	Austin, Texas
Office of the Attorney General Thursday, September 17, 1998	9:00 AM	William B. Travis Bldg., Room 1-100, 1701 N. Congress Ave.	Austin, Texas
Texas Department of Housing and Community Affairs Thursday, September 17, 1998	9:30 AM	John H. Reagan, Room 109, 105 W. 15th Street,	Austin, Texas

The University of Texas Health Science Center at San Antonio			
	Thursday, September 17, 1998	10:00 AM	UTSA-John Peace Library Bldg., Regents Room 6900 North Loop 1604 West San Antonio, Texas
The University of Texas at Brownsville			
	Thursday, September 17, 1998	10:00 AM	UTSA-John Peace Library Bldg., Regents Room 6900 North Loop 1604 West San Antonio, Texas
The University of Texas at San Antonio			
	Thursday, September 17, 1998	10:00 AM	UTSA-John Peace Library Bldg., Regents Room 6900 North Loop 1604 West San Antonio, Texas
Texas Department of Insurance			
	Thursday, September 17, 1998	1:00 PM	John H. Reagan, Room 109, 105 W. 15th Street, Austin, Texas
Texas Department of Agriculture			
	Thursday, September 17, 1998	2:00 PM	GSC Board Room 402, 1711 San Jacinto Austin, Texas
Office of Public Insurance Counsel			
	Thursday, September 17, 1998	3:00 PM	John H. Reagan, Room 109, 105 W. 15th Street, Austin, Texas
The University of Texas M.D. Anderson Cancer Center			
	Monday, September 21, 1998	9:00 AM	UTSMCD-North Campus, Simmons Biomedical Research Bldg., Room NB 2.402/403 6000 Harry Hines Blvd. Dallas, Texas
The University of Texas Health Center at Tyler			
	Monday, September 21, 1998	9:00 AM	UTSMCD-North Campus, Simmons Biomedical Research Bldg., Room NB 2.402/403 6000 Harry Hines Blvd. Dallas, Texas
The University of Texas Southwestern Medical Center at Dallas			
	Monday, September 21, 1998	9:00 AM	UTSMCD-North Campus, Simmons Biomedical Research Bldg., Room NB 2.402/403 6000 Harry Hines Blvd. Dallas, Texas

General Services Commission			
Tuesday, September 22, 1998	9:00 AM	Capitol Extension, E1.010, 14th & Congress Ave.	Austin, Texas
Midwestern State University			
Tuesday, September 22, 1998	9:00 AM	Radisson Hotel 2211 I-35 North	Denton, Texas
Texas Woman's University			
Tuesday, September 22, 1998	9:00 AM	Radisson Hotel 2211 I-35 North	Denton, Texas
University of North Texas Health Science Center at Fort Worth			
Tuesday, September 22, 1998	9:00 AM	Radisson Hotel 2211 I-35 North	Denton, Texas
University of North Texas			
Tuesday, September 22, 1998	9:00 AM	Radisson Hotel 2211 I-35 North	Denton, Texas
Texas Department of Transportation			
Tuesday, September 22, 1998	10:30 AM	Capitol Extension, E1.014 14th & Congress Ave.	Austin, Texas
The University of Texas at Pam American			
Thursday, September 24, 1998	10:00 AM	Capitol Extension, E1.026, 14th & Congress Ave.	Austin, Texas
Texas Tech University Health Sciences Center			
Thursday, September 24, 1998	10:30 AM	Capitol Extension, E1.026, 14th & Congress Ave.	Austin, Texas
Texas Tech University			
Thursday, September 24, 1998	1:30 PM	Capitol Extension, E1.026, 14th & Congress Ave.	Austin, Texas

Schedule for Joint Budget Hearings (for the period of September 14 through 25, 1998) on Appropriations Requests for the 2000-2001 Biennium.s

Food and Fibers Commission

Thursday, September 24, 1998	3:30 PM	Capitol Extension, E1.026, 14th & Congress Ave.	Austin, Texas

TRD-9813972
John Keel
Director
Legislative Budget Board
Filed: September 2, 1998

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Texas State Board of Medical Examiners

Consultant Contract Award

The Texas State Board of Medical Examiners announces this notice of award. The solicitation for bids was published in the July 24, 1998, issue of the *Texas Register* (23 TexReg 7648).

As described in the solicitation notice, the selected vendor will assess agency operations and develop specific strategies to improve agency operations. Engagement will include Administrative, Investigations, Licensing and Hearing Departments. Areas analyzed will include current business processes, utilization of information technologies, organizational staffing, assessment of current work levels, performance reporting, document management, evaluation of enabling technologies, and impact study of physician profiling.

The contract was awarded to KPMG Peat Marwick on August 24, 1998, for the amount of $86,000.

TRD-9813729
Bruce A. Levy, M.D., J.D.
Executive Director
Texas State Board of Medical Examiners
Filed: August 28, 1998

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Texas Department of Mental Health and Mental Retardation

Medicaid Public Hearing Notice

The Health and Human Services Commission and the Texas Department of Mental Health and Mental Retardation will conduct a joint public hearing to receive public comment on proposed reimbursement rates for Home and Community-Based Waiver Services - OBRA (HCS-O) program effective September 1, 1998, through August 31, 1999. The joint hearing will be held in compliance with Title 1, Texas Administrative Code, §355.702(h), which requires a public hearing on proposed reimbursement rates for medical assistance programs.

The public hearing will be held on Tuesday, September 22, 1998, at 1:30 p.m. in the auditorium of the TDMHMR Central Office building (Building 2) at 909 West 45th Street, Austin, Texas 78751.

Written comments may be submitted to Reimbursement and Analysis Section, Medicaid Administration, Texas Department of Mental Health and Mental Retardation, P.O. Box 12668, Austin, Texas 78711-2668, or faxed to (512) 206-5693 by 5 p.m., Tuesday, September 22, 1998. Interested parties may obtain a copy of the reimbursement briefing package by calling the Reimbursement and Analysis Section at (512) 206-5753.

Persons requiring ADA accommodation should contact Tom Wooldridge by calling (512) 206-5753, at least 72 hours prior to the hearing. Persons requiring an interpreter for the deaf or hearing impaired should contact Tom Wooldridge through the Texas Relay operator by calling 1-800-735-2988.

TRD-9813782
Charles Cooper
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Filed: August 31, 1998

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Texas Natural Resource Conservation Commission

Notice of Opportunity to Comment on Default Orders of Administrative Enforcement Actions

The Texas Natural Resource Conservation Commission (TNRCC or commission) Staff is providing an opportunity for written public comment on the listed Default Orders. The TNRCC Staff proposes Default Orders when the Staff has sent an Executive Director's Preliminary Report and Petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; and the proposed technical requirements necessary to bring the entity back into compliance, and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPR. Similar to the procedure followed with respect to Agreed Orders entered into by the executive director of the TNRCC pursuant to the Texas Water Code, §7.075, this notice of the proposed orders 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**October 10, 1998**. The TNRCC will consider any written comments received and the TNRCC may withdraw or withhold approval of a Default Order if a comment discloses facts or considerations that indicate that the proposed Default Order is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the TNRCC's jurisdiction, or the TNRCC's orders and permits issued pursuant to the TNRCC's regulatory authority. Additional notice of changes to a proposed Default Order is not required to be published if those changes are made in response to written comments.

A copy of each of the proposed Default Orders is available for public inspection at both the TNRCC's Central Office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable Regional Office listed as follows. Written comments about these Default Orders should be sent to the attorney designated for each Default Order at the TNRCC's Central Office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on October 10, 1998**. Written comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The TNRCC attorneys are available to discuss the Default Orders and/or the comment procedure at the listed phone number; however, comments on the Default Orders should be submitted to the TNRCC in **writing**.

(1)COMPANY: Mark Echols dba Just M.E. Sprinklers; DOCKET NUMBER: 97-0427-LII-E; ENF ID NUMBER: 12481; LOCATION: Coppell, Dallas County,Texas; TYPE OF FACILITY: landscape irrigation system; RULES VIOLATED: Texas Water Code, §34.007(a) by acting as a licensed landscape irrigator or installer without proper authorization; PENALTY: $4,050; STAFF ATTORNEY: William Puplampu, Legal-Litigation Division, MC 175, (512) 239-0677; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499, (817) 697-6750.

(2)COMPANY: Jet-Era Enterprise, Incorporated; DOCKET NUMBER: 97-0998-MWD-E; TNRCC ID NUMBER: 11578-001; LOCATION: Fairfield, Freestone County, Texas; TYPE OF FACILITY: waste water system; RULES VIOLATED: 30 TAC §325.2, TNRCC Permit Number 11578-001, and the June 7, 1996, TNRCC Agreed Order (Docket Number 96-0340-MWD-E) by failing to provide certified operational coverage at the Facility from June 1996 through October 1997 and from January 1998 through April 1998; June 7, 1996, TNRCC Agreed Order (Docket Number 96-0340-MWD-E) by failing to submit a Sludge/Solids Management Plan; 30 TAC §305.125(17) and §319.1, and TNRCC Permit Number 11578-001 by failing to submit monthly effluent reports for the months of October 1996, June 1997, July 1997, August 1997, January 1998, February 1998, and March 1998; Texas Water Code, §26.121 and TNRCC Permit Number 13709-001 exceeded the permitted daily average limit of 20 milligrams per liter for Total Suspended Solids ; PENALTY: $17,500; STAFF ATTORNEY: Bill Jang, Legal-Litigation Division, MC 175,

(512) 239-2269; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710, (254) 772-0335.

(3)COMPANY: Toby Floyd; DOCKET NUMBER: 97-0988-AGR-E; ENFORCEMENT ID NUMBER: 12049; LOCATION: Stephenville, Erath County, Texas; TYPE OF FACILITY: wastewater irrigation business; RULES VIOLATED: 30 TAC §321.37(a)(2) and Texas Water Code, §26.121 by discharging wastewater into or adjacent to any water in the state without authorization from the commission; PENALTY: $6,805; STAFF ATTORNEY: William Puplampu, Legal-Litigation Division, MC 175, (512) 239-0677; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-0499, (817) 469-6750.

(4)COMPANY: Jim Wurtz dba Builders Depot and Jim Wurtz, Individually; DOCKET NUMBER: 97-1080-OSI-E; ENFORCEMENT ID NUMBER: 11943; LOCATION: Tenaha, Shelby County, Texas; TYPE OF FACILITY: two on-site sewage facilities; RULES VIOLATED: 30 TAC §285.50(b) and Texas Health and Safety Code, §366.071 by installing the Facilities without holding valid certification issued by the executive director; 30 TAC §285.58(a)(5) and Texas Health and Safety Code, §366.051(c) by installing two on-site sewage facilities that were not authorized by the permitting authority; 30 TAC §285.58(a)(11) and Texas Health and Safety Code, §366.054 and § 366.055 by failing to inform the TNRCC Beaumont Regional Office of the date he planned to commence installing two on-site sewage facilities and failure to have the TNRCC Beaumont Regional Office inspect the two on-site sewage facilities; 30 TAC §285.58(a)(6) and Texas Health and Safety Code, §366.004 by installing two on-site sewage facilities that failed to meet the minimum criteria found in 30 TAC Chapter 285 in violation of 30 TAC §285.58(a)(6) and Texas Health and Safety Code, §366.004; 30 TAC §285.33(a)(1)(A) by installing the two on-site sewage facilities in unsuitable soils; 30 TAC §285.33(a)(1)(D) by installing an absorptive gravel-less pipe drain field that exceeded 150 feet; 30 TAC §285.33(b)(1)(A)by installing gravel-less pipes in Class IV soil; 30 TAC §285.33(b)(1)(C) by installing absorptive gravel-less pipe drain fields that were not sized in accordance with 30 TAC §285.33(b)(1)(A); 30 TAC §285.34(a) by failing to provide a two-way clean out plug between the building's plumbing and the septic tank at two sites; PENALTY: $5,250; STAFF ATTORNEY: Lisa Z. Hernandez, Legal-Litigation Division, MC 175, (512) 239-0612; REGIONAL OFFICE: 3870 Eastex Freeway, Suite 110, Beaumont, Texas 77073, (409) 898-3838.

TRD-9813920
Paul C. Sarahan
Director, Legal-Litigation Division
Texas Natural Resource Conservation Commission
Filed: September 2, 1998

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Notice of Opportunity to Comment on Settlement Agreements of Administrative Enforcement Actions

The Texas Natural Resource Conservation Commission (TNRCC or commission) Staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) pursuant to Texas Water Code (the Code), §7.075, which requires that the TNRCC may not approve these AOs unless the public has been provided an opportunity to submit written comments. Section 7.075 requires that notice of the proposed orders and of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **October 11, 1998**. Section 7.075 also requires that the TNRCC promptly consider any written comments received and that the TNRCC may withhold approval of an AO if a comment discloses facts or considerations that indicate the proposed AO is inappropriate, improper, inadequate, or inconsistent with the requirements of the Code, the Texas Health and Safety Code (THSC), and/or the Texas Clean Air Act (the Act). Additional notice is not required if changes to an AO are made in response to written comments.

A copy of each of the proposed AOs is available for public inspection at both the TNRCC's Central Office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-1864 and at the applicable Regional Office listed as follows. Written comments about these AOs should be sent to the enforcement coordinator designated for each AO at the TNRCC's Central Office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on October 11, 1998**. Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The TNRCC enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs should be submitted to the TNRCC in **writing**.

(1)COMPANY: Air Liquide America Corporation; DOCKET NUMBER: 98-0347-IWD-E; IDENTIFIER: Enforcement Identification Number 12352; LOCATION: Grand Prairie, Dallas County, Texas; TYPE OF FACILITY: air separation plant; RULE VIOLATED: 30 TAC §305.125(2), by failing to renew a permit application on or before the expiration date; PENALTY: $7,000; ENFORCEMENT COORDINATOR: Craig Carson, (512) 239-2175; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499, (817) 469-6750.

(2)COMPANY: Avalon Water Supply & Sewer Service Corporation; DOCKET NUMBER: 98-0209-MWD-E; IDENTIFIER: Enforcement Identification Number 8161; LOCATION: Avalon, Ellis County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(2), Permit Number 11022-001, and the Code, §26.121, by failing to renew permit on or before the expiration date and by allowing the discharge of wastewater without authorization by rule, permit, or order; PENALTY: $3,750; ENFORCEMENT COORDINATOR: Merrilee Mears, (512) 239-4490; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499, (817) 469-6750.

(3)COMPANY: City of Del Rio; DOCKET NUMBER: 97-0064-MSW-E; IDENTIFIER: Municipal Solid Waste Landfill Permit Number 207A; LOCATION: Del Rio, Val Verde County, Texas; TYPE OF FACILITY: municipal solid waste landfill; RULE VIOLATED: 30 TAC §330.55(a)(3), by failing to control access by maintaining a barbed wire fence around all active and completed disposal areas and by failing to install and maintain landfill markers; 30 TAC §330.130, by failing to complete installation of methane monitors as prescribed in the approved landfill gas management plan; 30 TAC §330.111, by failing to operate in accordance with the approved site operating plan and final closure plan by storing and managing waste above approved contours; PENALTY: $17,920; ENFORCEMENT COORDINATOR: Carol Piza, (512) 239-6729; REGIONAL OFFICE: 140 Heimer Road, Suite 360, San Antonio, Texas 78232-5042, (210) 490-3096.

(4)COMPANY: The City of Sanger; DOCKET NUMBER: 98-0213-MWD-E; IDENTIFIER: Permit Number 10271-001; LOCATION: Sanger, Denton County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: Permit Number 10271-001 and the Code, §26.121, by allowing an unauthorized discharge of wastewater; PENALTY: $12,500; ENFORCEMENT COORDINATOR: Laurie Eaves, (512) 239-4495; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499, (817) 469-6750.

(5)COMPANY: Dallas County Water Control and Improvement District #6; DOCKET NUMBER: 98-0221-PWS-E; IDENTIFIER: Public Water Supply Number 0570032; LOCATION: Balch Springs, Dallas County, Texas; TYPE OF FACILITY: drinking water system; RULE VIOLATED: 30 TAC §290.46(g) and (s), by failing to disinfect repaired facilities, by failing to submit to an approved Texas Department of Health laboratory water samples for bacteriological analysis, and by failing to immediately issue a boil water notification to areas affected by a 12-inch main break; PENALTY: $400; ENFORCEMENT COORDINATOR: Sandy VanCleave, (512) 239-0667; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499, (817) 469-6750.

(6)COMPANY: Diamond Shamrock Refining Company, L.P.; DOCKET NUMBER: 98-0601-IWD-E; IDENTIFIER: Permit Number 01353; LOCATION: Three Rivers, Live Oak County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: Permit Number 01353 and the Code, §26.121, by discharging wastewater from the facility's tail water control pond without authorization; PENALTY: $6,875; ENFORCEMENT COORDINATOR: Michael Meyer, (512) 239-4492; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (512) 980-3100.

(7)COMPANY: El Paso-Los Angeles Limousine Express; DOCKET NUMBER: 97-1071-PST-E; IDENTIFIER: Petroleum Storage Tank Facility Identification Number 0011846; LOCATION: El Paso, El Paso County, Texas; TYPE OF FACILITY: bus maintenance; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and (2)(A), by failing to provide proper release detection for its underground storage tank (UST) systems and for the pressurized piping associated with its UST systems; 30 TAC §334.51(b)(2)(B) and (C), by failing to provide proper spill containment and overfill prevention equipment for its UST systems; PENALTY: $1,920; ENFORCEMENT COORDINATOR: Rebecca Cervantes, (915) 778-9634; REGIONAL OFFICE: 7500 Viscount Boulevard, Suite 147, El Paso, Texas 79925-5633, (915) 778-9634.

(8)COMPANY: E-Z Serve Corporation; DOCKET NUMBER: 98-0154-PWS-E; IDENTIFIER: Public Water Supply Number 0130063; LOCATION: Skidmore, Bee County, Texas; TYPE OF FACILITY: public drinking system; RULE VIOLATED: 30 TAC §290.106(a)(1), by failing to submit monthly water samples for bacteriological analysis; PENALTY: $3,125; ENFORCEMENT COORDINATOR: Subhash Jain, (512) 239-5867; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (512) 980-3100.

(9)COMPANY: Henry Company; DOCKET NUMBER: 98-0697-AIR-E; IDENTIFIER: Account Number HX-1667-A; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: asphalt based sealant plant; RULE VIOLATED: 30 TAC §116.110(a) and the THSC, §382.085(b) and §382.0518(a), by constructing and operating an asphalt based sealant plant without a permit; PENALTY: $4,000; ENFORCEMENT COORDINATOR: Miriam Hall, (512) 239-1044; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(10)COMPANY: Hill Country Bible Church; DOCKET NUMBER: 98-0353-EAQ-E; IDENTIFIER: Enforcement Identification Number 12375; LOCATION: Austin, Travis County, Texas; TYPE OF FACILITY: church; RULE VIOLATED: 30 TAC §213.4(a), by failing to submit to the TNRCC an Edwards Aquifer protection plan and sewage collection system plan and receive approval prior to initiation of construction; PENALTY: $800; ENFORCEMENT COORDINATOR: Laurie Eaves, (512) 239-4495; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(11)COMPANY: John Rafizadeh dba JR's Auto Repair; DOCKET NUMBER: 98-0568-AIR-E; IDENTIFIER: Account Number DB-4768-T; LOCATION: Garland, Dallas County, Texas; TYPE OF FACILITY: state inspection station; RULE VIOLATED: 30 TAC §114.50(a)(1) and the Act, 382.085(b), by issuing a motor vehicle inspection certificate without conducting all emission tests; PENALTY: $625; ENFORCEMENT COORDINATOR: Carl Schnitz, (512) 239-1892; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499, (817) 469-6750.

(12)COMPANY: Mr. Henk Kenkhuis; DOCKET NUMBER: 98-0269-AGR-E; IDENTIFIER: Permit Number 03163; LOCATION: Dublin, Erath County, Texas; TYPE OF FACILITY: dairy; RULE VIOLATED: 30 TAC §321.31, Permit Number 03163, and the Code, §26.121, by allowing an unauthorized discharge of wastewater from the facility; PENALTY: $720; ENFORCEMENT COORDINATOR: Craig Carson, (512) 239-2175; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499, (817) 469-6750.

(13)COMPANY: Ramez Nour dba Kwik Kar Lube and Tune; DOCKET NUMBER: 98-0120-AIR-E; IDENTIFIER: Account Number DB-4829-B; LOCATION: Irving, Dallas County, Texas; TYPE OF FACILITY: automobile inspection station; RULE VIOLATED: 30 TAC §114.50(e)(1) and the Act, §382.085(b), by issuing passing inspection stickers to vehicles that had not properly passed the emissions test; PENALTY: $1,250; ENFORCEMENT COORDINATOR: Sheila Smith, (512) 239-1670; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499, (817) 469-6750.

(14)COMPANY: Ron and Cheryl McGlothlin; DOCKET NUMBER: 98-0030-EAQ-E; IDENTIFIER: Enforcement Identification Number 12110; LOCATION: San Marcos, Hays County, Texas; TYPE OF FACILITY: commercial building; RULE VIOLATED: 30 TAC §213.4(a), for failing to submit to the TNRCC an Edwards Aquifer protection plan and receive approval prior to the initiation of construction; PENALTY: $800; ENFORCEMENT COORDINATOR: Laurie Eaves, (512) 239-4495; REGIONAL OFFICE: 1921 Cedar Bend, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(15)COMPANY: Mr. Ernesto Hernandez dba Paisano Truck Stop; DOCKET NUMBER: 98-0178-AIR-E; IDENTIFIER: Account Number EE-1054-N; LOCATION: El Paso, El Paso County, Texas; TYPE OF FACILITY: gasoline station; RULE VIOLATED: 30 TAC §114.100(a) and the THSC, §382.085(b), by supplying and/or dispensing gasoline for use as a motor vehicle fuel which failed to meet the minimum oxygen content of 2.7% by weight; PENALTY: $600; ENFORCEMENT COORDINATOR: Lawrence King, (512) 239-1405; REGIONAL OFFICE: 7500 Viscount Boulevard, Suite 147, El Paso, Texas 79925-5633, (915) 778-9634.

(16)COMPANY: Prime Services dba Prime Equipment; DOCKET NUMBER: 98-0526-AIR-E; IDENTIFIER: Account Number EE-1153-K; LOCATION: El Paso, El Paso County, Texas; TYPE OF FACILITY: equipment sales and rental store; RULE VIOLATED: 30 TAC §114.100(a) and the THSC, §382.085(b), by supplying and/or dispensing gasoline for use as a motor vehicle fuel which failed to meet the minimum oxygen content of 2.7% by weight; PENALTY: $600; ENFORCEMENT COORDINATOR: Stacey Young, (512) 239-1899; REGIONAL OFFICE: 7500 Viscount Boulevard, Suite 147, El Paso, Texas 79925-5633, (915) 778-9634.

(17)COMPANY: Michael Dib dba Professional Automotive; DOCKET NUMBER: 97-0815-AIR-E (Revised); IDENTIFIER: Account Number TH-0677-P; LOCATION: Austin, Travis County, Texas; TYPE OF FACILITY: repair and refinishing shop; RULE VIOLATED: 30 TAC §116.110(a) and the Act, §382.085(b) and §382.0518(a), by constructing and operating a repair and refinishing

shop without first obtaining a permit or a permit exemption; PENALTY: $400; ENFORCEMENT COORDINATOR: Tel Croston, (512) 239-5717; REGIONAL OFFICE: 1921 Cedar Bend, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(18)COMPANY: Hsuan Yu dba Ted's Auto; DOCKET NUMBER: 98-0121-AIR-E; IDENTIFIER: Account Number DB-4830-Q; LOCATION: Richardson, Dallas County, Texas; TYPE OF FACILITY: automobile inspection station; RULE VIOLATED: 30 TAC §114.50(e)(1) and the Act, §382.085(b), by issuing passing inspection stickers to vehicles that had not properly passed the emissions test; PENALTY: $1,250; ENFORCEMENT COORDINATOR: Sheila Smith, (512) 239-1670; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499, (817) 469-6750.

(19)COMPANY: Texas A&M University; DOCKET NUMBER: 98-0193-IWD-E; IDENTIFIER: Enforcement Identification Number 12233; LOCATION: College Station, Brazos County, Texas; TYPE OF FACILITY: power plant; RULE VIOLATED: 30 TAC §305.125(2) and the Code, §26.121, by failing to renew a permit application on or before the expiration date and by allowing an unauthorized discharge of wastewater; 30 TAC §334.22(a), by failing to pay annual facility fees for underground storage tanks; 30 TAC §334.128, by failing to pay annual facility fees for aboveground storage tanks; the THSC, §341.041, by failing to pay public health service fees; 30 TAC §335.328(a), by failing to pay annual generation fees assessed of industrial solid waste generators; and 30 TAC §305.504, by failing to pay annual waste treatment fees assessed against each person holding a permit; PENALTY: $3,750; ENFORCEMENT COORDINATOR: Karen Berryman, (512) 239-2172; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(20)COMPANY: Ms. Linda Williams; DOCKET NUMBER: 97-1147-PST-E; IDENTIFIER: Enforcement Identification Number 11883; LOCATION: Paradise, Wise County, Texas; TYPE OF FACILITY: former retail gasoline station; RULE VIOLATED: 30 TAC §334.54(d)(1)(B), by failing to permanently remove from service USTs which have been temporarily out of service longer than 12 months; PENALTY: $0; ENFORCEMENT COORDINATOR: Cameron Lopez, (817) 469-6750; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499, (817) 469-6750.

TRD-9813836

Paul Sarahan

Director, Legal-Litigation Division

Texas Natural Resource Conservation Commission

Filed: September 1, 1998

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Notice of Public Hearing (Chapter 106, Major Source Thresholds)

Notice is hereby given that under the requirements of Texas Health and Safety Code, §382.017 and Texas Government Code, Subchapter B, Chapter 2001, the Texas Natural Resource Conservation Commission (commission) will conduct a public hearing to receive testimony concerning revisions to 30 TAC Chapters 106 and 116.

The commission proposes the repeal of Chapter 106, Subchapter A, and new Chapter 106, Subchapter A, concerning general requirements for exemptions from permitting. The proposed repeals and new sections lower the upper emission limits for facilities to use exemptions from permitting. The subchapter is also revised to improve readability. In addition, §116.620, concerning Installation and Modification of Oil and Gas Facilities, is amended to replace the cross-reference to §106.4 in the new Subchapter A with the actual emission limits designated for each pollutant that is contained in the current rule. This change will maintain the status quo for facilities authorized under the standard permit.

A public hearing on the proposal will be held October 8, 1998, at 2:00 p.m. in Room 2210 of Texas Natural Resource Conservation Commission Building F, located at 12100 Park 35 Circle, Austin. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion 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 answer questions before and after the hearing.

Comments may be submitted to Lisa Martin, Office of Policy and Regulatory Development,MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Comments must be received by 5:00 p.m., October 12, 1998, and should reference Rule Log Number 98020-106-AI. For further information, please contact Dale Beebe-Farrow, New Source Review Permits Division, (512) 239-1310, or Jim Dodds, Air Policy and Regulations Division, (512) 239-0970.

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

TRD-9813815

Margaret Hoffman

Director, Environmental Law Division

Texas Natural Resource Conservation Commission

Filed: August 31, 1998

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Public Notice

The executive director of the Texas Natural Resource Conservation Commission (TNRCC) by this notice is issuing a public notice of deletion (delisting) of a facility from the state registry (state Superfund registry) of sites which may constitute an imminent and substantial endangerment to public health and safety or the environment due to a release or threatened release of hazardous substances into the environment.

The site which has been deleted is the Mu¤oz Borrow Pits state Superfund site which was originally placed on the state Superfund registry on January 16, 1987 (12 TexReg 205). The Mu¤oz Borrow Pits state Superfund site, including all land, structures, appurtenances, and other improvements, is 0.1 miles south of U. S. Highway 83 on the east side of State Highway 1016, in the City of Mission, Hidalgo County, Texas. In addition, the site includes any areas outside the site property boundary where hazardous substance(s) came to be located as a result, either directly or indirectly, of releases of hazardous substance(s) from the site property. The site is on the southern portion of an approximately 7.86 acre tract of land.

With the removal of soil contaminated with pesticides and arsenic above cleanup levels, the site has been remediated to the degree necessary to reduce the risk to public health, safety, and the environment to acceptable levels. The property is considered appropriate for residential use according to the risk reduction standards applicable at the time of this filing.

This notice is issued to finalize the deletion process which began on July 3, 1998, when the executive director of the TNRCC issued a

public notice in the *Texas Register* (23 TexReg 7137) of TNRCC's intent to delete the Mu¤oz Borrow Pits site from the state Superfund registry, following the determination made pursuant to 30 TAC §335.344(c), that the site does not present an imminent and substantial endangerment to public health and safety or the environment. The notice (23 TexReg 7137) further indicated that the TNRCC shall hold a public meeting, as required by 30 TAC §335.344(b), if a written request is filed with the executive director of the TNRCC within 30 days, challenging the determination by the executive director made pursuant to 30 TAC §335.344(c). Equivalent publication of the notice (23 TexReg 7137) was also published in the July 3, 1998 edition of the ***Progress Times*** .

The TNRCC did not receive a request for a public meeting from any interested persons during the request period (within 30 days of publication of notice); therefore, the Mu¤oz Borrow Pits site is hereby deleted from the Texas state Superfund registry.

All inquiries regarding the deletion of this site should be directed to Janie Montemayor, TNRCC Community Relations, 1-800-633-9363 (within Texas only) or 512-239-3844.

TRD-9813946
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: September 2, 1998

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North Texas Local Workforce Development Board

Request for Proposal

North Texas Local Workforce Development Board is requesting proposals for delivery of services in accordance with Section 123 of the Job Training Partnership Act (JTPA). Allowable training activities include: school-to-work transition, literacy and lifelong learning, and model programs designed to train, place, and retain women in non-traditional employment.

Training must be provided by Texas Education Agency/Texas Higher Education Coordinating Board approved institutions that are either 1) accredited independent school districts, community colleges or post-secondary institutions, institutions of higher education, 2) private businesses, trade, technical or vocational schools certified by TEA, 3) the Texas State Technical College, or 4) education service centers.

Participants to be served reside in 11 counties of North Texas: Archer, Baylor, Clay, Cottle, Foard, Hardeman, Jack, Montague, Wichita, Wilbarger, and Young.

RFP packets will be available Tuesday, September 8, 1998. Contact Barbara A. Young, Administrative Technician, North Texas Local Workhorse Development Board, 4309 Jacksboro Highway, Suite 106, Wichita Falls, TX 76302. Call (940) 322-5281 (TDD# 1-800-RELAYTX or 1-800-735-2989) for more information.

Deadline for proposal submission is 4:00 p.m., October 9, 1998. A Bidder's Conference to provide assistance in completing proposals will be held September 16, 1998, 10 a.m., Nortex Regional planning Commission, small conference room.

JTPA services are offered in accordance with Equal Employment Opportunity policies and auxiliary aids and services are available upon request to individuals with disabilities. Project operation dependent upon availability of funds from Texas Workforce Commission.

TRD-9813652
Mona Williams
Executive Director
North Texas Local Workforce Development Board
Filed: August 27, 1998

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Texas Department of Protective and Regulatory Services

Public Notice-Adult Protective Services Policy and Procedures Regarding Clients with Limited Proficiency and Impaired Sensory or Speaking Skills

The Adult Protective Services (APS) program of the Texas Department of Protective and Regulatory Services (PRS) has two major components, *In-home, or community- based investigations and services, known as "APS,"* and *Facility Investigations, or investigations in Texas Department of Mental Health Mental Retardation (MHMR) facilities and community MHMR centers.*

To receive protective services, an individual must be elderly or disabled and be reported to be in a state of abuse, neglect, or exploitation.

Use of Interpreter Services: Federal law requires state programs receiving federal funds to provide appropriate interpreter services to limited English proficient and sensory impaired clients. The APS handbooks for facility investigations (as issued December 15, 1997) and for in-home investigations and services (as revised effective July 1, 1998) contain specific policy and procedures related to serving persons with limited English proficiency (LEP) and impaired sensory or speaking skills. These are as follows.

When conducting investigations of suspected instances of abuse or neglect, the investigator or case worker *shall ensure that the investigation not be subject to delays or interference with any actions necessary to protect a person served from harm or risk of harm, and is required to clearly identify any person served or other principle in a case in need of interpreter services and document all reasonable efforts to acquire the service in the client's case record.*

Who May Provide Interpreter Services: When a principle in a case has limited proficiency in English, APS staff make reasonable efforts to provide information and communicate service availability to the client and alleged perpetrator(s) using: *bilingual PRS workers, other qualified translators, such as a speech pathologist with no conflicts of interest, sign language interpreters, pictures or objects and bilingual brochures, communication devices, and forms or other materials printed in the principle's preferred language.*

Ideally, the interpreter will be a professional trained as an interpreter or an APS investigator, caseworker, or supervisor fluent in the client's preferred language.

If the only option is a family member, the investigator or caseworker should ensure that this person is not involved in the case.

In investigations regarding persons with LEP served in MHMR settings, facility staff are not used as interpreters unless they are unrelated to the case and are qualified to provide the interpreter service.

Service Provision: APS efforts are intended to insure that principles with LEP or with hearing, visual, or speech impairments understand all significant APS actions at each stage of the case, including

investigation, service planning, service delivery, judicial proceedings, alternative placement, and emergency client services.

Cost of the Services: The investigator obtains interpreter services at no cost to the person served. Regional management staff will ensure that their staff develop local resources to provide interpreter services upon request from volunteers. If the service is not available through volunteers, the cost shall be borne by the department.

Confidentiality: When a non-APS interpreter or translator is used, the confidentiality of case information shall be maintained.

Contact Person: For additional information regarding LEP services, please contact Steve Casills, Texas Department of Protective and Regulatory Services, Adult Protective Services Program, mail code E-561, P.O. Box 149030, Austin, Texas 78714- 9030, phone number 512-438-5506, or email to casills@auste654b.aust.tdprs.state.tx.us.

TRD-9813880
C. Ed Davis
Deputy Commissioner for Legal Services
Texas Department of Protective and Regulatory Services
Filed: September 1, 1998

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Public Utility Commission of Texas

Applications to Introduce New or Modified Rates or Terms Pursuant to P.U.C. Substantive Rule §23.25

Notice is given to the public of an application filed with the Public Utility Commission of Texas on August 27, 1998 to introduce new or modified rates or terms pursuant to P.U.C. Substantive Rule §23.25, Procedures Applicable to Chapter 58-Electing Incumbent Local Exchange Companies (ILECs).

Tariff Title and Number: Southwestern Bell Company Notification to Introduce a New Billing Option Called Smart Payment Plan, Pursuant to Substantive Rule §23.25. Tariff Control Number 19802.

The Application: Southwestern Bell Company (SWBT) proposes to introduce a new billing option called Smart Payment Plan. Smart Payment Plan allows business customers the option to pre-pay for either a three- or five-year period their monthly recurring phone charges for flat rate business lines and analog trunks. The full payment for the term of the agreement is due up front and adjusted by SWBT's cost of money. This adjustment reflects the standard financial assumption of the net present value of a dollar. This payment option is revenue neutral. There are no price changes or changes in costs for services offered under Smart Payment Plan. This plan provides a versatile payment option to meet the needs of business customers. It provides these customers rate stability, payment consolidation, time value of money benefits and the opportunity for tax advantages. The Smart Payment Plan allows customers the ability to add, move and reduce services within limits. Customers are also able to extend the agreement for one additional 12 month period. The plan provides for a "Discontinuance Settlement" if the customer terminates the agreement early. The amount of the settlement is less than the full value of the services remaining at the time of termination. The customer will not be billed additional charges for early termination.

Persons who wish to intervene in this proceeding should contact the Public Utility Commission of Texas, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Customer Protection at (512) 936-7120 by September 17, 1998. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-9813902
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: September 1, 1998

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Notice is given to the public of an application filed with the Public Utility Commission of Texas on August 26, 1998 to introduce new or modified rates or terms pursuant to P.U.C. Substantive Rule §23.25, Procedures Applicable to Chapter 58-Electing Incumbent Local Exchange Companies (ILECs).

Tariff Title and Number: Application of Southwestern Bell Telephone Company (SWBT) to Institute Promotional Rates for Residence Customers in Texas, Who Subscribe to Speed Calling 8 and Speed Calling 30 Services Between September 15, 1998 and October 29, 1998, Pursuant to Substantive Rule §23.25. Tariff Control Number 19794.

The Application: SWBT proposes to institute promotional rates for residence customers in Texas, who subscribe to Speed Calling 8 service and for business customers in Texas, who subscribe to Speed Calling 30 service between September 15, 1998 and October 29, 1998. During the promotional period, new residence subscribers of Speed Calling 8 and new business subscribers of Speed Calling 30 will receive a waiver of installation charges and a credit equal to two months of the monthly recurring rates. Eligible customers are those who do not already subscribe to Speed Calling 8 (residence) or Speed Calling 30 (business). There is a 60 day retention requirement associated with this offer.

Persons who wish to intervene in this proceeding should contact the Public Utility Commission of Texas, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Customer Protection at (512) 936-7120 by September 17, 1998. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-9813903
Rhonda Dempsey
Rules Coordinator
Public Utility Commission
Filed: September 1, 1998

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Notice is given to the public of an application filed with the Public Utility Commission of Texas on August 28, 1998 to introduce new or modified rates or terms pursuant to P.U.C. Substantive Rule §23.25, Procedures Applicable to Chapter 58-Electing Incumbent Local Exchange Companies (ILECs).

Tariff Title and Number: Notification of Southwestern Bell Telephone Company (SWBT) to Introduce New Optional Features and Institute Promotional Rates for SmartTrunk Service, Pursuant to Substantive Rule §23.25. Tariff Control Number 19807.

The Application: SWBT proposes to introduce three new optional features for SmartTrunk Services called Enhanced Alternate Route, Inform 911 and Station Record Detail. SWBT will also institute promotional rates for these new services between September 28, 1998 through December 19, 1998.

SWBT will offer Enhanced Alternate Route, Inform 911 and Station Record Detail to all current and potential SmartTrunk customers. Enhanced Alternate Route allows the customer the flexibility to establish efficient alternate routes for directing calls during peak

periods, network/CPE failures or disaster periods. Inform 911 will allow the transmission of the calling party number of the calling station, rather than the billing number, to be sent to the E911 database. Station Record Detail will provide the customer with the station number of all originating calls on the customer's bill so that call information can be tracked at a station level. During the promotional period, installation charges will be waived for Enhanced Alternate Route, Inform 911 and Station Record Detail optional features.

Persons who wish to intervene in this proceeding should contact the Public Utility Commission of Texas, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Customer Protection at (512) 936-7120 by September 17, 1998. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-9813905
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: September 1, 1998

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Notice of Application for Amendment to Service Provider Certificate of Operating Authority

On August 27, 1998, TeleNetwork, Inc., filed an application with the Public Utility Commission of Texas (PUC) to amend its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60095. Applicant intends to remove the resale only restriction and expand its geographic area to include the entire state of Texas.

The Application: Application of TeleNetwork, Inc., for an Amendment to its Service Provider Certificate of Operating Authority, Docket Number 19801.

Persons with questions about this docket, or who wish to intervene or otherwise participate in these proceedings should make appropriate filings or comments to the commission at the Public Utility Commission of Texas, at P.O. Box 13326, Austin, Texas 78711-3326 no later than September 16, 1998. You may contact the PUC Office of Customer Protection at (512) 936-7120. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 19801.

TRD-9813890
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: September 1, 1998

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Notices of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on August 24, 1998, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.154-54.159 of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Docket Title and Number: Application of United Technological Systems, Inc., d/b/a Uni-Tel for a Service Provider Certificate of Operating Authority, Docket Number 19787 before the Public Utility Commission of Texas.

Applicant intends to resell the existing services of the incumbent local exchange carriers where available.

Applicant's requested SPCOA geographic area includes the entire state of Texas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, at P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Customer Protection at (512) 936-7120 no later than September 9, 1998. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-9813886
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: September 1, 1998

♦ ♦ ♦

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on August 25, 1998, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.154-54.159 of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Docket Title and Number: Application of ClearSource, Inc., for a Service Provider Certificate of Operating Authority, Docket Number 19790 before the Public Utility Commission of Texas.

Applicant intends to provide local exchange, long distance, access service, high speed data, video services, and 9-1-1 emergency services.

Applicant's requested SPCOA geographic area includes the entire state of Texas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, at P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Customer Protection at (512) 936-7120 no later than September 16, 1998. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-9813887
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: September 1, 1998

♦ ♦ ♦

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on August 26, 1998, for a service provider certificate of operating authority (SPCOA), pursuant to § §54.154 - 54.159 of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Docket Title and Number: Application of VarTec Telecom, Inc., for a Service Provider Certificate of Operating Authority, Docket Number 19745 before the Public Utility Commission of Texas.

Applicant intends to provide local exchange services to customers in Texas, including, but not limited to, dial tone, Caller ID, three-way calling, call waiting, call blocking, call screening, telephone line number calling cards, call return, busy line verification and emergency line interruption.

Applicant's requested SPCOA geographic area includes the entire state of Texas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, at P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Customer Protection at (512) 936-7120 no later than September 16, 1998. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-9813888
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: September 1, 1998

♦ ♦ ♦

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on August 28, 1998, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.154-54.159 of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Docket Title and Number: Application of United States Telecommunications, Inc., d/b/a TelCom Plus for a Service Provider Certificate of Operating Authority, Docket Number 19805 before the Public Utility Commission of Texas.

Applicant intends to provide resold flat rate, basic local exchange services, including extended area service, toll restriction, call control options, tone dialing, custom calling services, and any other services available on a resold basis from the underlying incumbent local exchange carriers.

Applicant's requested SPCOA geographic area includes the entire state of Texas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, at P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Customer Protection at (512) 936-7120 no later than September 16, 1998. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-9813904
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: September 1, 1998

♦ ♦ ♦

Notices of Application to Amend Certificate of Convenience and Necessity

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on August 21, 1998, to amend a certificate of convenience and necessity pursuant to §§ 14.001, 32.001, 36.001, 37.051, and 37.054, 37.056, 37.057, 37.058 of the Public Utility Regulatory Act, TEX. UTIL. CODE ANN.(Vernon 1998) (PURA). A summary of the application follows.

Docket Title and Number: Application of Southwestern Public Service Company (SPS) to Amend a Certificate of Convenience and Necessity to Construct Proposed Transmission Lines within Deaf Smith County, Docket Number 19780 before the Public Utility Commission of Texas.

The Application: In Docket Number 19780, SPS requests approval to construct the proposed project. The proposed project consists of four components: 1) construct 1.1 miles of 115/69-kV double-circuit transmission line; 2) rebuild 1.2 miles of existing 115/69-kV double- circuit transmission line to 115/115/69-kV triple-circuit transmission line; 3) reconfigure 0.4 miles of 115-kV double-circuit transmission line to single-circuit operation; and 4) construct a 115/69- kV interchange one mile east of the City of Hereford, Texas. The proposed transmission lines and interchange is being constructed in order for SPS to continue providing reliable electric power to the area around the city of Hereford, Texas. The proposed transmission lines and interchange will provide additional voltage support and satisfy load growth in this area of SPS' service territory.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, at P. O. Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Customer Protection at (512) 936-7120 within 15 days of this notice. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-9813885
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: September 1, 1998

♦ ♦ ♦

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on August 25, 1998, to amend a certificate of convenience and necessity pursuant to §§ 14.001, 32.001, 36.001, 37.051, and 37.054, 37.056, 37.057, 37.058 of the Public Utility Regulatory Act, TEX. UTIL. CODE ANN.(Vernon 1998) (PURA). A summary of the application follows.

Docket Title and Number: Application of Austin Energy/City of Austin (Austin Energy) to Amend Certificated Service Area Boundaries within Travis County, Docket Number 19791 before the Public Utility Commission of Texas.

The Application: In Docket Number 19791, Austin Energy requests a service area boundary change with Pedernales Electric Cooperative, Inc. (PEC) in order to provide electric service to City of Austin's Four Point Firestation/EMS facility in Travis County. Austin Energy has distribution facilities 100 feet from the firestation, whereas PEC's nearest facilities are approximately 0.5 miles from the firestation in an area considered habitat for the Golden Cheeked Warbler.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, at P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Customer Protection at (512) 936-7120 within 15 days of this notice. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-9813889
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: September 1, 1998

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Notice of Intent to File Pursuant to P.U.C. Substantive Rule §23.27

Notice is given to the public of the intent to file with the Public Utility Commission of Texas of an application pursuant to P.U.C. Substantive Rule §23.27 for a customer-specific contract to provide ATM/UNI Service to the Lewisville Independent School District (ISD) in Lewisville, Texas.

Tariff Title and Number: GTE Southwest, Inc.'s (GTESW) Notice of Intent to File a Customer-Specific Contract for Lewisville ISD Pursuant to P.U.C. Substantive Rule §23.27. Tariff Control Number 19808.

The Application: GTESW is requesting approval to provide Asynchronous Transfer Mode/User-to-network Interface (ATM/UNI) Service to the Lewisville ISD located in Lewisville, Texas. GTESW intends to file this application around September 8, 1998. The ATM/UNI service which GTESW proposes to offer the Lewisville ISD is a high-speed private line service. ATM service offers a customer the unique ability to combine multiple service types - voice, video and data onto a single physical access circuit.

UNI is used as an interface between the ATM customer's premise equipment and the GTESW ATM network (central office) switch. The UNI configuration allows a customer to gain access to the ATM cloud at rates of 1.544 Mbps, 45 Mbps, 155 Mbps and 622 Mbps. Each customer location requires only one access line to the ATM cloud since ATM allows multiple logical channels to be defined on one physical connection. The customer, Lewisville ISD, will be provided with ATM/UNI services to twelve customer locations. GTESW proposes to offer this service in the Lewisville, Texas exchange.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Customer Protection at (512) 936-7120. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-9813906
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: September 1, 1998

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Public Notice of Amendment to Interconnection Agreement

On August 27, 1998, Southwestern Bell Telephone Company and ETS Telephone Company, Inc. (formerly Kingsgate Telephone, Inc.), collectively referred to as applicants, filed a joint application for approval of an amendment to an existing interconnection agreement under § 252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated §§ 11.001-63.063 (Vernon 1998) (PURA). The joint application has been designated Docket Number 19803. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the amendment to the interconnection agreement. Any interested person may file written comments on the joint application by filing 13 copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 19803. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by September 28, 1998, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this project or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P. O. Box 13326, Austin, Texas 78711-3326. You may call the Public Utility Commission Office of Customer Protection at (512) 936-7120. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 19803.

TRD-9813901
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: September 1, 1998

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Public Notice of Interconnection Agreement

On August 21, 1998, United Telephone Company of Texas, Inc. d/b/a Sprint, Central Telephone Company of Texas d/b/a Sprint (collectively, Sprint) and Transtar Communications, LLC, collectively referred to as applicants, filed a joint application for approval of an interconnection agreement under the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated §§ 11.001-63.063 (Vernon 1998) (PURA). The joint application has been designated Docket Number 19781. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The FTA authorizes the commission to review and approve any interconnection agreement adopted by negotiation of the parties. Pursuant to FTA §252(e)(2) the commission may reject any agreement if it finds that the agreement discriminates against a telecommunications carrier not a party to the agreement, or that implementation of the agreement, or any portion thereof, is not consistent with the public interest, convenience, and necessity. Additionally, under FTA §252(e)(3), the commission may establish or enforce other requirements of state law in its review of the agreement, including requiring compliance with intrastate telecommunications service quality stan-

dards or requirements. The commission must act to approve the agreement within 90 days after it is submitted by the parties. The parties have requested expedited review of this application.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing 13 copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 19781. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by September 28, 1998, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this docket or who wish to comment on the application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P. O. Box 13326, Austin, Texas 78711-3326. You may call the Public Utility Commission Office of Customer Protection at (512) 936-7120. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 19781.

TRD-9813891
Rhonda Dempsey
Rules Coordinator
Public Utility Commission
Filed: September 1, 1998

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Southwest Texas State University

Request for Proposals

Southwest Texas State University is accepting proposals on October 2, 1998 for the long term lease of its land at the intersection of IH 35 and McCarty Lane in San Marcos, Texas. The property consists of 246.5 acres and is just north of the San Marcos Factory Shops and Outlet Mall.

Please contact Ms. Kathy Voges, Director, Auxiliary Services, Southwest Texas State University, 601 University Drive, San Marcos, Texas 78666 for additional information or contact her at 512-245-2585.

TRD-9813753
William A. Nance
Vice President for Finance & Support Services
Southwest Texas State University
Filed: August 31, 1998

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Texas Turnpike Authority Division of the Texas Department of Transportation

Notice of Intent

Pursuant to Title 43, Texas Administrative Code, §§52.1 - 52.8, concerning Environmental Review and Public Involvement, the Texas Turnpike Authority Division of the Texas Department of Transportation (TxDOT) is issuing this notice to advise the public that the scope (project limits) of the environmental impact statement (EIS) for the proposed State Highway 45 project in Travis and Williamson Counties, Texas, will be revised. This notice also serves to inform the public that the proposed project has been identified as a toll road candidate. Accordingly, TxDOT has assigned project development responsibilities to its Turnpike Authority Division (TTA). This notice amends the NOI for proposed State Highway 45 that was published in the October 17, 1997, issue of the *Texas Register* (22 TexReg 10470).

The TTA, in cooperation with the Federal Highway Administration (FHWA), will prepare a draft environmental impact statement (EIS) on a proposal to construct State Highway 45 from Farm-to-Market Road 685 north of Pflugerville, Texas, westerly to Farm-to-Market Road 2769 (Anderson Mill Road). The proposed project will include, west of Anderson Mill Road, a transition back to existing Ranch-to-Market Road 620. The total length of the proposed facility, including the transitional area west of Anderson Mill Road, is 26.1 kilometers (16.2 miles).

As initially planned SH 45 was to extend from FM 685 north of Pflugerville, Texas, westerly to a termini at U.S. Highway 183 (a distance of approximately 22.5 kilometers or 14 miles) with a 1.1 kilometer (0.7 mile) transition to existing Ranch-to-Market Road 620.

Based on preliminary traffic and engineering analyses, it was determined that the western project terminus and 1.1 kilometer (0.7 mile) transitional area, as originally proposed, would not provide for efficient dissipation of traffic demand and would, in fact, contribute to congestion on US 183, Anderson Mill Road and RM 620. To provide for efficient traffic movement in the western portion of the project area, it is necessary to extend the western project limit to Anderson Mill Road (Ranch-to-Market Road 2769). West of Anderson Mill Road the proposed facility will be transitioned back to existing RM 620. The environmental impact statement for proposed State Highway 45 will address the entire 26.1 kilometer (16.2 mile) length of the revised limits of State Highway 45 which includes the transitional area west of Anderson Mill Road.

As currently envisioned, between Anderson Mill Road in southwest Williamson County and proposed State Highway 130 in northeast Travis County, the proposed facility will be initially constructed and operated as a controlled access toll road. Frontage roads will be provided in some areas, but will not be continuous throughout the length of the proposed project. Between Anderson Mill Road and

proposed State Highway 130 the ultimate facility design is anticipated to be a six-lane controlled access freeway with frontage roads.

From State Highway 130 to FM 685, the eastern project termini, the proposed facility will be a non-toll 4-lane divided highway.

In conjunction with preparation of the EIS for State Highway 45 and selection of a preferred alternative, the TTA will conduct a toll feasibility study to evaluate the viability of developing the selected alternative as a toll road (except in the area east of proposed State Highway 130) and financing it, in whole or in part, through the issuance of revenue bonds. The toll road designation will not influence the selection of a preferred alternative. Proposed alternatives, including alternative alignments, will be evaluated for how well they meet the established purpose and need for the proposed project. Any impacts owing to the toll road designation will be discussed in the environmental impact statement.

On October 7, 1998, the TTA will conduct a public meeting to discuss the proposed State Highway 45 project. The purpose of the public meeting will be to receive comments on the proposed project. During the public meeting, particular emphasis will be placed upon the portion of the proposed facility to be located within the expanded project limits. The meeting will be held at Noel Grisham Middle School, 10805 School House Lane, Austin, Texas 78750. From 6:00 to 7:00 p.m., displays showing the preliminary alternatives corridors will be available for review. During this time, TTA staff will be available to answer questions. At 7:00 p.m. there will be a formal project presentation followed by a public comment period. All interested citizens are invited to attend this meeting.

A public hearing will be held after publication of the Draft EIS. Public notice will be given of the time and place of the hearing. The Draft EIS will be available for public and agency review and comment prior to the public hearing.

To ensure that the full range of issues related to this proposed action are addressed, and all significant issues identified, and to continue the scoping process for the project, comments and suggestions are invited from all interested parties.

Agency Contact: Comments or questions concerning the proposed action and the EIS should be directed to Stacey Benningfield, Environmental Manager, Texas Turnpike Authority Division, Texas Department of Transportation, 125 E. 11th Street, Austin, Texas 78701, (512) 936-0983.

TRD-9813941

James W. Griffin, P.E.

Interim Director

Texas Turnpike Authority Division of the Texas Department of Transportation

Filed: September 2, 1998

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Texas Commission on Volunteerism and Community Services

Notice of Request for Proposals

The Texas Commission on Volunteerism and Community Service issues a Request for Proposals (RFP) for the purpose of subgranting funds to community based organizations (CBO's) to sponsor AmeriCorps Promise Fellows who will help implement programs in support of the five goals for children and youth set at the Presidents' Summit for America's Future. These grants, in the aggregate, will support 20 Fellows. These Fellows will spend one year serving with CBO's that are committed to helping to meet one or more of the five goals of the Presidents' Summit. Each fellow will receive $10,000 of their annual $13,000 living allowance from the Texas Commission on Volunteerism and Community Service. Host agencies will be required to make a $5,000 match to cover additional expenses. Each Fellow who successfully completes a term of service will receive the $4,725 AmeriCorps Education Award funded through the Corporation for National Service.

Last year in Philadelphia, President Clinton, former Presidents Bush, Carter, and Ford, Mrs. Nancy Reagan, and General Colin Powell, with the endorsement of many governors, mayors, and leaders of the independent sector, declared: "We have a special obligation to America's children to see that all young Americans have:

1. Caring adults in their lives, as parents, mentors, tutors, coaches;

2. Safe places with structured activities in which to learn and grow;

3. A healthy start and a healthy future;

4. An effective education that equips them with marketable skills; and

5. An opportunity to give back to their communities through their own service.

These five goals are now the five fundamental resources sought by America's Promise - The Alliance for Youth, the organization following up on the goals of the Presidents' Summit

This new Fellowship program will provide local communities with additional and unique support to help carry out their plans to provide America's children with these five fundamental resources

Eligible Proposers: Texas Commission on Volunteerism and Community Service will consider proposals from community-based organizations and public or private non-profit entities.

Contact: Interested parties should fax a one page request for an RFP to (512) 463-1861, to be received no later than 12:00 noon CST, September 25, 1998. The request should include organization name, contact person, address, and phone number. Contact Texas Commission on Volunteerism and Community Service for more information (512) 463-1861. The RFP will be available on September 11, 1998 or as soon thereafter as possible.

Closing Date: Proposals must be received by Texas Commission on Volunteerism and Community Service no later than 5:00 p.m. CST on Thursday, October 15, 1998. Hand deliveries and Overnight Mail should be sent to Texas Commission on Volunteerism and Community Service, AmeriCorps Promise Fellows, 1700 North Congress, Room 310, Austin, Texas 78701. Mailed proposals should be sent to P.O. Box 13385, Austin, TX 78711-3385. Proposals received after 5:00 p.m. CST on Thursday, October 15, 1998 will not be considered.

Award Procedures: Proposals will be subject to evaluation based on the requirements as set forth in the RFP. Texas Commission on Volunteerism and Community Service will make the final decision as to which proposal or proposals best satisfy the RFP's criteria.

Texas Commission on Volunteerism and Community Service reserves the right to accept or reject any or all proposals submitted. Texas Commission on Volunteerism and Community Service is under no legal obligation to execute a contract on the basis of this notice or the distribution of any RFP. In addition, Texas Commission on Volunteerism and Community Service reserves the right to vary the provisions set forth in the RFP any time prior to the execution of a contract when such variance is deemed to be in the best interest of Texas Commission on Volunteerism and Community Service. Neither

this notice nor the RFP commits Texas Commission on Volunteerism and Community Service to pay for any costs incurred prior to the execution of a contract.

The anticipated schedule of events is as follows: issuance of RFP - September 11, 1998; proposals due - October 15, 1998 at 5:00 p.m. CST; contract execution - November 1, 1998, or 5 days within receipt of Texas Commission on Volunteerism and Community Service AmeriCorps Promise Fellows Award from the Corporation for National Service. Grant awards are contingent upon receipt of federal funding.

TRD-9813840

J. Randel (Jerry) Hill

General Counsel-Texas Workforce Commission

Texas Commission on Volunteerism and Community Service

Filed: September 1, 1998

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Texas Water Development Board

Applications Received

Pursuant to the Texas Water Code, Section 6.195, the Texas Water Development Board provides notice of the following applications received by the Board:

Greater Texoma Utility Authority (City of Paradise), 5100 Airport Drive, Denison, Texas, 75020, received July 22, 1998, application for financial assistance in the amount of $325,000 from the Drinking Water State Revolving Fund.

Edwards Aquifer Authority, 1615 North St. Mary's Street, San Antonio, Texas, 78212 received July 31, 1998, application for financial assistance in the amount of $3,000,000 from the Agricultural Water Conservation Loan Program.

St. Paul Water Supply Corporation, Rt. 1, Box 207B, Sinton, Texas, 78387, received May 4, 1998, application for grant assistance in the amount of $1,435,323 from the Economically Distressed Areas Program.

City of El Paso, Texas - Public Service Board (Canutillo Project), 1154 Hawkins, El Paso, Texas, 79925, received July 1, 1998, application for grant/loan assistance in the amount of $11,062,750 from the Economically Distressed Areas Program.

Additional information concerning this matter may be obtained from Craig D. Pedersen, Executive Administrator, P.O. Box 13231, Austin, Texas, 78711.

TRD-9813948

Gail L. Allan

Director of Project-Related Legal Services

Texas Water Development Board

Filed: September 2, 1998

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and additonal entry offices
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