TEXAS REGISTER

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Artist: *Lucas Salley*

Eisenhower High School

Aldine ISD

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ATTORNEY GENERAL

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OFFICE OF THE ATTORNEY GENERAL

Under provisions set out in the Texas Constitution, the Texas Government Code. Title 4, §402.042, and numerous statutes, the attorney general is authorized to write advisory opinions for state and local officials. These advisory opinions are requested by agencies or officials when they are confronted with unique or unusually difficult legal questions. The attorney general also determines, under authority of the Texas Open Records Act, whether information requested for release from governmental agencies may be held from public disclosure. Requests for opinions, opinions, and open records decisions are summarized for publication in the ***Texas Register***. The attorney general responds to many requests for opinions and open records decisions with letter opinions. A letter opinion has the same force and effect as a formal Attorney General Opinion, and represents the opinion of the attorney general unless and until it is modified or overruled by a subsequent letter opinion, a formal Attorney General Opinion, or a decision of a court of record. 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# 98–078 (RQ-1141). Request from The Honorable Keith Oakley, Chair, Committee on Public Safety, Texas House of Representatives, P.O. Box 2910, Austin, Texas, 78768-2910, concerning whether the Texas Department of Licensing and Regulation must defer enforcing general reach-range requirements against gasoline pump credit-card readers until the federal government has adopted reach-range requirements specifically applicable to the credit-card readers.

Summary. The Texas Department of Licensing and Regulation has the discretion to defer enforcement of general reach-range requirements against gasoline pump credit- card readers until the federal government has adopted reach-range requirements specifically applicable to the credit-card readers.

LO# 98–079 (RQ-1013). Request from The Honorable Ron Lewis, Chair, Committee on County Affairs, Texas House of Representatives, P.O. Box 2910, Austin, Texas, 78768-2910, concerning whether municipal utility district may contract with county for provision of additional security patrols in district.

Summary. A municipal utility district may contract, pursuant to the Interlocal Cooperation Act, Government Code chapter 791, with a county for the provision of law enforcement services in the district by county deputy constables or sheriffs.

LO# 98–080 (RQ-1135). Request from Mr. Craig D. Pedersen, Executive Administrator, Texas Water Development Board, P.O. Box 13231, Austin, Texas, 78711-3231, concerning regional water planning groups established by section 16.053, Water Code.

Summary. Members of regional water planning groups as constituted by section 16.053 of the Texas Water Code are exempt from personal liability for acts taken in their official capacity. Absent specific statutory authority, such entities may not enter into intergovernmental contracts. The nature of such entities is a matter for the determination of the legislature.

LO# 98–081 (RQ-1142). Request from The Honorable Clyde Alexander, Chair, Committee on Transportation, Texas House of Representatives, P.O. Box 2910, Austin, Texas, 78768-2910, concerning taxing authority of the Henderson County Rural Fire Prevention District No. 2.

Summary. A rural fire prevention district created pursuant to article III, section 48-d of the Texas Constitution, may not include territory in a municipality's limits or extraterritorial jurisdiction unless a majority of the voters residing in the combined territory consisting of the municipality and its ETJ who vote at the election vote in favor of creating the district and levying a tax.

LO# 98–082 (RQ-1051). Request from The Honorable Robert Junell, Chair, Appropriations Committee, Texas House of Representatives, P.O. Box 2910, Austin, Texas, 78768-2910, concerning the meaning of the phrase "fair market value of the land" in Local Government Code section 272.001(h), and related question.

Summary. Under Local Government Code section 272.001(h), the fair market value of a municipality's interest in land is the amount that a willing buyer, who desires but is not obligated to buy, would pay a willing seller, who desires but is not obligated to sell. Unless evidence to the contrary is produced, the leasehold estate merges into the fee simple estate when the lessee purchases the land he or she currently leases. A lessee who purchases the whole of the city's interest in a lakeside lot under section 272.001(h) must pay for both the city's right to future rent payments and the city's reversionary interest. A municipality may not instruct an appraiser as to whether to value the land as encumbered or unencumbered.

LO# 98–083 (RQ-1080). Request from The Honorable Debra Danburg, Chair, Committee on Elections, Texas House of Representatives, P.O. Box 2910, Austin, Texas, 78768-2910, concerning conflict among three amendments by the Seventy-Fifth Legislature to section 33.52 of the Tax Code.

Summary. Section 33.52 of the Tax Code, relating to judgment foreclosing a tax lien on real property, was amended by three different bills during the Seventy- fifth Legislative Session. The three bills, House Bills 2587, 2262, and 3306, deal with collecting from the proceeds of the foreclosure sale the current taxes and other taxes on the real property that are not yet delinquent at the date of the judgment. The three bills differ as to their mandatory or permissive effect and as to which nondelinquent taxes will be collected from the proceeds of the foreclosure sale. Because the bills make different substantive changes to the same Tax Code provision, they cannot be reconciled. House Bill 2262, which requires the judgment of foreclosure to order that the taxing unit recover from the proceeds of the foreclosure sale the tax for the current tax year and each subsequent tax year until the property is sold, is the latest enacted of the three bills, and with respect to Tax Code section 33.52, it will prevail over the other two.

LO# 98–084 (RQ-1153). Request from The Honorable Kim Brimer, Chair, Committee on Business & Industry, Texas House of Representatives, P.O. Box 2910, Austin, Texas, 78768-2910, concerning whether dishonored check is "debt" for purposes of Texas Debt Collection Practices Act and federal Fair Debt Collection Practices Act.

Summary. A dishonored check is a "debt" for purposes of the Texas Debt Collection Practices Act and the federal Fair Debt Collection Practices Act.

LO# 98–085 (RQ-1039). Request from The Honorable James M. Kuboviak, Brazos County Attorney, 300 East 26th Street, Suite #325, Bryan, Texas, 77803, concerning whether the county tax assessor-collector may approve an interlocal contract under Tax Code section 6.24(b) to collect dealers' motor vehicle inventory tax prepayments the collector is authorized to collect under Tax Code section 23.122 and related question.

Summary. A county tax assessor-collector may approve an interlocal contract with another taxing unit in the county or the appraisal district under Tax Code section 6.24(b) to collect the dealers' motor vehicle inventory tax prepayments the collector is authorized to collect and administer under Tax Code section 23.122. Even if another taxing unit or the appraisal district collects the motor vehicle inventory tax pursuant to such a contract, the collector retains the interest earnings on dealers' escrow accounts, and the county retains the fines imposed on dealers for failure to file the motor vehicle inventory tax statements as required by section 23.122.

TRD-9815295

Sarah Shirley
Assistant Attorney General
Office of the Attorney General
Filed: September 29, 1998

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Request for Opinions

RQ-1191. Requested from The Honorable Guy James Gray, Criminal District Attorney, P.O. Box 1329, Jasper, Texas, 75951, concerning whether carrying a loaded rifle at a demonstration constitutes a violation of section 42.01(10) of the Penal Code.

RQ-1192. Requested from The Honorable Eddie Lucio, Jr., Chair, Intergovernmental Relations Committee, Texas State Senate, P.O. Box 12068, Austin, Texas, 78711-2068, concerning authority of a city council to dismiss council meetings for three successive months.

RQ-1193. Requested from The Honorable James Warren Smith, Jr., Frio County Attorney, 500 East San Antonio, Box 1, Pearsall, Texas, 78061-3100, concerning whether a county commissioner may be compensated for transporting emergency medical services patients.

RQ-1194. Requested from The Honorable John Sharp, Comptroller of Public Accounts, Office of the Comptroller, LBJ State Office Building, Austin, Texas, 78774, concerning proper method of adjusting taxable property value findings.

RQ-1195. Requested from Ms. Linda Cloud, Executive Director, Texas Lottery Commission, P.O. Box 16630, Austin, Texas, 78761-6630, concerning expiration and renewal of lottery retailer and charitable bingo licenses.

RQ-1196. Requested from The Honorable Juan J. Hinojosa, State Representative, Texas House of Representatives, P.O. Box 2910, Austin, Texas, 78768-2910, concerning authority of the McAllen Independent School District to implement a minimum wage in its contracts for services.

TRD-9815296
Sarah Shirley
Assistant Attorney General
Office of the Attorney General
Filed: September 30, 1998

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PROPOSED RULES

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

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

TITLE 1. ADMINISTRATION

Part IV. Office of the Secretary of State

Chapter 81. Elections

Subchapter E. Miscellaneous

1 TAC §81.86

The Office of the Secretary of State, Elections Division, proposes a new rule, §81.86, concerning counting mail and personal appearance early voting ballots prior to election day as authorized in certain elections by §87.0241(b)(2) of the Texas Election Code. The new rule is proposed to provide procedures for early counting of electronic voting system ballots.

Ann McGeehan, Deputy Assistant Secretary of State for Elections, has determined that for the first five-year period that this rule is in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the rule.

Ms. McGeehan has determined also that for each year of the first five years that the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be to provide faster totals on election night by allowing larger counties to count the early ballots prior to election day, while preserving secrecy by prohibiting output of reports. There will be no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Ann McGeehan, Deputy Assistant Secretary of State for Elections, Office of the Secretary of State, P.O. Box 12060, Austin, Texas 78711-2060.

The rule is proposed under the Code, Chapter 31, Subchapter A, §31.003, which provides the Secretary of State with authority to promulgate rules to obtain uniformity in the interpretation and application of the Code, and under the Code, Chapter 122, §122.001(c), which authorizes the Secretary of State to prescribe additional standards for voting systems.

The Code, Chapter 122, §122.001(c) and Chapter 87, §87.0241(b)(2), are affected by this proposed rule.

§81.86. Counting Ballots Prior to Election Day in Counties with a Population of 100,000 or More.

(a) The following procedure to count ballots before election day that were voted by mail or early in person may be used if the following conditions in paragraphs (1)-(7) of this subsection are met:

(1) the election is conducted by the county elections officer;

(2) the election is a county election ordered by the Governor, county judge, or commissioners court, a joint election between the county and another political subdivision using the same electronic ballot, or a primary election;

(3) the county has a population of 100,000 or more;

(4) electronic system ballots are used in the election;

(5) tabulation can be completed without revealing the vote count prior to the close of polls on election day;

(6) the second and third logic and accuracy test required by Texas Election Code, Chapter 27 can be performed before the count and after the count;

(7) a real time audit report can be produced immediately after the count to verify the number of ballots counted with the ballot transmittal form.

(b) The central counting station is authorized to convene to count the ballots early.

(c) The manager of the central counting station will determine whether to count the early voted ballots prior to election day.

(d) The manager must notify, in writing, the presiding judge of the early voting ballot board as to the time and place where the presiding judge must deliver the ballots voted early. The notice must be given at least eight days before convening the central counting station. The early voting clerk is sent a copy of the notice.

(e) The early voting clerk must post a notice of time and place on the bulletin board used for posting open meetings where the central counting station personnel will be meeting. The notice must be posted no later than the last day for early voting in person. In the general election for state and county officers, the notice must also be sent to each county chair that has a nominee on the general election ballot.

(f) All tests of the tabulating equipment must conducted pursuant to the Texas Election Code, Chapter 127, Subchapter D. The testing authority must conduct the second test immediately prior to the count of the early voted ballots.

(g) Poll watchers are authorized to be present during the early count.

(h) The judge of the early voting ballot board must convene the ballot board after the close of early voting in person in order to qualify and prepare the ballots for counting prior to the convening of the central counting station. The presiding judge of the ballot board shall issue a notice of delivery prior to the meeting of the ballot board in the regular manner (Texas Election Code, §87.022 and §87.025). The early voting clerk must post notice of delivery of ballots to the ballot board in the regular manner (Texas Election Code, §87.023). These procedures do not supersede the regular procedures of notice, delivery, and processing of ballots voted by mail by the signature verification committee.

(i) After the count is concluded, the tabulation supervisor must store the vote tabulation on a tape or other electronic device (personal computer) without producing a printout or any other method of the vote count.

(j) The tabulation supervisor must run a report indicating the number of ballots counted for each precinct and do a comparison between those numbers and number of ballots indicated on the ballot transmittal form. This report is used to verify the number of ballots counted since a report showing vote totals is not authorized to be produced prior to election day prohibited.

(k) The tabulation supervisor must zero the votes on the tabulation device and run the third test. If the third test is not successful, the count is void.

(l) The counted ballots must be locked in the ballot box and delivered to the custodian. The key to the ballot box must be delivered to the custodian of the key pursuant to the Texas Election Code, §66.060.

(m) The box containing the counted ballots may not be opened unless the count of the ballots stored on tape or other electronic means is blank or appears to be incorrect when the tabulation supervisor reloads those results on the computer or accumulator on election day. In that event, the manager of the central counting station shall direct the custodian of the box and the custodian of the key to the box to deliver those items to the central counting station.

(n) The Central Counting Station personnel may convene only once prior to election day to count early votes. Any ballots received after the ballot board judge delivered the ballots to the manager shall be counted on election day.

(o) The central counting station personnel will reconvene on election day at a time determined by the manager. Prior to the start of counting any ballots, the second test must be conducted to determine the tabulating equipment is tabulating correctly. After a successful test has been conducted, the results of the early voting count shall be loaded into the tabulating equipment. The tabulation supervisor must run the same report showing the number of the ballots counted. This report must be compared with the report ran after the conclusion of counting before election day.

(p) If the two reports do not match, the count of the ballots prior to election day is void. The tabulation supervisor shall zero out the votes loaded on the tabulating machine. After a second test is successfully conducted, all ballots counted prior to election day must be rerun.

(q) On election day, the counting of early votes and election day votes shall be conducted in accordance with the procedures set forth in the Texas Election Code.

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

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

TRD-9815054
Clark Kent Ervin
Assistant Secretary of State
Office of the Secretary of State
Earliest possible date of adoption: November 8, 1998
For further information, please call: (512) 463–5701

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1 TAC §81.87

The Office of the Secretary of State, Elections Division, proposes a new rule, §81.87, concerning counting ballots received after election day as authorized by §87.125 of the Texas Election Code (the "Code"). The new rule is proposed to provide procedures for late counting of paper and electronic voting system ballots.

Ann McGeehan, Deputy Assistant Secretary of State for Elections, has determined that for the first five-year period that this rule is in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the rule.

Ms. McGeehan has determined also that for each year of the first five years that the rule is in effect, the public benefit anticipated as a result of enforcing the rule will the uniform implementation of §87.125 throughout the state. There will be no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Ann McGeehan, Deputy Assistant Secretary of State for Elections, Office of the Secretary of State, P.O. Box 12060, Austin, Texas 78711-2060.

The rule is proposed under the Code, Chapter 31, Subchapter A, §31.003, which provides the Secretary of State with authority to promulgate rules to obtain uniformity in the interpretation and application of the Code, and Chapter 122, §122.001(c), which authorizes the Secretary of State to prescribe additional standards for voting systems.

The Code, Chapter 122, §122.001(c) and Chapter 87, §87.125, are affected by this proposed rule.

§81.87. Counting Late Ballots.

(a) General provisions.

(1) For general elections for state and county officers, the early voting ballot board shall reconvene on the sixth day after the election to count any late ballots received in accordance with the Texas Election Code, §86.007. For all other elections, the early voting ballot board may convene any time after the second day after the election and prior to the official canvass.

(2) The presiding judge shall notify the early voting clerk as to the time and place where the board will reconvene. The notice must be made in time so the early voting clerk may give proper notice of the delivery. The early voting clerk must post notice of delivery of jacket envelopes and any other accompanying papers to the ballot board at least 24 hours prior to the delivery. The notice shall be posted at the main early voting polling place. The Texas Election Code, §1.006 does not apply.

(3) The presiding judge shall send notice to the custodian of the key and the custodian of election records to redeliver the ballot box containing the counted ballots and the key to the box. After the late ballots have been counted, the presiding judge shall lock the late counted ballots in the ballot box. The presiding judge shall deliver the ballot box to the general custodian of election records and the key to the ballot box to custodian of the key.

(4) Poll watchers are entitled to be present.

(5) If all mail ballots were received by the close of voting on election day or no ballots were received by the appropriate deadline for the election, the early voting clerk shall certify that fact and deliver the certification to the canvassing board before they convene to canvass the votes.

(b) Provisions For Paper Ballots.

(1) Once the ballots have been qualified, the presiding judge shall use the regular method of counting ballots by keeping three new tally sheets, counting by precinct, and having two members per tally team. The Texas Election Code, §87.1231(b), is not applicable for these counting procedures.

(2) Once the board has counted all the ballots, an original and three copies of the return sheet shall be prepared.

(3) The distribution of the tally sheets and return sheets shall be made in accordance with the Texas Election Code, Subchapter B, Chapter 66.

(4) The canvassing board shall add the returns from both early voting return sheets when canvassing the vote.

(c) Provisions for Electronic Voting Systems.

(1) The manager of the center counting station shall decide whether the ballot board shall manually count the ballots and be manually added to the computer count for a canvass total or whether the central counting station shall reconvene.

(2) The manager shall send notice to the presiding judge of the ballot board prior to the reconvening the board as to whether the ballots are to be counted manually by the board or whether the ballots are just to be prepared for delivery to the central counting station.

(3) If the ballots are to be counted by the central counting station, the manager must post notice at least 24 hours prior to reconvening the central counting station. Section 1.006 does not apply.

(4) A ballot transmittal form must be completed by the presiding judge of the ballot board. The transmittal form will accompany the ballots qualified.

(5) The manager must order a second test to be conducted prior to the count. The test must be successful.

(6) Poll watchers are entitled to be present.

(7) After the second test is successful, the unofficial election results preserved by electronic means shall be loaded in the tabulating equipment.

(8) The tabulation supervisor shall print a status report before the count is to begin. This status report shall be compared with the report run on election night. If the two status reports do not match, the electronic ballots must be counted by hand and manually added to the returns printed on election night.

(9) If the status reports match, the tabulation supervisor may order the count to begin. The precinct returns from these counts may be included with the original precinct counts. The tabulation supervisor does not need to keep the precinct by precinct results of the late ballots separate from other early voted ballots.

(10) Once the ballots have been counted, results shall be prepared in the regular manner. The manager shall prepare a certification and attach it to the returns, then place it in envelope number 1 to the presiding officer of the canvassing board that the result supersedes any returns printed prior to the reconvening of the central counting station after election day.

(11) After the results have been prepared, as successful third test must be performed.

(12) The results, ballots, and distribution of ballots and all records shall be made in the regular manner.

This 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 September 24, 1998.

TRD-9815053
Clark Kent Ervin
Assistant Secretary of State
Office of the Secretary of State
Earliest possible date of adoption: November 8, 1998
For further information, please call: (512) 463–5701

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1 TAC §81.88

The Office of the Secretary of State, Elections Division, proposes a new rule, §81.88, concerning the criteria which an optical disk or other electronic storage medium must meet to enable voter registrars to record voter registration applications and other documentation in that storage medium. The new rule is being proposed so that voter registrars will have another option in retaining voter registration applications and other supporting documentation, in accordance with §13.104 of the Texas Election Code (the "Code"). Currently, local governments are already subject to rules regarding electronic storage and maintenance. This rule will incorporate rules previously adopted for use by local jurisdictions with regard to records maintenance.

Ann McGeehan, Deputy Assistant Secretary of State for Elections, has determined that for the first five-year period this rule is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the rule.

Ms. McGeehan has determined also that for each year of the first five years the rule is in effect, the public benefits anticipated as a result of enforcing the rule will be to ensure that voter registration material stored on an optical disk or other computer storage medium will meet the criteria established by

the Secretary of State as required by the Code. There are no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Ann McGeehan, Deputy Assistant Secretary of State for Elections, Office of the Secretary of State, P.O. Box 12060, Austin, Texas 78711-2060.

The rule is proposed under the Code, section 13.104, which requires the Secretary of State to prescribe procedures to implement electronic storage of voter registration applications and supporting documentation.

The Code, Chapter 13, subchapter D, §13.104 is affected by this proposed rule.

§81.88. Optional Storage Method.

A voter registrar who records voter registration data for storage purposes on optical disk or other computer storage medium shall follow the procedures for such storage as set forth in Chapter 7 of this Code and authorized pursuant to Chapter 205 of the Texas Local Government Code.

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

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

TRD-9815189
Clark Kent Ervin
Assistant Secretary of State
Office of the Secretary of State
Earliest possible date of adoption: November 8, 1998
For further information, please call: (512) 463–5701

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TITLE 16. ECONOMIC REGULATION

Part II. Public Utility Commission of Texas

Chapter 23. Substantive Rules

Subchapter F. Quality of Service

16 TAC §23.67, §23.70

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

The Public Utility Commission of Texas (commission) proposes the repeal of §23.67, relating to Open-access Comparable Transmission Service, and §23.70, relating to Terms and Conditions of Open-access Comparable Transmission Service. Project Number 18703 has been assigned to this proceeding. The Appropriations Act of 1997, HB 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 commission held three workshops to conduct a preliminary review of its rules. As a result of these workshops, the commission 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. As a result of this reorganization, §23.67 and §23.70 will be duplicative of proposed new §§25.191-25.204 relating to wholesale transmission access and pricing in Chapter 25 (Substantive Rules Applicable to Electric Service Providers).

Jess Totten, assistant director, Office of Policy Development, has determined that for each year of the first five-year period the repeal is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the repeal of these sections.

Mr. Totten has determined that for each year of the first five years the repeal is in effect, the public benefit anticipated as a result of the repeal will be the elimination of a duplicative rules. There will be no effect on small businesses as a result of repealing these sections. There is no anticipated economic cost to persons as a result of repealing these sections.

Mr. Totten also has determined that for each year of the first five years the repeal is in effect there will be no impact on employment in the geographic area affected by the repeal of these sections.

Comments on the proposed repeal (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, PO Box 13326, Austin, Texas 78711-3326, within 30 days after publication. All comments should refer to Project Number 18703.

This repeal 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.

§23.67. Open-access Comparable Transmission Service.

§23.70. Terms and Conditions of Open-access Comparable Transmission Service.

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

Filed with the Office of the Secretary of State, on September 25, 1998.

TRD-9815101
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: November 8, 1998
For further information, please call: (512) 936–7308

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Chapter 25. Substantive Rules Applicable to Electric Service Providers

Subchapter I. Transmission and Distribution

Division 1. Open-Access Comparable Transmission Service for Electric Utilities in the Electric Reliability Council of Texas

16 TAC §§25.191–25.204

The Public Utility Commission of Texas (PUC or commission) proposes new §§25.191-25.204, relating to wholesale transmission access and pricing. The new sections comprise a new Chapter 25, Subchapter I, Division 1 (relating to Open-Access Comparable Transmission Service for Electric Utilities in the Electric Reliability Council of Texas), of the commission's substantive rules. The proposed new sections will enhance transmission service in Texas, thereby supporting the development of competition in the sale of electricity at the wholesale level. Project Number 18703 has been assigned to this proceeding.

The Appropriations Act of 1997, HB 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. The commission has designated Chapter 25 for all commission substantive rules applicable to electric service providers. The duplicative sections of Chapter 23 will be proposed for repeal as each new section is proposed for publication in the new chapter.

The proposed new sections reflect different section, subsection, and paragraph designations due to the reorganization of the rules. Citations to the Public Utility Regulatory Act have been updated to conform to the Texas Utilities Code throughout the sections and citations to other sections of the commission's rules have been updated to reflect the new section designations. References to the terms "public utility" or "utility" have been changed to "electric utility" where needed as a result of definition changes in the Texas Utilities Code. The *Texas Register* will publish these sections as all new text. Persons who desire a copy of the proposed new sections as they reflect changes to existing sections in Chapter 23 may obtain a redlined version from the commission's Central Records under Project Number 18703.

The commission adopted the existing transmission rules, §23.67, relating to open-access comparable transmission service, and §23.70, relating to terms and conditions for open-access comparable transmission service, to carry out a legislative mandate to introduce competition in the sale of electricity at wholesale. The statutory provisions that led to the adoption of these rules are still in effect, and the commission believes that the reenactment of the rules is essential to meeting the legislative objective of fostering competition in the wholesale market. At the same time, the commission is proposing to reorganize the rules, in the belief that they will be easier to use, and is proposing a number of changes that are intended to enhance the value of transmission service and enhance wholesale competition.

Section 25.191 of the new rules, relating to transmission service requirements, differs from the existing rule, §23.67, in several ways. Under §23.67 electric utilities within the Electric Reliability Council of Texas (ERCOT) that own transmission facilities are required to provide transmission service. Section 25.191 refers to these electric utilities as transmission service providers. Under the proposed changes, a transmission service provider will be required to provide service at the distribution level that includes the delivery of power to a retail customer. This modification will permit a customer in an area where more than one electric utility has a certificate to provide retail electric service to switch from one electric utility to another, without incurring charges for the replacement of distribution facilities. This section is also being modified to make it clear that a transmission service provider has an obligation to interconnect with new generators in its service area. One of the obligations of a transmission service provider under proposed §25.191 is to provide reactive power support to maintain adequate voltage support and control. The commission seeks comments on whether this obligation should be changed to encourage new transmission-only electric utilities.

The commission is proposing to reorganize the cost and rate provisions in §23.67 and §23.70 in a more logical structure and making a number of amendments to reflect the commission's decisions in setting transmission rates. The new provisions relating to rates and rate procedures are in §25.192 through §25.194. Section 25.192, relating to transmission service rates, is being modified (from the existing §23.67) to specify the fee for unplanned transmission service that may be charged by the independent system operator (ISO). This section is also being modified to exclude from an electric utility's transmission cost of service the cost of the electrical connection from a generator to the transmission system and to permit municipal utilities to use a cash-flow method (or other alternatives to the methods traditionally used for setting the rates of investor-owned electric utilities) in determining their transmission cost of service. The proposed rule would also authorize the inclusion of a portion of the cost of the direct-current (DC) ties that connect ERCOT and the Southwest Power Pool in the transmission cost of service of the electric utilities that own a share of the DC ties. The proposed rule would direct the ISO to develop a more accurate method of compensation for transmission losses. The proposed rule would eliminate inadvertent energy accounting and require that electric utilities take an ancillary service (a schedule imbalance service) for differences in scheduled and actual power flows between control areas. The proposed rule continues the transition adjustment that the commission adopted under §23.67, but the commission seeks comments on whether the transition adjustment should be discontinued or modified.

On August 28, 1998, the Lower Colorado River Authority filed a rulemaking petition, requesting that the commission amend Substantive Rule §23.67 to permit an electric utility

to include the costs of a statewide weather-data collection network in its wholesale transmission rates. This rulemaking petition has been assigned Project Number 19809, and the commission published a notice of the petition and a request for comments in the *Texas Register.* Because the commission is considering significant changes to the transmission access and pricing rules in Project Number 18703, it is interested in comments on the question raised by the Lower Colorado River Authority. Is it appropriate to include the cost of a weather network in transmission rates? Will including the costs of such a network in transmission rates afford the commission an adequate opportunity to review a weather network and determine whether the costs incurred in completing it are reasonable and necessary? Persons who are interested in obtaining a copy of the petition for rulemaking may do so by contacting the commission's Central Records Office, 1701 North Congress Ave., P.O. Box 13326, Austin, Texas 78711-3326.

Persons who wish to file written comments on the petition may do so in response to the notice published in Project Number 19809 or this project. The commission will consider in Project Number 18703, any comments relating to the recovery of costs of a weather network through transmission rates, whether they are filed in Project Number 19809 or Project Number 18703.

Section 25.193, relating to procedures for modifying transmission rates, is being modified (from the existing §23.67) to provide for an annual update of transmission rates to reflect changes in invested capital, loads and megawatt-mile impacts on the transmission system. Section 25.193(a) requires investor-owned electric utilities to update their rates on an annual basis and permits other electric utilities to do so. The commission is interested in reducing regulatory lag by updating the rates periodically, but also wishes to avoid an undue burden on either electric utilities, the commission or other persons who are interested in transmission rates. The commission seeks comments on whether the distinction in this subsection is appropriate and whether these objective could be better achieved by a different rule. In addition to the other issues raised by this proposal, the commission seeks comments on when the annual updates under this section should be initiated. The commission is also requesting comments on whether it is appropriate to permit electric utilities to adopt a retail rate factor that would permit them to pass through to their retail customers changes in their wholesale transmission rates. Is such a rate factor permitted by the Public Utility Regulatory Act, Texas Utilities Code, §11.001-63.063 (PURA), and is it appropriate?

Section 25.195, relating to terms and conditions for transmission service, is being modified (from the existing §23.67) to specify that when a new generator is constructed and seeks an interconnection with a transmission service provider in ERCOT, the new generator will not be responsible for transmission system upgrades that are needed as a result of the operation of the new generating plant and the transmission of power to its customers. The new generator is responsible only for cost of constructing a direct connection to transmission system. This section is also modified to require a new generator to make a deposit with the transmission service provider to cover costs of planning and licensing new transmission facilities related to the new generating plant. This provision is intended to protect the transmission service provider from responsibility for such costs, in the event that the new generation project is canceled or delayed and the related transmission project is not needed.

Section 25.196, relating to functional unbundling, is being modified (from the existing §23.67 and §23.70) to prohibit an electric utility and its affiliates from building a new generation facility in the electric utility's service area, unless permitted under the electric utility's integrated resource planning process in accordance with §25.170 of this title (relating to hearing on the final integrated resource plan) or §25.171 of this title (relating to certificates of convenience and necessity). The commission is concerned that integrated electric utilities that provide transmission service under these rules will have a motive and opportunity to obstruct the efforts of developers of power plants (other than the electric utility or its affiliate) to obtain interconnection agreements in their service areas. The prospect for discrimination by integrated electric utilities against developers of power plants that seek to enter the ERCOT market and compete against the existing electric utilities is a serious threat to the development of wholesale competition. If integrated electric utilities are able to impede or delay these developers in their efforts to obtain an interconnection and transmission service, they will make the risks for power plant developers significantly greater, and developers of merchant power projects are likely to turn to other areas of the country that are more hospitable.

One means of eliminating the opportunity for discrimination against third-party power projects would be to transfer the planning function and the responsibility for permitting interconnection entirely to the ISO. It does not appear that with its current resources, the ISO could perform these functions. Other options include divestiture of assets by integrated electric utilities, so that they do not own both generation and transmission facilities. The prohibition that is proposed in §25.196 is a less intrusive means of ensuring that developers of independent power projects are fairly treated by the transmission service provider. The commission seeks comments on whether this will be effective and whether there are other means to achieve the same end that would be either more effective or less intrusive.

Section 25.197, relating to the ERCOT independent system operator (ISO), is being modified (from the existing §23.67) to require that retail customers be represented on the ISO's governing board, clarify and expand the duties of the independent system operator, and require electric utilities and other persons participating in the wholesale electric market to provide information to the ISO in connection with the performance of its duties. Under the revised section the ISO would perform the following functions: determining the eligibility of a persons for transmission service; maintaining the reliability of the ERCOT electrical network; processing requests for interconnection; supervising system security studies; supervising the planning of transmission facilities; and establishing interconnection standards for new generation. The rule would also provide for the ISO to make reports on its activities to the commission. The commission seeks comments on how the representatives of retail customers should be selected and whether the retail representatives should be designated as representing particular classes of retail customers. The proposed rule would expand the duties of the ISO, but the commission believes that the proposal would be commensurate with its current staffing, funding, and other resources. The commission also seeks comments on whether it is appropriate to add other duties to the ISO, such as giving the ISO day-to-day transmission planning responsibility and authority to determine whether new power plants may interconnect with transmission service providers.

Section 25.198, relating to initiating transmission service, is being modified (from the existing provisions in §23.70) to require transmission service providers to provide planned transmission service on a weekly and daily basis. Under current rules, planned transmission service is available only on an annual and monthly basis. A number of persons have expressed the view that the existing rules are not sufficiently flexible and pose obstacles to short-term sales of power. The commission is proposing the new planned transmission services to permit buyers and sellers of power to obtain a more certain delivery service to transmit power from a generating facility to a wholesale customer. The commission seeks comments on whether these new transmission services will enhance the opportunities in the wholesale market for persons interested in making short-term sales of power or sales of other specialized services, such as peaking power.

The commission is also proposing to authorize the ISO to propose rates for weekly and daily planned transmission service. The commission contemplates that the rates for the new services would include the costs of owning and operating the transmission facilities used in providing the service but is seeking comments on a number of issues relating to the structure of the rates: Should the rates for weekly and daily planned transmission service be based on the full embedded transmission costs, or should they be based on some percentage of the embedded costs? Should the rates for these services be distance-sensitive? Should the rates include seasonal or on-peak/off-peak differences? If so, how should the seasons and peaks be defined and what level of rate differential should be reflected in the rates?

Section 25.199 requires a system security study in connection with an application for planned transmission service from a new resource and provides that the transmission service provider will perform the security study under the supervision of the independent system operator. The commission seeks comments on whether the transmission customers should deal with the independent system operator in arranging for a security study and whether the independent system operator should be responsible for performing security studies.

Section 25.200, relating to load shedding, curtailment and redispatch, is being modified (from the existing §23.67 and §23.70) to require a person that provides redispatch service in connection with planned transmission service to provide information to document the costs incurred in providing the redispatch service.

Section 25.201, relating to ancillary services, is being modified (from the existing §23.67 and §23.70) to distinguish between services that the ISO has determined are required services and other services that may be offered to support a vibrant wholesale market. This proposed section would also provide that three-quarters of the revenue margin from the sales of ancillary services by regulated electric utilities would be credited to retail customers. The balance would be additional profit to the electric utility. The latter proposal is consistent with one of the recommendations in the commission's report, Investigation into the Competitiveness of the Wholesale Market (May 1998). This section would also provide that the sale of an ancillary service at a rate below the ceiling would not be considered a discounted rates, under PURA §36.007. These modifications are intended to induce the electric utility to engage in sales of ancillary services at a rate below the ceiling rate prescribed in its tariff.

Section 25.203 is being amended to recognize that the administration of the alternative dispute resolution procedures has been transferred to the ISO from the commission.

The commission proposes a number of other changes that appear in various sections of the proposed rules. For example, the existing rules, in describing a number of the functions of operating and supervising the transmission system, assign responsibilities to either the ISO or a transmission service provider. In the proposed rule, most of these duties are assigned to the ISO. The commission is also using the term transmission service provider for an electric utility that is required to provide transmission service under the proposed rules, rather than the terms "utility" or "transmission provider".

Jess Totten, assistant director, Office of Policy Development, 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.

Mr. Totten has determined that for each year of the first five years the proposed sections are in effect the public benefit anticipated as a result of enforcing the sections will be more vigorous wholesale competition in the sale of electricity, resulting in better electric service at lower rates. There will be no effect on small businesses as a result of enforcing this sections. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

Mr. Totten 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.

The commission staff will conduct a public hearing on this rulemaking under Government Code §2001.029 at the commission's offices, located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701. The date for the public hearing is still to be determined. Once determined, notice of the date and time will be provided.

Comments on the proposed sections (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, within 30 days after publication. Reply comments may be submitted within 45 days after publication. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed sections. The commission will consider the costs and benefits in deciding whether to adopt the sections.

The commission also invites specific comments regarding the Section 167 requirement as to whether the reason for adopting §23.67 and §23.70 continues to exist in adopting these new sections. All comments should refer to Project Number 18703.

These new sections are proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998) (PURA), which provide the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; §31.001 of PURA, which declares that the public interest requires that rules, policies and principles be formulated and applied to protect the public interest in a more competitive marketplace; §35.002, which grants all generators the right to compete for the business of selling power; §35.003, which prohibits an electric utility from granting an undue preference to an affiliate in the purchase or

sale of electric energy at wholesale; §35.004, which requires electric utilities to provide comparable wholesale transmission service, directs the commission to ensure that electric utilities provide non-discriminatory transmission service, and requires the commission to adopt reasonable rates for transmission service; §35.005, which permits the commission to require an electric utility to provide wholesale transmission service, determine whether the terms and conditions of such service are reasonable, and require the construction or enlargement of a transmission facility; §35.006, which directs the commission to adopt rules relating to wholesale transmission service; §35.007, which requires electric utilities to file tariffs in compliance with the rules adopted under §35.006; and §35.008, which permits the commission to require a party to a dispute concerning the prices or terms of wholesale transmission service to engage in a non-binding alternative dispute resolution process.

Cross Index to Statutes: Public Utility Regulatory Act §§14.002, 31.001, and §§35.002-35.008.

§25.191. Transmission Service Requirements.

(a) Purpose. The purpose of §§25.191-25.204 of this title (which comprise Subchapter I, Division 1 of this chapter (relating to Transmission and Distribution) is to clearly state the terms and conditions that govern wholesale transmission access and related ancillary services, in order to:

(1) increase competition in the sale of electric energy at wholesale in Texas,

(2) preserve the reliability of electric service, and

(3) enhance economic efficiency in the production and consumption of electricity.

(b) Nature of transmission service. Transmission service allows transmission service customers to use the transmission systems to deliver power from generation resources to serve their loads, inside and outside of the Electric Reliability Council of Texas (ERCOT). Service provided pursuant to Subchapter I, Division 1 of this chapter, permits a customer to use the transmission systems of all of the transmission service providers in ERCOT.

(c) Definitions. The following terms, when used in Subchapter I, Division 1 of this chapter, have the following meanings, unless the context clearly indicates otherwise:

(1) Planned transmission service. A transmission service customer shall have the right to use the transmission service providers' transmission systems for the delivery of power from planned resources to loads on the same basis as the transmission service providers use their transmission systems to reliably serve their native load customers. This service is referred to as planned transmission service and shall have priority over all unplanned transmission service.

(2) Unplanned transmission service. A transmission service customer may use the transmission service providers' transmission systems to deliver energy to its loads from resources that have not been designated as the transmission service customer's planned resources. This service is referred to as unplanned transmission service, and such energy shall be delivered if sufficient transmission capacity is available to support the requested service.

(3) Control area. An electric system or systems, bounded by tie line metering and telemetry, capable of controlling generation to maintain its interchange schedule with other control areas and contribute to frequency regulation within ERCOT.

(d) Application. Unless otherwise explicitly provided, Subchapter I, Division 1 of this chapter, applies to electric utilities in ERCOT, as the term "electric utility" is defined in the Public Utility Regulatory Act §35.001. The transmission service standards described in Subchapter I, Division 1 of this chapter, also apply to transmission service to, from, and over the direct-current interconnections between ERCOT and the Southwest Power Pool, to the extent that tariffs for such service incorporating the terms of this Subchapter I, Division 1 of this chapter, are approved for electric utilities that own an interest in the interconnections.

(e) Obligation to provide transmission service. Each electric utility in ERCOT that owns transmission facilities shall provide wholesale transmission service to other electric utilities, power marketers, exempt wholesale generators, qualifying facilities and other eligible transmission service customers, in accordance with the provisions of Subchapter I, Division 1 of this chapter. Each electric utility that owns transmission facilities shall file a tariff for transmission service and shall take transmission service for all of its uses of its transmission facilities in accordance with the terms of its tariff for transmission service.

(1) Each electric utility that owns transmission facilities shall provide transmission service to other electric utilities, power marketers, exempt wholesale generators, qualifying facilities and other eligible transmission service customers on the same terms and conditions that it provides transmission service to itself. Where an electric utility has contracted for another person to operate its transmission facilities, the person assigned to operate the facilities shall carry out the operating responsibilities of the electric utility under Subchapter I, Division 1 of this chapter.

(2) The obligation to provide comparable wholesale transmission service applies to an electric utility, even if the electric utility's interconnection with the customer is through distribution, rather than transmission facilities.

(A) A transmission service provider that owns facilities for the delivery of electricity to an eligible transmission service customer purchasing electricity at wholesale using facilities rated at less than 60 kilovolts shall provide an eligible transmission service customer access to the transmission service provider's delivery points on the same pricing, terms and conditions used by the transmission service provider in serving similar primary metered distribution-level customers.

(B) A transmission service provider shall also provide access at the distribution level to another electric utility, in order to transmit power to a customer in an area in which the other electric utility has a certificate to provide electric service. Such service shall be provided under the same pricing and other terms and conditions available to the transmission service provider in serving similar customers.

(3) The obligation to provide transmission service includes the obligation to provide reactive power support to maintain adequate system voltage support and control.

(4) A transmission service provider shall interconnect its facilities with new generating sources and construct facilities needed for such an interconnection, in accordance with Subchapter I, Division 1 of this chapter.

(5) Service provided pursuant to Subchapter I, Division 1 of this chapter, allows a transmission service customer to deliver energy from its planned resources to serve loads within ERCOT, deliver unplanned energy to its loads without an additional facilities charge, deliver energy to third parties in connection with a sale of

energy to loads within ERCOT, and transmit power over transmission facilities within ERCOT for export from ERCOT.

(6) All transmission service and ancillary services shall be provided on a non- discriminatory basis, in a manner that is comparable to the service provider's use of such services to serve its native load customers.

(f) Resale of transmission rights. A transmission service customer that holds transmission and ancillary transmission service rights under Subchapter I, Division 1 of this chapter, may resell those rights to another eligible transmission service customer.

(g) Redispatch. ERCOT utilities shall provide redispatch services in accordance with §25.200 of this title (relating to Load Shedding, Curtailments, and Redispatch).

(h) Scheduling. Control area utilities shall schedule a transmission service customer's resources and accommodate changes to schedules requested by transmission service customers. Control area utilities shall implement requested schedules and changes to schedules for third party transmission service customers upon the same terms and conditions and within the same time frames applied by control area utilities in scheduling resources to serve their native load customers.

§25.192. Transmission Service Rates.

(a) Charges for transmission service. Transmission service customers shall incur both facilities charges and loss compensation charges for planned transmission service. Transmission service customers shall incur loss compensation charges for unplanned transmission service. Transmission service customers shall incur an independent system operator (ISO) fee for unplanned transmission service and for weekly and daily planned transmission service. The facilities charge shall consist of an access fee and an impact fee. Facilities charges shall be determined in transmission ratemaking proceedings conducted periodically, at such intervals as the commission determines are appropriate.

(1) The costs included in the access fee will be seven-tenths of the annual cost of transmission service for each transmission service provider in the Electric Reliability Council of Texas (ERCOT). A transmission service customer taking planned transmission service will pay a share of these costs, based on its share of the total load in ERCOT.

(A) For each transmission service provider, an access rate will be calculated by dividing seven-tenths of the transmission service provider's annual transmission cost of service by the total ERCOT load, as calculated in accordance with this section.

(B) Each transmission service customer taking annual planned transmission service will pay an access charge to transmission service providers, calculated by multiplying the applicable access rate by the transmission service customer's peak load, as calculated in accordance with this section.

(2) The costs included in the impact fee will be three-tenths of each transmission service provider's annual cost of transmission service. A transmission service customer taking planned transmission service will pay an impact fee to the transmission service providers, based on the impact of transmitting its resources to its loads, calculated using the vector-absolute megawatt-mile method for assessing impacts.

(A) For each transmission service provider, a megawatt-mile rate will be calculated by dividing three-tenths of the transmission service provider's annual transmission costs, as determined in accordance with this section, by the sum of the megawatt-mile impacts of all planned resources on the transmission service provider's system, using the impacts calculated in accordance with §25.194 of this title (relating to Determining Peak Loads and Megawatt-Mile Impacts).

(B) Each transmission service customer taking annual planned transmission service will pay an impact charge to transmission service providers, calculated by multiplying the applicable rate by the impact of the transmission service customer's planned resources on the transmission service provider's system, as calculated in accordance with §25.194 of this title.

(3) In adopting facilities charges under this section, the commission shall apply a transition mechanism in 1999 to reduce the impact of the changes in the level of transmission charges under this section on an electric utility or its customers. In applying this transition mechanism, the commission shall calculate the "unadjusted rate impact" for each electric utility, which shall be the difference between the facilities charge and the transmission revenues an electric utility would receive under this section, both calculated at the time transmission rates were first determined under the commission's open-access transmission rules, and without regard to any adjustment under this paragraph. An adjustment shall be made to the facilities charge, such that the difference between the facilities charge incurred by an electric utility and its annual transmission cost for calendar year 1999 does not exceed 30% of the unadjusted rate impact.

(4) The commission may adjust the facilities charges under this section to account for any transmission revenues that an electric utility receives under an existing transmission contract.

(b) Transmission cost of service. The annual cost of transmission service for each transmission service provider shall be based on the annual expenses in Federal Energy Regulatory Commission (FERC) expense accounts 560-573 (or accounts with similar contents) plus the depreciation, federal income tax, and other associated taxes, and the commission-allowed rate of return based on FERC plant accounts 350-359 (or accounts with similar contents), less accumulated depreciation and accumulated deferred federal income taxes.

(1) The following facilities are deemed to be transmission facilities:

(A) power lines, substations, and associated facilities, operated at 60 kilovolts or above, including radial lines operated at or above 60 kilovolts, except the step-up transformers and transmission facilities that provide a direct interconnection from a generating station to the transmission network;

(B) substation facilities on the high side of the transformer, in a substation where power is transformed from a voltage higher than 60 kilovolts to a voltage lower than 60 kilovolts; and

(C) the cost of the direct-current (DC) interconnections with the Southwest Power Pool that are owned by a transmission service provider in ERCOT to the extent that the commission determines that cost is properly allocable to ERCOT customers.

(2) In determining the annual transmission cost under this subsection, the following expenses shall not be included:

(A) expenses of an electric utility that are otherwise included in its annual transmission cost for service under any existing transmission contract (including the value of goods and services exchanged for transmission service);

(B) transmission expenses paid to another electric utility in accordance with this section; and

(C) expenses for transmission service outside of ERCOT.

(3) For electric utilities whose rates are not otherwise subject to the commission's ratesetting authority, the commission may permit the use of reasonable alternative methods of determining the annual cost of transmission service, including the cash flow method, consistent with the rate actions of the rate-setting authority for the electric utility.

(4) For electric utilities whose rates are not otherwise subject to the commission's ratesetting authority, the rate of return may be the electric utility's actual debt service and a reasonable coverage ratio. In determining a reasonable coverage ratio, the commission will consider the coverage ratios required in the electric utility's bond indentures or ordinances and the most recent rate action of the rate-setting authority for the electric utility.

(5) The commission may adopt rate-filing requirements that provide additional details concerning the costs that may be included in the annual transmission cost and how such costs should be reported in a proceeding to establish transmission rates.

(c) Billing units. As used in this section, a transmission service customer's system demand is the average of the demand of the customer's retail and wholesale customers for hours that are coincident with the most recent ERCOT system coincident peak demand. In determining a transmission service customer's demand and ERCOT system coincident peak demand, the actual demand on electric utility systems shall be considered, and the ERCOT system coincident peak demand shall be an average of the highest aggregate demand in each of the months of June, July, and August of the relevant period. Actual electric utility demand shall be calculated based on the electric utility's net hourly generation, plus wholesale purchases, minus wholesale sales.

(1) The megawatt-mile impact of transmitting resources to load shall be calculated using the loads and resources at the ERCOT peak and shall be calculated by the independent system operator or calculated under its supervision. Megawatt-mile impacts shall be calculated in the manner prescribed in §25.194 of this title.

(2) Peak demand and megawatt-mile impact may be adjusted for known and measurable changes to wholesale customer loads, when such changes can be identified and quantified with reasonable certainty.

(d) Transmission revenue. The facilities charges prescribed in subsection (a) of this section are intended to provide each transmission service provider an opportunity to recover its transmission cost of service. Revenue from the transmission of electric energy out of ERCOT over the DC ties that is not recovered through rates for annual planned transmission service and revenue from monthly, weekly, and daily planned transmission service shall be credited to all transmission service customers as a reduction in the transmission cost of service for transmission service providers that receive the revenue.

(e) Compensation for losses. A transmission service customer that uses transmission service to transmit power to its loads shall compensate affected control-area utilities for energy losses resulting from such transmission service. Losses shall be calculated by the independent system operator under a method approved by the commission. The method of compensation for losses shall provide reasonably accurate compensation for the cost of supplying losses incurred under different system conditions.

(f) Independent system operator charges. Transmission service customers shall incur an ISO fee of $ .15 per megawatt-hour for weekly and daily planned transmission service and for unplanned transmission service, payable to the independent system operator. The independent system operator may request the commission to approve changes in this fee.

(g) Inadvertent energy. Control-area utilities shall compensate each other for inadvertent energy flows under a tariff for schedule imbalance service, under §25.201 of this title (relating to Ancillary Services). The independent system operator shall develop any necessary procedures to implement this subsection.

(h) Transmission rates for exports from ERCOT. Facilities charges, ISO charges, and loss compensation for exports of power from ERCOT will be assessed to transmission customers for that portion of transmission that is within the boundaries of ERCOT, in accordance with this section.

(1) For the purposes of facilitating these transactions, the annual facilities charge shall be prorated on a monthly, weekly, daily and hourly basis.

(2) Transmission customers exporting power from ERCOT on an unplanned basis will be assessed an access charge based on the duration of the transaction, and will be charged only for the transmission service actually used. Transmission customers exporting power from ERCOT on a planned basis will be assessed an access charge based on duration of the service requested.

(3) The monthly on-peak access fee will be one-fourth the annual rate, and the monthly off-peak access fee will be one-twelfth the annual rate. The peak period used to determine the applicable transmission rate for such transactions shall be the months of June, July, and August. The access fee for monthly transactions shall be the greater of the sum of the monthly rates for the off-peak months for which transmission service is requested or the sum of the monthly rates for the on-peak months for which transmission service is requested. The impact charge will be calculated in accordance with this section.

§25.193. Procedures for Modifying Transmission Rates.

(a) Revision of transmission rates. Each provider of transmission and ancillary service in the Electric Reliability Council of Texas shall periodically revise its transmission and ancillary service rates to reflect changes in the cost of providing such services. Any request for a change in transmission rates shall comply with the filing requirements established by the commission under §25.192 of this title (relating to Transmission Service rates).

(1) Each investor-owned electric utility that provides transmission service in ERCOT shall on an annual basis update its transmission rates to reflect changes in its invested capital, through the addition or retirement of transmission facilities and additional depreciation on such facilities, and to reflect changes in loads and megawatt-mile impacts. All other transmission service providers in ERCOT shall on an annual basis update the transmission rates to reflect changes in loads and megawatt-mile impacts and may update the transmission rates to reflect changes in invested capital, through the addition of transmission facilities and additional depreciation.

(2) Changes in rates to reflect changes in invested capital shall be subject to reconciliation at the next complete review of the electric utility's transmission cost of service. The commission shall review whether the cost of transmission plant additions are reasonable and necessary at the next complete review of the electric utility's transmission cost of service.

(3) The commission may prescribe a schedule for providers of transmission and ancillary services to file proceedings to revise the rates for such services.

(4) If an electric utility requests modifications, other than those relating to rates, in a tariff for transmission or ancillary services, it shall first notify affected persons of the proposed changes, solicit their views, and attempt to resolve any disagreement over the changes through the alternative dispute resolution process established under §25.203 of this title (relating to Alternative Dispute Resolution).

(b) Commission order. The facilities rates and charges calculated in accordance with Subchapter I, Division 1 of this chapter (relating to Transmission and Distribution), of this title will be converted to monthly amounts, and such monthly charges will be paid to the transmission service providers, in accordance with a commission order. Such rates remain in effect until modified by subsequent order of the commission.

§25.194. Determining Peak Load and Megawatt-mile Impacts.

(a) Information relating to peak load and impact calculations. The vector-absolute megawatt-mile impacts referred to in §25.192 of this title (relating to Transmission Service Rates) shall be calculated in accordance with this subsection. Each electric utility in the Electric Reliability Council of Texas (ERCOT) shall on an annual basis provide to the independent system operator historical information concerning peak loads and the load and resource information necessary to perform the calculations described in this section.

(1) The independent system operator shall establish a working group, with equal participation from all wholesale market participants, to review the peak load information and load flow case and the underlying data, reconcile the peak load information, and perform the impact calculations. The independent system operator shall also appoint a chair of the working group. The independent system operator shall include in the working group any transmission service provider or eligible customer that requests to participate.

(2) The chair of the working group shall report in writing to the independent system operator either the working group's unanimous acceptance of the data, or the objections raised to the data by any member of the group. Disputes over the data will be resolved in accordance with the procedures for alternative dispute resolution prescribed in §25.203 of this title (relating to Alternative Dispute Resolution).

(b) Peak load. The working group established under this section shall determine the prior year's peak load for ERCOT and for each transmission service customer, in accordance with §25.192 of this title.

(c) Load flow model. Megawatt-miles for all ERCOT loads shall be determined using a single load flow model that is based on the following conditions or assumptions:

(1) the transmission system will be configured as it is anticipated to operate in the upcoming summer season;

(2) every generator that is a part of any load's planned resource commitment will be represented in the calculations; and

(3) the models and assumptions used will be applied in a consistent manner, to the greatest extent possible, from one electric utility to another.

(d) Pairing of loads and resources. The impact calculation is based on identifying the generating units that, by reason of ownership or contractual entitlement, are serving the load of a transmission service customer and have been identified as planned resources. Each group of generating units and the loads they serve are referred to in this section as a transmission event.

(e) Nomination of resources. Each transmission service customer taking service under Subchapter I, Division 1 of this chapter (relating to Transmission and Distribution), shall nominate from its list of planned resources a specific amount of generation from each unit, such that the sum of the nominations is greater than or equal to 115% of the electric utility's demand or at a level based on the reserve requirement established by the independent system operator. Such nominations shall be consistent with an economic dispatch of the transmission service customer's resources.

(f) Method. The vector-absolute megawatt-mile impact is an assessment of the impact of the transmission of power and energy made by calculating the sum of the impacts of individual transmission lines with a nominal operating voltage of at least 60,000 volts when measured phase-to-phase. The impact for each transmission line is the product of the vector-absolute change in megawatt power flows for the transmission line and the length of each line in miles, calculated for each generator.

(1) The impact calculation is based on a single load-flow base case that takes into account all transmission events.

(2) The impact calculation is performed for each generator bus that serves load within a single transmission event, as follows:

(A) A portion of the load on every bus that is assigned to the particular transmission event is removed.

(B) The output of the generators in the transmission event is reduced by an amount that results in a balancing of load and generation, without affecting the output of generators that are not included in the transmission event.

(C) The vector-absolute change in flow on every line is determined by comparing the flow calculated in subparagraph (B) of this paragraph with the base case and multiplying the vector-absolute change in flow, in megawatts, by the length of the line in miles.

(D) The megawatt-mile impact per megawatt of generation is determined by dividing the impact determined in subparagraph (C) of this paragraph by the generation change used in subparagraph (B) of this paragraph.

(3) From the information calculated in paragraph (2) of this subsection, a matrix is prepared that shows the megawatt-mile impact on each transmission service provider per megawatt of generation for each generator in each transmission event.

(4) The total megawatt-mile impact of a transmission event is determined by summing the product of the nomination level for each generator, as prescribed in subsection (e) of this section, and the megawatt-mile impact per megawatt for that generator, as calculated in paragraph (2) of this subsection.

§25. 195. Terms and Conditions for Transmission Service.

(a) Transmission service requirements. As a condition to obtaining transmission service, the transmission service customer shall execute interconnection agreements with the transmission service providers to which it is physically connected. The transmission service customer shall either:

(1) operate as a control area under applicable guidelines adopted by the national reliability organization and the independent system operator for Electric Reliability Council of Texas; or

(2) satisfy its control area requirements, including the provision of all necessary ancillary services by contracting with the

transmission service provider or by purchasing the necessary services from another service provider or non-utility provider of such services, in accordance with good utility practice.

(b) Transmission service provider responsibilities. The transmission service provider will plan, construct, operate and maintain its transmission system in accordance with good utility practice in order to provide transmission service customers with planned transmission service over its transmission system in accordance with Subchapter I, Division 1 of this chapter (relating to Transmission and Distribution). The transmission service provider shall include transmission service customers' load in its transmission system planning and shall, consistent with good utility practice, endeavor to construct and place into service sufficient transmission capacity to deliver power from the resources nominated by a transmission service customer as annual planned resources to serve the customer's load on the same basis as the transmission service provider's delivery of its own nominated generating and purchased resources to its native load customers.

(c) Transmission service customer redispatch obligation. A transmission service customer will redispatch its resources to provide annual planned transmission service to third parties. The redispatch of resources pursuant to Subchapter I, Division 1 of this chapter, shall be on a non-discriminatory basis among all transmission service customers and transmission service providers.

(d) Priority for transmission service applications. Planned transmission service shall have priority over unplanned transmission service, and annual planned transmission service shall have priority over planned transmission service of a shorter duration. Subject to the foregoing priorities, for applications for planned or unplanned transmission service, complete applications filed earlier with the independent system operator shall have priority over applications that are filed later. Where a transmission service customer is using annual planned transmission service for a resource that becomes unavailable due to an unplanned outage, the customer shall have priority, in using the same transmission capacity to transmit power from a replacement resource, over other requests for unplanned transmission service or planned transmission service of a shorter duration.

(e) Construction of new facilities. If additional transmission facilities or interconnections between electric utilities are needed to provide transmission service pursuant to a request for such service, the transmission service providers where the constraint exists shall acquire the facilities necessary to permit the transmission service to be provided, unless the independent system operator determines that redispatch or other more economical means of making transmission capacity available will permit the requested transmission service to be provided. If additional facilities are needed to provide ancillary services to a customer requesting such service, the ancillary service provider shall acquire the facilities necessary to permit the ancillary service to be provided.

(1) If, in order to provide ancillary services, an electric utility must construct new facilities, the ancillary services customer may be required to enter a long- term contract for ancillary service or make a contribution in aid of construction to cover all or a part of the cost of acquiring the new facilities, to the extent that the acquisition of the additional facilities is for the customer's benefit.

(2) When an eligible transmission service customer requests transmission service for a new generating source that is planned to be interconnected with a transmission service provider's transmission network, the transmission service customer shall be responsible for the cost of any transmission facilities needed to provide a direct interconnection from the generating station to the transmission network, but the transmission service provider shall be responsible for the cost of any other transmission system upgrades that may be necessary to accommodate the requested transmission service.

(A) An affected transmission service provider may require the transmission service customer to pay a reasonable deposit or provide another means of security, to cover the costs of planning and licensing any new transmission facilities that will be required in order to provide the requested service.

(B) If the new generating source is completed and the transmission service customer begins to take the requested transmission service, the transmission service provider shall return the deposit or security to the transmission service customer. If the new generating source is not completed and new transmission facilities are not required, the transmission service provider may retain as much of the security as is required to cover the costs it incurred in planning and licensing activities related to the planned new transmission facilities.

(3) In cases not covered by paragraph (2) of this subsection, an eligible transmission service customer that is requesting transmission service may be required to make a contribution in aid of construction to cover all or a part of the cost of acquiring additional facilities, if:

(A) the acquisition of the additional facilities would impair the tax-exempt status of obligations issued by the provider of transmission or ancillary services; or

(B) if the acquisition of the additional facilities is primarily for the benefit of the electric utility, qualifying facility, exempt wholesale generator, or power marketer requesting the transmission service.

(f) Curtailment of service. In an emergency situation, as determined by the independent system operator and at its direction, control-area utilities may interrupt transmission service, if necessary, to preserve the stability of the transmission network and service to customers. Any interruption shall be based on operational factors and shall not accord a higher priority to the electric utility's native load customers than to its customers taking transmission service. Priority shall be accorded to planned transmission service over unplanned transmission service. Service to all customers shall be restored as quickly as possible. The control-area utility shall provide notice of any such interruption to affected wholesale and transmission service customers and remote suppliers of generation. The independent system operator shall report the interruption to the commission, together with a description of the events leading to the interruption, the services interrupted, the duration of the interruption, and the steps taken to restore service.

(g) Filing of contracts. Electric utilities shall file with the commission all new interconnection agreements and agreements involving the sale or purchase of electric utility generation, transmission, or ancillary services at wholesale within 30 days of their execution. Upon a showing of good cause, appropriate portions of the filings required under this subsection may be subject to provisions of confidentiality to protect competitively sensitive information. Interconnection agreements are subject to commission review and approval upon request by any party to the agreement.

§25.196. Functional Unbundling.

(a) Cost separation. Each electric utility in the Electric Reliability Council of Texas shall separate its costs and rates, based on the costs associated with the electric utility's generation, transmission, distribution, and customer-service operations. Unless otherwise directed by the commission, the cost and rate separation requirements prescribed in this section shall not require the statement of unbundled

generation, transmission, distribution, and customer-service rates on retail customer bills.

(b) Separation of functions. Each electric utility subject to this rule that operates a control area shall functionally separate the operation of its transmission facilities and the operation of its wholesale power purchase and sale activities.

(1) Electric utility personnel shall be physically separated to the maximum extent practicable and necessary to accomplish the purposes of this section. Each electric utility subject to this section shall make a filing with the commission showing how it will implement the requirements of this section, including written procedures governing the exchange of information and physical separation of personnel among its functionally separated organizational units. This filing shall be amended if the requirements of this section are amended or the electric utility changes its organization or procedures relating to the requirements of this section.

(2) Electric utilities may request limitations on the requirement to separate their personnel, based on a showing that complete physical separation would impair the reliability of electric service. The electric utility bears the burden of demonstrating that the separation of personnel requirements contained in this rule would impair system reliability.

(3) An electric utility subject to §25.170 of this title (relating to Hearing on the Final Integrated Resource Plan) and any affiliate of such an electric utility may not construct a new generating facility in the electric utility's retail service area, unless the facility is approved in accordance with §25.170 of this title or §25.171 of this title (relating to Certificate of Convenience and Necessity for Generation Facilities).

(c) Standards of conduct. In performing its obligations under Subchapter I, Division 1 of this chapter (relating to Transmission and Distribution), a transmission or ancillary service provider shall apply the provisions of this section in a non- discriminatory manner to all users, including itself. In addition, any electric utility that operates a control area shall comply with the following standards:

(1) The employees of an electric utility that are engaged in wholesale merchant functions (that is, the purchase or sale of electric energy at wholesale), other than purchases required under the Public Utility Regulatory Policies Act, shall not:

(A) conduct transmission system operations or reliability functions;

(B) have preferential access to the electric utility's system control center and other facilities, beyond the access that is available to other market participants;

(C) have preferential access to information about the electric utility's transmission system that is not available to users of the electronic information network established in accordance with Subchapter I, Division 1 of this chapter; or

(D) obtain information about the electric utility's transmission system and offerings of ancillary services, including calculations of available transmission capacity and information concerning curtailments, through means or sources other than the electronic information network operated by the independent system operator.

(2) To the maximum extent practicable, employees of an electric utility engaged in transmission system operations must function independently of employees engaged in wholesale merchant functions and of employees of any affiliate of the electric utility. Employees engaged in transmission system operations may disclose information to employees of the electric utility engaged in merchant functions only through the electronic information network, if the information relates to the electric utility's transmission system or offerings of ancillary services, including calculations of available transmission capacity and information concerning curtailments.

(3) Information concerning transfers of persons between an organizational unit that is responsible for transmission system operations and a unit that is responsible for wholesale merchant functions shall be provided to the independent system operator on a monthly basis and shall be made available, on request, to any market participant.

(4) If an employee of an electric utility discloses or obtains information in a manner that is inconsistent with the requirements in this subsection, the electric utility shall post a notice and details of the disclosure on the information network and shall be subject to an assessment of an administrative penalty under the Public Utility Regulatory Act §15.023.

(5) Employees of an electric utility engaged in transmission operations shall apply the rules in Subchapter I, Division 1 of this chapter, and any tariffs relating to transmission and ancillary service in a fair and impartial manner.

(6) Provisions of this section that allow no discretion shall be strictly applied, and where discretion is allowed, it shall be exercised in a non-discriminatory manner.

(7) This subsection shall not apply to data that does not relate to transmission service operations such as information on human resource policies.

(d) Communications with eligible customers. A transmission or ancillary service provider shall use all reasonable efforts to communicate promptly with all eligible customers to resolve any questions regarding their requests for service in a non- discriminatory manner.

(e) Standard of due diligence. If a transmission or ancillary service provider or customer is required to complete activities or to negotiate agreements as a condition of service, each party shall use due diligence to complete these actions within a reasonable time.

§25.197. ERCOT Independent System Operator.

(a) Purpose. The purpose of the independent system operator is to foster a healthy wholesale market in the Electric Reliability Council of Texas (ERCOT) by maintaining the reliability of the electrical network and facilitating wholesale market transactions.

(b) Governance. The ERCOT independent system operator shall be administered through procedures that allow equal participation by all wholesale market participants and retail customers. The retail customers shall have the same level of representation on the governing board as each of the wholesale market groups.

(c) Functions. The ERCOT independent system operator shall operate an integrated ERCOT electronic transmission information network and carry out the other functions prescribed by this section. The independent system operator's responsibilities shall include, but not be limited to the following:

(1) administering, on a daily basis, the ERCOT transmission tariffs, including determining whether a person is eligible for transmission service;

(2) serving as the single point of contact for the initiation of transmission transactions;

(3) supervising the performance of functions related to the reliability and security of the ERCOT electrical network, including ensuring that control areas perform the instantaneous balancing of ERCOT generation and load and monitoring the adequacy of resources to meet demand;

(4) coordinating the scheduling of ERCOT generation and transmission transactions;

(5) directing the curtailment and redispatch of ERCOT generation and transmission transactions on a non-discriminatory basis to preserve system reliability in emergencies, including determining how any curtailment or redispatch would be accomplished, the cost of the redispatch, and the assignment of redispatch cost responsibility, in accordance with the provisions of Subchapter I, Division 1 of this chapter (relating to Transmission and Distribution);

(6) analyzing, coordinating, and directing the redispatch of ERCOT generation transactions on a non-discriminatory basis for economic purposes to free up transmission capacity, including determining how any curtailment or redispatch would be accomplished, the cost of the redispatch, and the assignment of redispatch cost responsibility, in accordance with the provisions of Subchapter I, Division 1 of this chapter;

(7) implementing the loss compensation mechanism approved by the commission and administering transaction accounting among market participants;

(8) accepting and supervising the processing of all requests for interconnection to the ERCOT transmission system from owners of new generating facilities;

(9) supervising the conduct of any system security study jointly with affected transmission service providers, when a joint study agreement has been executed with a transmission service customer requesting transmission service under Subchapter I, Division 1 of this chapter;

(10) supervising ERCOT transmission system planning, in accordance with subsection (f) of this section; and

(11) administering the alternative dispute resolution procedures in §25.203 of this title (relating to Alternative Dispute Resolution).

(d) Electronic transmission information network. The ERCOT electronic transmission information network shall permit electric utilities, qualifying facilities, power marketers, and exempt wholesale generators to have contemporaneous, real-time access to information concerning the availability of transmission service and the availability and cost of ancillary services on a non- discriminatory basis. Transmission-owning electric utilities in ERCOT shall rely upon this information network to obtain contemporaneous access to information about the ERCOT transmission system.

(1) The ERCOT electronic transmission information network will, at a minimum, provide all information required under any Federal Energy Regulatory Commission (FERC) regulations governing electronic transmission information networks which apply to electric utilities under FERC jurisdiction, subject to appropriate regional variations approved by the FERC. Information that an electric utility is required to make available to market participants in accordance with §25.196 of this title (relating to Functional Unbundling) shall be posted on the electronic information network. The information on the network shall include, but not be limited to:

(A) total and available transfer capability for transmission of energy between ERCOT control areas and to, from, and over the direct-current (DC) interconnections with the Southwest Power Pool;

(B) ERCOT transmission prices;

(C) ancillary service prices, including any pricing discounts for such services;

(D) requests and offers for transmission service and ancillary transmission services on the primary and secondary transmission markets;

(E) transmission scheduling data;

(F) transmission service curtailment and interruption data; and

(G) information necessary to verify redispatch cost calculations.

(2) The methodology used and data required to independently reproduce information related to the total and available transfer capability for the transmission of energy between ERCOT control areas and to, from, and over the DC ties shall be provided upon request to any transmission service customer.

(3) The electronic information system shall also include a capability for posting generation bids and offers.

(4) Electric utilities shall use the electronic information network when offering ancillary services, requesting transmission service, and responding to requests for transmission service. Market participants other than electric utilities may also post offers to sell ancillary services on the electronic information network.

(e) Commercial functions. The ERCOT independent system operator shall not purchase or sell bulk electricity. The ERCOT independent system operator shall not dispatch generation facilities, but shall have full authority to direct the redispatch of generation facilities under the circumstances specified in Subchapter I, Division 1 of this chapter.

(f) Planning. The independent system operator shall supervise ERCOT transmission system planning and exercise comprehensive authority over the planning of bulk transmission projects that affect the transfer capability of the ERCOT transmission system or result in changes to the operational configuration of the ERCOT transmission system. The independent system operator's authority with respect to transmission projects that are local in nature is limited to supervising and coordinating the planning activities of transmission service providers.

(1) The independent system operator shall evaluate and make a recommendation to the commission as to the need for any transmission facility over which it has comprehensive transmission planning authority. A proposal for new transmission facilities subject to the independent system operator's planning authority shall be submitted to the independent system operator at least 60 days prior to the filing of an application for the certification of the transmission facilities with the commission.

(2) A transmission service provider shall coordinate its transmission planning efforts with those of other transmission service providers, insofar as its transmission plans affect other transmission service providers.

(3) Within 120 days of the effective date of this section, the independent service operator shall submit to the commission its proposed guidelines and procedures for implementing this subsection. The independent system operator shall submit to the commission any subsequent revisions or additions to the guidelines and procedures

as they are proposed. The independent system operator may seek input from the commission as to the content and implementation of its guidelines and procedures as it deems necessary.

(g) Information and coordination. Providers of transmission and ancillary services and customers of such service providers shall provide such information as may be required by the independent system operator to carry out the functions prescribed by this section. The ERCOT independent system operator shall have a fiduciary responsibility to maintain the confidentiality of competitively sensitive information entrusted to it by providers of transmission and ancillary services, their customers, and prospective customers. Providers of transmission and ancillary services shall also maintain the confidentiality of competitively sensitive information entrusted to them by the independent system operator or a transmission or ancillary services customer.

(h) Interconnection standards. In performing its functions related to the reliability and security of the ERCOT electrical network, the ERCOT independent system operator may prescribe reliability and security standards for the interconnection of generating facilities that use the ERCOT transmission network.

(i) Reports. The independent system operator shall periodically file with the commission reports concerning the reliability of the ERCOT electrical network and its transmission planning efforts, including a list of any transmission projects that it recommends.

(j) Disputes. Any disputes regarding the administration, procedures, decisions, or conduct of the ERCOT independent system operator may be submitted to the commission for resolution.

§25.198. Initiating Transmission Service.

(a) Initiating service. Where a transmission service customer uses the transmission facilities in the Electric Reliability Council of Texas (ERCOT), whether its own facilities or those of another transmission service provider, in serving its native load or in making sales of energy to a third party, it shall apply for transmission service pursuant to this section. Transmission service customers and transmission service providers shall provide the information that is required under this section to the independent system operator.

(b) Conditions precedent for receiving service. Subject to the terms and conditions of this section, the transmission service provider will provide transmission service to any eligible customer, provided that:

(1) the eligible customer has completed an application for service under subsection (c), (d), or (f) of this section;

(2) the eligible customer and the transmission service provider have completed the technical arrangements set forth in subsection (g) of this section;

(3) the eligible customer has an executed interconnection agreement for service under this section or, if necessary, requested in writing that the transmission service provider file a proposed unexecuted agreement with the commission;

(4) the eligible customer has arranged for ancillary services necessary for the transaction; and

(5) if the eligible customer is responsible for serving wholesale load, it shall maintain a power factor of 95% or greater at each point at which a load is connected to the transmission system.

(c) Application procedures for annual planned transmission service. An eligible customer requesting annual planned transmission service under this section must submit an application for service by October 1 in the year preceding the year in which service is to commence. A completed application shall provide information required in paragraph (2) of this subsection.

(1) The eligible customer or transmission service provider shall provide the information that is required under paragraph (2) of this subsection to the ERCOT independent system operator. The independent system operator shall provide to affected transmission service providers the information needed for them to evaluate the request.

(2) The following information shall be provided in connection with an application for service under this section:

(A) the identity, address, telephone number and facsimile number of the party requesting service and the name of a contact person to deal with matters relating to the application;

(B) a statement that the party requesting service is, or will be upon commencement of service, an eligible customer under Subchapter I, Division 1 of this chapter;

(C) a description of the load to be served (The description should include a five-year forecast of summer and winter peak load and resource requirements beginning with the first year after the service is scheduled to commence. The independent system operator will establish the nature, detail and format of the information that must be provided);

(D) a description of planned resources (current and five-year projection), which shall include, for each resource:

(i) location, unit size and amount of capacity from a unit to be designated as a resource,

(ii) reactive power capability (both leading and lagging) of all generators,

(iii) operating restrictions, including:

(I) any periods of restricted operations during the year;

(II) minimum loading level of unit,

(III) normal operating level of unit, and

(IV) any must-run unit designations required for system reliability or contract reasons,

(iv) a description of purchased power designated as a resource, including source of supply, control area location, transmission arrangements and, if applicable, delivery points into ERCOT,

(v) to the extent arrangements have been made for ancillary services, the identity of the providers of ancillary services,

(vi) the service commencement date of the requested transmission service and service termination date or duration of service,

(vii) where the transmission service customer serving the load does not own the resource, a copy of the contract between the transmission service customer and the owner of the resource, and

(viii) any other information designated by the independent system operator as reasonably necessary to evaluate the ability of the interconnected ERCOT transmission systems to reliably accommodate the requested service.

(3) The independent system operator must acknowledge the request within ten days of receipt. The acknowledgment must include a date by which a response will be sent to the eligible

customer and a statement of any fees associated with responding to the request (e.g., system studies).

(4) If an application fails to meet the requirements of this subsection, the independent system operator shall notify the eligible customer requesting service within 15 days of receipt and specify the reasons for such failure. Wherever possible, the independent system operator will attempt to remedy deficiencies in the application through informal communications with an eligible customer.

(5) If a system security study is required, upon approval of the requesting transmission service customer, the independent system operator or transmission service provider will initiate such a study. Should this study conclude that the transmission system will be adequate to accommodate the request for service, either in whole or in part, or that no costs are likely to be incurred for new transmission facilities or upgrades, the transmission service will be initiated or tendered, within 15 days of completion of the system security study.

(6) If the independent system operator determines as a result of the system security study that additions or upgrades to the transmission system are needed to supply the transmission service customer's forecasted transmission requirements, the independent system operator or transmission service provider will, upon the approval of the requesting transmission service customer, initiate a facilities study. When completed, a facilities study will include an estimate of the cost of any required facilities or upgrades and the time required to complete such construction and initiate the requested service.

(7) Unplanned transmission service transactions of a duration of 30 days may be converted to planned transmission service transactions upon approval of an application submitted pursuant to subsection (d) of this section. To the extent that such a conversion requires more megawatt miles than those offset by terminating a previously approved planned transaction, the additional megawatt miles may be purchased from transmission service providers or from other transmission service customers. The participants to such a transaction are responsible for the costs of feasibility analysis.

(d) Application procedures for other planned transmission service. An eligible customer may request monthly, weekly, or daily planned transmission service in connection with a change in its designated planned resources or other transmission needs. The independent system operator may establish hourly planned transmission service, if it deems that it is feasible.

(1) The independent system operator shall determine maximum and minimum lead times for submitting requests for planned transmission service other than annual planned transmission service.

(2) The application must provide information similar to that required for annual planned transmission service for the period that the planned transmission service is to be effective.

(3) When the independent system operator determines that the service can be provided and a system security study is not required it will notify the requesting transmission service customer and tender transmission service.

(4) The independent system operator may develop simplified methods of determining transmission charges for planned transmission service under this subsection, consistent with the pricing method prescribed in §25.192 of this title (relating to Transmission Service Rates). The transmission charges shall be subject to commission approval.

(e) Planned resources. Planned resources must be designated by transmission service customers as required by subsection (c) of this section in a timely fashion on an annual planning basis such that deficiencies in the ERCOT transmission system may be identified and plans may be formulated by the independent system operator and transmission service providers to correct these deficiencies.

(f) Application for unplanned transmission service. Eligible customers wishing to use the ERCOT transmission system for unplanned transmission service must submit a request for service to the independent system operator. The duration for unplanned transactions is from one hour to 30 days. In no case shall unplanned transactions be accepted for consideration more than 30 days in advance of the actual commencement of service.

(1) Requests for service must be submitted with at least the lead times prescribed in subparagraphs (A)-(D) of this paragraph:

(A) for hourly transactions, at least 20 minutes in advance,

(B) for daily transactions, no later than 2:00 p.m. the day before the transaction is to commence,

(C) for weekly transactions, at least two days in advance, and

(D) for monthly transactions, at least four days in advance.

(2) A response to a request for service will be made by the appropriate transmission operators as soon as practical after the request is made. Unless the parties agree to a different time frame, responses to requests for unplanned transmission service shall be provided no later than the times prescribed in subparagraphs (A)-(D) of this paragraph:

(A) for hourly transactions, within 10 minutes of the request for service,

(B) for daily transactions, within four hours of the request for service,

(C) for weekly transactions, within 24 hours of the request for service, and

(D) for monthly transactions, within two days of the request for service.

(3) A request for a transaction will be analyzed first for the next hour and allowed to start if no violations of the transmission operating criteria are anticipated.

(4) The following information shall be provided in connection with an application for unplanned transmission service:

(A) the identity, address, telephone number and facsimile number of the party requesting service and contact person to deal with questions concerning the application for service;

(B) a statement that the party requesting service is, or will be upon commencement of service, an eligible customer under this section;

(C) a description of the load to be served and the resources serving the load, which shall include, for each resource:

(i) location, unit size and amount of capacity from that unit to be designated as resource,

(ii) reactive power capability (both leading and lagging) of all generators,

(iii) operating restrictions, including minimum loading level of unit, and normal operating level of unit,

(iv) a description of purchased power designated as a resource including source of supply, control area location, and, if applicable, delivery points into ERCOT,

(v) to the extent arrangements have been made for ancillary services, the identity of the providers of ancillary services,

(vi) when service is to begin and the anticipated duration,

(vii) if the unplanned transmission service will result in the transmission service customer's using different resources than its planned resources, a statement of the effect of the unplanned transmission service on the use of the planned resources.

(5) The independent system operator will make every reasonable attempt to begin the transactions as soon as possible to conform to the requested commencement time. Operating restrictions, anticipated redispatch needs, the potential for curtailment, and other related information, if known, will be communicated to the requester to see if the transactions are still feasible for the eligible customer given the known restrictions.

(6) The independent system operator, at its discretion, may take requests outside the timeframes prescribed in paragraph (1) of this subsection, if practical given the current or expected operating conditions on the transmission service providers' systems. The independent system operator may set longer notification and response times than those prescribed in paragraphs (1)and (2) of this subsection, during a system emergency, and shall periodically review the notification and response times and may propose to the commission revisions to those times. The independent system operator may put such revisions into effect, pending action by the commission on its proposal.

(g) Technical arrangements to be completed prior to commencement of service. Service under this section shall not commence until the transmission service provider and the transmission service customer, or a third party, have completed installation of all equipment specified under the interconnection agreement, consistent with guidelines adopted by the national reliability organization and the independent system operator. The transmission service provider shall exercise reasonable efforts, in coordination with the transmission service customer, to complete such arrangements as soon as practical prior to the service commencement date.

(h) Transmission service customer facilities. The provision of transmission service shall be conditioned upon the transmission service customer's constructing, maintaining and operating the facilities on its side of each point of interconnection that are necessary to reliably interconnect and deliver power from a resource to the transmission system and from the transmission system to the transmission service customer's loads.

(i) Transmission arrangements for resources located outside of ERCOT. It shall be the transmission service customer's responsibility to make any transmission arrangements necessary for delivery of capacity and energy produced from a resource outside of ERCOT to the interconnection with the Southwest Power Pool. The independent system operator and transmission service provider shall undertake reasonable efforts to assist the transmission service customer in coordinating and scheduling arrangements with connecting systems within ERCOT.

(j) Termination of planned transmission service. A transmission service customer may terminate planned transmission service after providing the transmission service provider with written notice of the transmission service customer's intention to terminate. A transmission service customer's provision of notice to terminate service under this section shall not relieve the transmission service customer of its obligation to pay transmission service providers any rates, charges, or fees, including contributions in aid of construction, for service previously provided under the applicable interconnection service agreement, and which are owed to transmission service providers as of the date of termination.

§25.199. Transmission Facilities or Upgrades for New Planned Resources.

(a) System security study. When a transmission service customer applies for planned transmission service for a new resource under Subchapter I, Division 1 of this chapter (relating to Transmission and Distribution), the transmission service customer and all affected transmission service providers shall execute a joint study agreement for performing a system security study to determine the feasibility of integrating such new resource into the transmission service providers' transmission system, and whether any upgrades of facilities providing transmission or ancillary services are needed. The transmission service provider will perform the security study under the supervision of the independent system operator.

(1) In performing the system security study, transmission service providers shall apply the same methods and criteria that they employ in integrating new resources they acquire to serve planned uses of the transmission system or integrating new loads.

(2) The transmission service provider shall complete the system security study within 60 days after the receipt of the executed study agreement and receipt from the customer of all the data necessary to complete the study. In the event a transmission service provider is unable to complete its portion of the study within the 60 day period, the transmission service provider will provide the transmission service customer a written explanation of when the study will be completed and the reasons for the delay.

(3) The requesting transmission service customer shall be responsible for the cost of the system security study and shall be provided with the results thereof, including relevant workpapers.

(4) The transmission service providers will use a methodology consistent with good utility practice to conduct a system security study and shall coordinate with other transmission service providers as needed in determining the most efficient means for all electric utilities in the Electric Reliability Council of Texas (ERCOT) to assure feasibility of transmission service.

(b) Facilities study. Based on the results of the system security study, the transmission service provider also may perform, pursuant to an executed facilities study agreement with the transmission service customer, a facilities study addressing the detailed engineering, design and cost of transmission or ancillary services facilities required to provide the requested transmission service.

(1) The facilities study will be completed as soon as reasonably practicable. Using the information in the system security study and the facilities study, the transmission service provider shall notify the transmission service customer whether it considers that a contribution in aid of construction is appropriate and the amount of the contribution that the transmission service customer should make.

(2) The transmission service customer shall be responsible for the reasonable cost of the facilities study pursuant to the terms of the facilities study agreement and shall be provided with the results of the facility study, including relevant workpapers.

(3) The transmission service provider shall be responsible for the costs of any facilities study undertaken to determine the engineering, design and cost of facilities associated with the transmission service provider's addition of new resources used to serve the transmission service provider's load. Such costs will be separately booked by the transmission service provider.

(c) Changes in service requests. A transmission service customer's decision to cancel or delay the addition of a new planned resource shall not relieve the transmission service customer of the obligation to pay a contribution in aid of construction to cover the costs of transmission facilities constructed by a transmission service provider. Upon receipt of a transmission service customer's written notice of such a cancellation or delay, a transmission service provider will use the same reasonable efforts to mitigate the costs and charges owed by the transmission service customer to the transmission service provider as it would to reduce its own costs and charges.

(d) Annual load and resource information updates. A transmission service customer shall provide the independent system operator with annual updates of load and resource forecasts consistent with those included in its application for transmission service by October first of each year. The transmission service customer also shall provide the independent system operator with timely written notice of material changes in any other information provided in its application relating to the transmission service customer's planned load, resources, its transmission system or other aspects of its facilities or operations affecting the transmission service provider's ability to provide reliable service under Subchapter I, Division 1 of this chapter.

§25.200. Load Shedding, Curtailments, and Redispatch.

(a) Procedures. Transmission service providers and the independent system operator shall establish non-discriminatory emergency load shedding and curtailment procedures for responding to emergencies on the transmission system.

(1) Transmission service providers and transmission service customers will comply with the load shedding and curtailment procedures established under this section.

(2) Transmission service providers and customers will implement such programs during any period when the independent system operator determines that a transmission capacity constraint exists and such procedures are necessary to alleviate the constraint.

(3) The transmission service provider will notify the independent system operator in a timely manner of any scheduled transmission facility interruption (e.g., scheduled maintenance).

(b) Transmission constraints. During any period when the independent system operator determines that a transmission constraint exists on the transmission system, and such constraint may impair the reliability of a transmission service provider's system or adversely affect the operations of either a transmission service provider or a transmission service customer, the independent system operator will take whatever actions, consistent with good utility practice, that are reasonably necessary to maintain the reliability of the transmission service provider's system and avoid interruption of service. In these circumstances, transmission service providers and transmission service customers shall take such action as the independent system operator directs.

(1) The independent system operator shall determine whether a proposed redispatch is cost-effective and which electric utility shall redispatch its generating resources to facilitate a transaction.

(2) To the extent the independent system operator determines that the reliability of the transmission system can be maintained by redispatching resources, or when redispatch arrangements are necessary to facilitate generation and transmission transactions for an eligible customer, a transmission service provider or transmission service customer will initiate procedures to redispatch its resources, as directed by the independent system operator. The obligation to redispatch resources includes the obligation to redispatch non-utility resources that a transmission service customer is relying on.

(3) To the greatest extent possible, any redispatch shall be made on a least-cost non-discriminatory basis. Any redispatch under this section will provide for equal treatment among transmission service customers. If the independent system operator determines that a transmission service provider will not have adequate transmission capacity to satisfy the full amount of a valid request for planned transmission service, the transmission service provider nonetheless shall be obligated to offer and provide the portion of the requested planned transmission service that can be accommodated without addition of any facilities. This obligation includes a duty to redispatch resources to increase the level of planned transmission service that may be provided. However, the transmission service provider shall not be obligated to provide transmission service, to the extent that the service requires the addition of facilities or upgrades to the transmission system, until such facilities or upgrades have been placed in service.

(c) Cost responsibility for relieving capacity constraints. Electric utilities in the Electric Reliability Council of Texas (ERCOT) shall provide redispatch services on a non-discriminatory basis to all wholesale market participants when necessary to preserve system reliability or to alleviate transmission constraints that impede wholesale generation and transmission transactions. The independent system operator shall keep a record of the circumstances requiring redispatch.

(1) The price for redispatch services for annual planned transactions shall be based on the cost of providing the service, which shall be allocated among transmission service customers in proportion to each customer's share of the transmission cost of service, as determined by the commission under §25.192 of this title (relating to Transmission Service Rates). For redispatch required to accommodate an annual planned transaction, the electric utility providing the redispatch service shall provide information documenting the costs incurred to provide the service to the independent system operator. This information shall be available to affected persons.

(2) The cost of redispatch services for other transactions (including planned transmission service of a duration of less than a year) shall be borne by the transmission service customer for whose benefit the redispatch is made. Electric utilities shall provide binding advance bids for redispatch services for unplanned transactions. The participants in unplanned transactions shall be promptly notified by the independent system operator that their transactions may be or have been continued through redispatch; shall be informed of the cost of the redispatch measures; and shall have the opportunity to abandon or curtail their transactions to avoid additional redispatch costs.

(3) ERCOT utilities that are required to provide ancillary services under Subchapter I, Division 1 of this chapter (relating to Transmission and Distribution), shall include in their tariffs a standard methodology for calculating redispatch costs.

(4) To the extent that non-utility resources are redispatched by an electric utility pursuant to this subsection, the compensation for such services shall be consistent with this subsection.

(d) System reliability. Notwithstanding any other provisions of this section, the transmission service provider reserves the right, consistent with good utility practice and on a non-discriminatory basis, to interrupt transmission service without liability on the transmission service provider's part for the purpose of making necessary adjustments to, changes in, or repairs to its lines, substations and other facilities, or where the continuance of transmission service would endanger persons or property.

(1) In the event of any adverse condition or disturbance on the transmission service provider's system or on any other system directly or indirectly interconnected with the transmission service provider's system, the transmission service provider, consistent with good utility practice, also may interrupt transmission service on a non-discriminatory basis in order to limit the extent or damage of the adverse condition or disturbance, to prevent damage to generating or transmission facilities, or to expedite restoration of service.

(2) The transmission service provider will give the independent system operator and transmission service customer as much advance notice as is practicable in the event of such interruption, and shall restore service with due diligence.

(3) Any interruption of transmission service and any restoration of service shall not be discriminatory relative to the transmission service provider's use of the transmission system on behalf of its native load customers.

(4) The transmission service customer's failure to respond to established emergency load shedding and curtailment procedures to relieve emergencies on the transmission system may result in the transmission service customer being deemed by the transmission service provider to be in default and subject to an assessment of an administrative penalty under the Public Utility Regulatory Act §15.023.

§25.201. Ancillary Services.

(a) Ancillary services. Each electric utility in the Electric Reliability Council of Texas (ERCOT) that operates a control area shall provide the following ancillary services:

(1) Static scheduling is a service that establishes specific hourly schedules for the transmission of power, by coordinating the event among the affected control areas.

(2) Dynamic scheduling is the provision of the remote load regulation service for a load or remote generation-schedule imbalance service for a generator.

(3) Load regulation service provides intra-hour changes in the output of generating units to match changes in the load being served.

(4) Generation-schedule imbalance service compensates for energy mismatches between the scheduled and actual transmission between the seller of power and a provider of transmission service in the generation host's control area.

(5) Load-schedule imbalance service compensates for energy mismatches between the scheduled and actual transmission between the seller of power and a provider of transmission service in the load host's control area.

(6) Emergency energy service consists of scheduling services, capacity and energy required to replace a capacity resource in an emergency, at the direction of the independent system operator.

(b) Reserve generation services. Each electric utility in ERCOT that operates a control area shall provide the following services, unless the commission otherwise orders:

(1) Responsive reserve consists of the daily operating reserves that are intended to help restore the frequency of the interconnected transmission system within the first few minutes of an event that causes a significant deviation from the standard frequency. Responsive reserves may be provided by unloaded generation facilities that are on line, interruptible load controlled by high set under-frequency relays, or from a direct-current (DC) tie response that stops frequency decay.

(2) Spinning reserve consists of the net generation capability on line that is not loaded, but could be loaded, and capability of a DC tie that can be utilized in a specified time.

(3) Scheduled backup service consists of scheduling services, capacity and energy required to replace a capacity resource on a planned or scheduled basis.

(4) Automatic backup service consists of scheduling services, capacity and energy required to replace a resource on an unscheduled basis.

(5) Load following service provides hour-to-hour changes in the output of generating unit to match changes in the load being served.

(c) Tariffs. Each electric utility that provides ancillary services shall file a tariff for such services and shall take such services for its own wholesale and retail operations, in accordance with the terms of its tariff for ancillary services.

(1) If a customer requests a service not listed in subsection (a) or (b) of this section or an electric utility intends to offer a service not listed in subsection (a) or (b) of this section, the electric utility may supply the service. In the case of a service requested by a customer, the definition and price may be determined by negotiations between the service provider and the customer. The service may be provided immediately upon the execution of a contract between the parties, but the service will be subject to approval by the commission.

(2) An electric utility that provides a service not specified in its tariffs shall file a tariff or modification to a tariff within 30 days of initiating the service and shall makes the service available to all wholesale market participants on a non-discriminatory basis. Any offer of a new service shall be posted on the ERCOT electronic transmission information network.

(3) All ancillary services shall be discretely priced and separately provided on a non-discriminatory basis to all wholesale market participants.

(4) An electric utility may request limitations on its obligation to provide ancillary services, based on the size of the electric utility and the cost of acquiring the equipment necessary to provide a service, based on its use of tax-exempt financing instruments, or for other good cause. The electric utility has the burden of establishing that any such limitation is reasonable and shall include the limitation in its tariffs.

(d) Provision of ancillary services by other service providers. An electric utility that is not required to provide an ancillary service may file a tariff to provide such a service. Any generator may compete to provide ancillary services to transmission service customers.

(e) Area control service. The independent system operator shall develop protocols for an area control service that will permit a transmission service customer to buy scheduling, imbalance, and regulation services, with a minimal use of the service provider's generation capacity.

(1) When protocols are developed for area control service, control area utilities shall file a tariff for the service and provide it to eligible customers.

(2) This subsection does not require a control area utility to provide area control service to another control area utility.

(f) Charges for ancillary services. Ancillary services, other than static and dynamic scheduling, may be offered at rates that are negotiated with the customer, subject to a price floor and ceiling and subject to the non-discrimination requirements in Subchapter I, Division 1 of this chapter (relating to Transmission and Distribution).

(1) For services that are related to the production of electricity, the price ceiling for capacity shall be based on the electric utility's average embedded cost of generating capacity, and the price floor will be calculated using the methodology prescribed in Public Utility Regulatory Act (PURA) §36.007. An ancillary service provider may not impose more than one capacity charge for capacity-related ancillary services associated with a single transaction, if the services may be provided by the same generating capacity.

(2) Rates for static and dynamic scheduling shall be established on the basis of the cost of providing the service.

(3) Offers to supply an ancillary service must be made available to all wholesale market participants on a non-discriminatory basis. Ancillary service providers shall post on the ERCOT electronic information network on a contemporaneous basis any ancillary services offered to persons buying or selling electricity in the bulk power market at less than the ceiling price established in accordance with this section. The service provider shall offer comparable rates on all services to similarly-situated transmission service customers on a non-discriminatory basis; in particular, if a service provider offers an ancillary service associated with a transaction, it must make that same offer of service available to all parties interested in that transaction on a non-discriminatory basis. A charge for an ancillary service that exceeds the floor but does not exceed the ceiling established for such a services in accordance with this section shall not be deemed a discount under PURA §36.007.

(4) An electric utility may not require the purchase of generation services from it as a condition for the provision of ancillary services or for discounts on such services. The purchase of power from a source shall not be contingent on purchase of ancillary services from the same source. Bids or offers for ancillary services shall not be bundled with a power sale.

(5) Rates for ancillary services shall be prorated on a monthly, weekly, daily and hourly basis.

(6) Three-fourths of an electric utility's margins from the sale of ancillary services shall be credited to native-load customers.

(g) Responsibility for ancillary services. A transmission service customer is responsible for obtaining or providing necessary ancillary services. The independent system operator shall assess whether an eligible transmission service customer has secured ancillary services that are adequate for a proposed transaction, shall notify the transmission service customer if additional ancillary services are needed, and shall notify affected transmission service providers of the ancillary service arrangements that the customer has made, including the services being provided and the identity of the service providers.

(1) A transmission service customer may provide the ancillary services necessary for prudent electric utility operation by purchasing the services from the transmission service provider or from another supplier, or supplying the service to itself. A transmission service provider shall not unreasonably refuse to accept contractual arrangements with another entity for ancillary services. The independent system operator shall foster the provision of ancillary services by non-utility suppliers.

(2) A person who requires ancillary services to utilize transmission service within ERCOT or to transmit power across the interconnection with the Southwest Power Pool is an eligible customer under this section. An eligible customer includes the electric utility (for its own use of the service), any other electric utility, a federal power marketing agency, exempt wholesale generator, qualifying facility, or power marketer. An eligible customer may designate an agent to represent it in making arrangements for ancillary services under this section.

(h) Initiating service. In order to receive ancillary services under this section, the eligible customer shall:

(1) complete an application for service as provided under subsection (i) of this section;

(2) complete the technical arrangements set forth in subsection (j) of this section; and

(3) execute a service agreement for service under this section, or request in writing that the electric utility file a proposed unexecuted service agreement with the commission.

(i) Application procedures. An eligible customer requesting service under this section must submit an application to the service provider.

(1) A completed application shall provide the following information:

(A) the identity, address, telephone number, and facsimile number of the party requesting service;

(B) a statement that the party requesting service is, or will be upon commencement of service, an eligible service customer under this subsection;

(C) the service requested, its commencement date and the term of the requested service.

(2) Requests for ancillary services must be submitted with at least the lead time prescribed as follows:

(A) to support hourly transactions, at least 20 minutes in advance of the commencement of the transaction;

(B) to support daily transactions, no later than 2:00 p.m. the day before the transaction is to commence;

(C) to support weekly transactions, at least two days in advance;

(D) to support monthly transactions, at least four days in advance; and

(E) to support planned annual transactions, at least 15 days in advance.

(3) If an application fails to meet the requirements of this section, the service provider shall notify the eligible customer requesting service and specify the reasons of such failure. A service provider's response to a request under this subsection must include a statement of any fees associated with responding to the request (e.g., system studies).

(4) Unless the parties agree to a different time frame, responses to requests for ancillary services shall be provided by the electric utility to the transmission service customer no later than the time prescribed in subparagraphs (A)-(E) of this paragraph:

(A) for hourly transactions, within 10 minutes of the request;

(B) for daily transactions, within four hours;

(C) for weekly transactions, within 24 hours;

(D) for monthly transactions, within two days; and

(E) for planned annual transactions, within seven days.

(5) Wherever possible, the electric utility will attempt to remedy deficiencies in the application through informal communications with the eligible customer.

(6) The ancillary service provider will not divulge information from the application to its marketing personnel, its affiliates, or persons buying or selling electricity in the bulk power market.

(7) The independent system operator may set longer notification and response times than those prescribed in paragraphs (2) and (4) of this subsection, during a system emergency, and shall periodically review the notification and response times and may propose to the commission revisions to those times. The independent system operator may put such revisions into effect, pending action by the commission on its proposal.

(j) Technical arrangements to be completed prior to commencement of ancillary service. The provision of ancillary service shall be conditioned upon construction, maintenance and operation of facilities necessary to reliably interconnect and receive service from the ancillary service provider consistent with good utility practice. Additional requirements may be applied by an electric utility only if they are reasonably and consistently imposed to ensure the reliable operation of the systems of affected electric utilities and service providers, are applied in a non-discriminatory manner, and have been approved by the independent system operator. The ancillary service provider shall exercise reasonable efforts, in coordination with the customer, to complete such arrangements as soon as practical prior to the service commencement date.

(k) Termination of service. A customer may terminate service under this subsection following written notice of the customer's intention to terminate. A customer's provision of notice to terminate service under this section shall not relieve the customer of its obligation to pay the service provider any rates, charges, or fees, including contributions in aid of construction, for service previously provided under the applicable service agreement or the operating agreement, and which are owed to the service provider as of the date of termination; nor shall such a notice relieve the customer of its obligations under a long-term contract with the service provider.

(l) Notification. The customer or service provider of any ancillary service shall report to the independent system operator the identity of the provider and user of such service and the non-price terms and conditions.

§25.202. Billing and Payment for Transmission Service and Ancillary Services.

(a) Billing and payment. Within a reasonable time after the first day of each month, the service provider shall submit an invoice to the customer for the charges for all services furnished under this section during the preceding month.

(1) The invoice shall be paid to the service provider by the customer so that the service provider will receive the funds by the 20th calendar day after the date of issuance of the invoice, unless the provider and the customer agree on another mutually acceptable deadline. All payments shall be made in immediately available funds payable to service provider, or by wire transfer to a bank named by the service provider.

(2) Interest on any unpaid amount shall be calculated in accordance with the methodology specified for interest on overbillings and underbillings in §23.45(h) of this title (relating to Billing). Interest on delinquent amounts shall be calculated from the due date of the bill to the date of payment. When payments are made by mail, bills shall be considered as having been paid on the date of receipt by the service provider.

(3) In the event the customer fails, for any reason other than a billing dispute as described in subparagraph (A) of this paragraph, to make payment to the service provider on or before the due date, and such failure of payment is not corrected within 30 calendar days after the service provider notifies the customer to cure such failure, a default by the customer shall be deemed to exist.

(A) Upon the occurrence of a default, the service provider may initiate a proceeding with the commission to terminate service. In the event of a billing dispute between the service provider and the customer, the service provider will continue to provide service during the pendency of the proceeding, as long as the customer:

(i) continues to make all payments not in dispute; and

(ii) pays into an independent escrow account the portion of the invoice in dispute, pending resolution of such dispute.

(B) If the transmission service customer fails to meet the requirements in subparagraph (A) of this paragraph, then the service provider will provide notice to the customer and to the commission of its intention to terminate service.

(C) Any dispute arising in connection with the termination or proposed termination of service shall be referred to the alternative dispute resolution process described in §25.203 of this title (relating to Alternative Dispute Resolution).

(4) Any person who knowingly makes use of an ancillary service required by the independent system operator without the agreement of the party providing that service shall pay to such service provider an amount equal to three times the otherwise applicable charge. In no case shall a service provider knowingly provide such an ancillary service without prior arrangements with the customer, nor shall a service provider unilaterally impose such an ancillary service on an unwilling purchaser.

(b) Indemnification and liability.

(1) Neither a customer nor service provider shall be liable to the other for damages for any act that is beyond such party's control, including any event that is a result of an act of God, labor disturbance, act of the public enemy, war, insurrection, riot, fire, storm or flood, explosion, breakage or accident to machinery or equipment, a curtailment, order, regulation or restriction imposed by governmental, military, or lawfully established civilian authorities, or by the making of necessary repairs upon the property or equipment of either party.

(2) Notwithstanding the provisions of the foregoing paragraph, a transmission service customer and service provider shall assume all liability for, and shall indemnify each other for, any losses resulting from negligence or other fault in the design, construction, or operation of their respective facilities. Such liability shall include a transmission service customer or service provider's monetary losses, costs and expenses of defending an action or claim made by a third person, payments for damages related to the death or injury of any person, damage to the property of the service provider or transmis-

sion service customer, and payments for damages to the property of a third person, and damages for the disruption of the business of a third person. This paragraph does not create a liability on the part of a service provider or transmission service customer to a retail customer or other third person, but requires indemnification where such liability exists. The indemnification required under this paragraph does not include responsibility for the service provider's or transmission service customer's costs and expenses of prosecuting or defending an action or claim against the other, or damages for the disruption of the business of the service provider or customer. The limitations on liability set forth in this subsection do not apply in cases of gross negligence or intentional wrongdoing.

(c) Creditworthiness for transmission service and ancillary services. For the purpose of determining the ability of a customer to meet its obligations related to transmission and ancillary services and any other obligation in Subchapter I, Division 1 of this chapter (relating to Transmission and Distribution), a service provider may require reasonable credit review procedures. This review shall be made in accordance with standard commercial practices.

(1) The service provider may require a customer to provide and maintain in effect during the term of service, an unconditional and irrevocable letter of credit in a reasonable amount as security to meet its responsibilities and obligations under Subchapter I, Division 1 of this chapter, or an alternative form of security proposed by the customer and acceptable to the service provider and consistent with commercial practices established by the Uniform Commercial Code that reasonably protects the service provider against the risk of non-payment.

(2) If a transmission service customer is creditworthy, no letter of credit or alternative form of security shall be required.

§25.203. Alternative Dispute Resolution.

(a) Obligation to use alternative dispute resolution. Subject to the right to seek direct commission review pursuant to subsection (i) of this section, in the event that a dispute arises over the provision of transmission service or ancillary services or the pricing or other terms or conditions of such services, the parties to the dispute shall engage in mediation or other alternative means for resolving the dispute, prior to filing a complaint with the commission.

(b) Referral to senior representatives. Such disputes shall be referred for resolution to a designated senior representative of each of the parties to the dispute. Such representatives shall make a good faith effort to resolve the dispute on an informal basis as promptly as practicable. In attempting to resolve the dispute within a mutually agreeable time period, they may seek the informal advice of the independent system operator regarding resolution of the dispute. The informal advice of the independent system operator is not binding on either party.

(c) Mediation or arbitration. In the event parties are unable to resolve the dispute under subsection (b) of this section, the parties shall either refer the matter to arbitration in accordance with the procedures in this subsection or, upon agreement of all parties, shall engage in mediation with the assistance of a neutral third party of their choice who has training or experience in mediation.

(1) The independent system operator shall administer the arbitration. The independent system operator shall maintain a commission-approved list of qualified persons available to serve on arbitration panels who are knowledgeable in electric utility matters, including electricity transmission and bulk power issues, to be selected from a list of persons proposed by owners and users of the transmission system wishing to participate in the development of the list. The independent system operator shall select at least one name submitted by each stakeholder for the list. The independent system operator shall also maintain a separate list of attorneys experienced in arbitration who may be available to chair the arbitration panels.

(2) A party shall initiate arbitration by filing a letter with the independent system operator requesting that arbitration be scheduled. A copy of the letter shall be served upon the other party to the dispute at the same time the letter is filed with the independent system operator. The independent system operator shall provide the parties the list of persons qualified to serve on arbitration panels and list of persons available to chair arbitration panels, within ten working days of receipt of the letter.

(3) Only parties to the dispute may participate in the arbitration.

(d) Arbitration panel. Any arbitration initiated under this section shall be conducted before a three-member arbitration panel. Each party shall choose one arbitrator from the approved list of panel members. In the event there are more than two parties to the dispute, the parties shall jointly select the two arbitrators. The two arbitrators chosen by the parties shall choose the chairman of the arbitration panel. If the two arbitrators chosen by the parties are unable to agree on the selection of a chairman, they will be dismissed and the parties shall select two different arbitrators from the approved list. The arbitrators are not required to choose the chairman from the names of persons on the independent system operator's list of panel members so long as the person chosen is an attorney who is qualified as an arbitrator. Panel members chosen shall not have any current or past substantial business or financial relationships with any party to the arbitration (other than previous arbitration experience). The chairman of the panel shall make all necessary arrangements for arbitration to commence within ten working days of completion of the panel.

(e) Procedures. The arbitrators shall provide each of the parties an opportunity to be heard and, except as otherwise provided herein, shall generally conduct the arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association and any applicable commission rules. The panel may request that the parties provide additional technical information relevant to the dispute. The arbitration panel shall render a decision within 30 calendar days from the closing of the evidentiary record of the arbitration and shall notify the parties in writing of such decision and the reasons therefor. The decision shall not be considered precedent in any future proceeding.

(f) Basis for decision. The arbitrators shall be authorized only to interpret and apply the provisions of the commission's rules relating to transmission and ancillary services, the independent system operator's rules, the electric utility's transmission tariff, and any service agreement entered into under that tariff and shall have no power to modify or change any of the above in any manner.

(1) The arbitrators may agree with the positions of one or more of the parties, or may recommend a compromise position.

(2) The arbitration panel decision shall be filed in the commission's Central Records and shall be considered by the commission in preparing a Preliminary Order, should either party file a complaint regarding the arbitrated matters. The complaint shall be docketed and may be referred to the State Office of Administrative Hearings. The decision may be admitted in evidence in any such complaint proceeding.

(g) Costs. Each party shall be responsible for the following costs, if applicable:

(1) its own costs incurred during the arbitration process;

(2) its pro rata share of the costs of the three arbitrators, pooled and shared evenly among the parties.

(h) Effect of pending arbitration. The transaction which is the subject of the dispute shall be allowed to go forward pending the resolution of the dispute to the extent system reliability is not affected.

(i) Effect on rights under law. Nothing in this section shall restrict the rights of any party to file a complaint with the commission under relevant provisions of the Public Utility Regulatory Act or with the Federal Energy Regulatory Commission under the Federal Power Act or the right of an electric utility to seek changes in the rates or terms for transmission or ancillary services, following the completion of the alternative dispute resolution procedures in this section.

(1) Use or application of the arbitration provisions in this subsection does not affect the jurisdiction of the commission over any matters arising under this section.

(2) Nothing in this section shall restrict the right of a market participant to file a petition seeking direct relief from the commission without first utilizing the alternative dispute resolution process where an action by or the independent system operator might inhibit the ability of an electric utility to provide continuous and adequate service to its customers.

(3) Because of the imminent threat to the health and welfare of an electric utility's customers in the event of a reliability problem, a petitioner's dispute will be heard by the commission in an emergency session except in those instances where a quorum of the commission is not present. In those instances where a quorum is not present, the chairman of the commission shall have the authority to issue an interim order to resolve the dispute so as to protect the reliability of the system, with the order remaining in effect until such time as a quorum is present.

§25.204. Summary of Required Filings.

Summary of required filings. This section summarizes the commission filings that are required in Subchapter I, Division 1 of this chapter (relating to Transmission and Distribution). The applicability and deadline for each filing are detailed in the relevant sections of Subchapter I, Division 1 of this chapter:

(1) Tariff for wholesale transmission service, in accordance with §25.191(e) of this title (relating to Transmission Service Requirements);

(2) Methods for determining transmission losses, in accordance with §25.192(e) of this title (relating to Transmission Service Rates);

(3) Information concerning peak loads and load and resource information relating to the calculation of megawatt-mile impacts, in accordance with §25.194(a) of this title (relating to Determining Peak Loads and Megawatt-Mile Impacts);

(4) Filing of new agreements, including interconnection agreements, governing the sale or purchase of generation, transmission, or ancillary services at wholesale, in accordance with §25.195(g) of this title (relating to Terms and Conditions for Transmission Service);

(5) Description of separation of cost and functions, in accordance with §25.196(a) and (b) of this title (relating to Functional Unbundling);

(6) Proposed transmission planning guidelines and procedures in accordance with §25.197(f) of this title (relating to ERCOT Independent System Operator);

(7) Methodologies for determining redispatch costs, in accordance with §25.200(c) of this title (relating to Load Shedding, Curtailment, and Redispatch); and

(8) Tariff for ancillary services, in accordance with §25.201(c) and (d) of this title (relating to Ancillary Services).

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

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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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TITLE 22. EXAMINING BOARDS

Part XI. Board of Nurse Examiners

Chapter 215. Nurse Education

22 TAC §§215.1–215.20

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

The Board of Nurse Examiners proposes the repeal of §§215.1-215.20 concerning General Requirements and Purpose of Standards; Definitions; New Programs; Accreditation; Pass Rate of Graduates on the National Council Licensure Examination for Registered Nurses; Administration and Organization; Faculty Qualifications; Faculty Policies; Faculty Organization; Faculty Development and Evaluation; Mission and Goals (Philosophy and Outcomes); Curriculum; Curriculum Changes; Distance Education Initiatives; Students; Educational Resources and Facilities; Affiliate Agencies; Records and Reports; Total Program Evaluation; Closing a Nursing Program or a Distance Education Initiative.

The repeal would allow for the adoption of new sections.

Katherine A. Thomas, MN, RN, executive director, has determined that there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

There will be no effect on local government nor businesses to comply with the rule.

Katherine A. Thomas, MN, RN, executive director, has determined that for each year of the first five years the rule as proposed the public is not effected.

Written comments on the proposed repeal may be submitted to Kathy Thomas, Board of Nurse Examiners, Post Office Box 430; Austin, Texas 78767-0430.

The repeal is proposed under the Nursing Practice Act, (Texas Civil Statutes, Article 4514), §1, which provides the Board of Nurse Examiners with the authority and power to make and enforce all rules and regulations necessary for the performance of its duties and conducting of proceedings before it.

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

§215.1. General Requirements and Purpose of Standards.

§215.2. Definitions.

§215.3. New Programs.

§215.4. Accreditation.

§215.5. Pass Rate of Graduates on the National Council Licensure Examination for Registered Nurses.

§215.6. Administration and Organization.

§215.7. Faculty Qualifications.

§215.8. Faculty Policies.

§215.9. Faculty Organizations.

§215.10. Faculty Development and Evaluation.

§215.11. Mission and Goals (Philosophy and Outcomes).

§215.12. Curriculum.

§215.13. Curriculum Changes.

§215.14. Distance Education Initiatives.

§215.15. Students.

§215.16. Educational Resources and Facilities.

§215.17. Affiliate Agencies.

§215.18. Records and Reports.

§215.19. Total Program Evaluation.

§215.20. Closing of a Nursing Program or a Distance Education Initiative.

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

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

TRD-9815139

Katherine A. Thomas, MN, RN

Executive Director

Board of Nurse Examiners

Proposed date of adoption: December 8, 1998

For further information, please call: (512) 305–6816

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22 TAC §§215.1–215.13

The Board of Nurse Examiners proposes new §§215.1-215.13 concerning General Requirements and Purpose of Standards; Definitions; Program Development, Expansion, and Closure; Accreditation; Mission and Goals (Philosophy and Outcomes); Administration and Organization; Faculty Qualifications and Faculty Organization; Students; Program of Study; Management of Clinical Learning Experiences and Resources; Facilities, Resources, and Services; Records and Reports; Total Program Evaluation.

The Board of Nurse Examiners appointed an Advisory Committee on Education to review and recommend changes to the education rules. This committee consists of representatives from the Texas Nurses Association, Texas Organization of Associate Degree Nursing, Texas Organization of Baccalaureate and Graduate Nursing Educators, Board of Vocational Nurse Examiners, Diploma Programs, Texas League for Nurses, Texas Organization of Nurse Executives and a consumer member. The committee met four times and drafted new rule language which was presented to the full board for consideration. The board met on September 17, 1998 and approved the proposed new language.

Katherine A. Thomas, MN, RN, executive director, has determined that there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

There will be no effect on local government nor businesses to comply with the rule.

Katherine A. Thomas, MN, RN, executive director, has determined that for each year of the first five years the rule as proposed will be in effect the public is assured enhanced protection. The learning experiences of students will be enhanced which will further assure that students are able to demonstrate critical behaviors and clinical skills appropriately. The anticipated economic cost to persons who are required to comply with the rules as proposed will be negligible; the options available to education programs are flexible enough to allow institutions to meet the proposed rules without any net increase in expenses. Enhanced education mobility between programs will be provided for by the rule changes.

Written comments on the proposed amendments may be submitted to Kathy Thomas, Board of Nurse Examiners, P.O. Box 430; Austin, Texas 78767-0430.

The new sections are proposed under the Nursing Practice Act, (Texas Civil Statutes), Article 4514, §1, which provides the Board of Nurse Examiners with the authority and power to make and enforce all rules and regulations necessary for the performance of its duties and conducting of proceedings before it and Article 4518, §1. which provides the Board of Nurse Examiners with the authority to prescribe and publish the minimum requirements and standards for a course of study in programs which prepare professional nurse practitioners.

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

§215.1. General Requirements and Purpose of Standards.

(a) General Requirements. The Dean/Director and faculty are accountable for complying with the Board's rules and regulations and the Nursing Practice Act.

(b) Rules for nursing programs shall provide reasonable and uniform standards within which flexibility and creativity, based upon sound educational principles, are possible.

(c) Purpose of Standards.

(1) To promote the safe and effective practice of nursing.

(2) To serve as a guide for the development of new nursing education programs.

(3) To provide criteria for the evaluation of new and established nursing education programs.

(4) To foster the continued improvement of established nursing education programs.

§215.2. Definitions.

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

(1) Accredited nursing program - A school, department, or division of nursing accredited/approved by the Board of Nurse Examiners for the State of Texas or other authority which has jurisdiction over accreditation/approval of nursing programs.

(2) Affiliate agency - An agency, other than the governing institution, which provides learning experiences for students.

(3) Alternative practice settings - settings which provide opportunities for clinical learning experiences although their primary function is not the delivery of health care.

(4) Articulation - A planned process between two or more educational systems to assist students to make a smooth transition from one level of education to another without duplication in learning.

(5) Baccalaureate degree program for registered nurses - A program leading to a bachelor's degree in nursing which admits only registered nurses.

(6) Basic nursing program - An educational unit whose purpose is to prepare practitioners of professional nursing and whose graduates are eligible to apply for initial licensure by examination.

(A) Associate degree program - A program leading to an associate degree in nursing conducted by an educational unit in nursing within the structure of a college or university.

(B) Baccalaureate degree program - A program leading to a bachelor's degree in nursing conducted by an educational unit in nursing which is a part of a senior college or university.

(C) Master's degree program - A program leading to a master's degree, which is an individual's first professional degree in nursing, and conducted by an educational unit in nursing within the structure of a senior college or university.

(D) Diploma program - A program leading to a diploma in nursing conducted by a single purpose school usually under the control of a hospital.

(7) Board - The Board of Nurse Examiners for the State of Texas composed of members appointed by the Governor for the State of Texas.

(8) Board survey visit - An on-site visit to a nursing program by a board representative for the purpose of evaluating the program of learning and gathering data to support whether the program is meeting the board's requirements as specified in §§215.2 - 215.13 of this title (relating to Definitions; Program Development, Expansion, and Closure; Accreditation; Mission and Goals (Philosophy & Outcomes); Administration and Organization; Faculty Qualifications and Faculty Organization; Students; Program of Study; Management of Clinical Learning Experiences and Resources; Facilities, Resources, and Services; Records and Reports; and Total Program Evaluation).

(9) Clinical learning experiences - Faculty-planned and guided learning activities designed to assist students to meet stated program and course outcomes and to safely apply knowledge and skills when providing nursing care to clients across the lifespan as appropriate to the role expectations of the graduates. These experiences occur in nursing skills and computer laboratories; in a variety of affiliate agencies or clinical practice settings including, but not limited to: acute care facilities, extended care facilities, clients' residences, and community agencies; and in associated clinical conferences.

(10) Clinical preceptor - A registered nurse or other licensed health professional who meets the minimum requirements in §215.7(h) of this title (relating to Faculty Qualifications and Faculty Organization), not paid as a faculty member by the governing institution, and who directly supervises a student's clinical learning experience. A clinical preceptor facilitates student learning in a manner prescribed by a signed written agreement between the educational institution, preceptor, and affiliate agency (as applicable).

(11) Clinical preceptorship - An organized system of clinical learning experiences which allows a nursing student, under the direction of a faculty member, to attain specific learning objectives under the supervision of a qualified clinical preceptor.

(12) Clinical teaching assistant - A registered nurse licensed in Texas, who is employed to assist and work under the supervision of a Master's or Doctorally prepared faculty member and who meets the minimum requirements in §215.10(g)(4) of this title (relating to Management of Clinical Learning Experiences and Resources).

(13) Coordinator - A qualified faculty who has the delegated responsibility for the day to day administration of an accredited professional nursing program or one or more distance education initiatives.

(14) Course - A specific set of organized learning experiences that must be met within a stated time period. A course involves both organized subject matter and related activities. In a clinical nursing course, the didactic content shall be taught either prior to or concurrent with the related clinical learning experiences.

(15) Curriculum - Content designed to achieve specific educational outcomes.

(16) Dean/Director - A registered nurse who is accountable for administering one or more of the following: basic nursing program or a post-licensure baccalaureate or higher degree program for registered nurses and who meets the requirements as stated in §215.6(e) of this title (relating to Administration and Organization).

(17) Distance education initiative - Instruction delivered by an accredited nursing program by any means to any location(s) other than the main campus. A distance education initiative may range from offering a single course or multiple courses to offering the entire program of study.

(18) Dormant distance education initiative - No enrollment for a period of an academic year in a distance education initiative that provides the entire program of study.

(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) Examination year - A twelve month period defined by the Board.

(21) Faculty currency/clinical competence - Maintenance of up-to-date knowledge and professional practice as demonstrated by certification and/or through participation in: continuing education, professional conferences, advanced academic courses, workshops, research projects, seminars, publications, clinical practice, and/or extended orientation.

(22) Faculty member - An individual employed to teach in the nursing program who meets the requirements as stated in

§215.7 of this title (relating to Faculty Qualifications and Faculty Organization).

(23) Faculty petition - A request submitted to the board petitioning to employ an individual who does not meet the requirements stated in §215.7 of this title.

(24) Faculty role - The activities which require the time of the faculty member and are related, directly or indirectly, to the performance of his/her professional education duties and responsibilities.

(25) Faculty waiver - A waiver granted by the board to an individual who has a baccalaureate degree in nursing and is currently licensed in Texas to be employed as a faculty member for a limited period of time.

(26) Governing institution - An accredited college, university, or hospital responsible for the administration and operation of an accredited nursing program.

(27) Health care professional - An individual other than a RN who holds at least a bachelor's degree in the health care field, including, but not limited to: respiratory therapists, physical therapists, occupational therapists, dieticians, pharmacists, physicians, social workers and psychologists.

(28) Innovative approach to nursing education - A board approved approach to professional nursing education which departs from existing educational processes or guidelines and for which the nursing faculty establish an educational goal, identify educational intervention(s), and measure the outcomes of the intervention(s).

(29) Mission - The purpose and overall role of the educational unit in nursing which are consistent with those of the governing institution.

(30) Mobility - The ability to advance without educational barriers.

(31) Observational experience - An assignment to a facility or unit where students observe the functions of the facility and the role of nursing within the facility, but where students do not participate in patient/client care.

(32) Pass rate - The percentage of first time candidates within one examination year who pass the National Council Licensure Examination for Registered Nurses.

(33) Philosophy - The underlying belief system of the educational nursing unit.

(34) Post-Licensure nursing program - An educational unit the purpose of which is to provide mobility options for registered nurses to attain undergraduate academic degrees in nursing. Post-licensure programs may be components of educational units within basic nursing programs or independent baccalaureate degree programs for registered nurses as defined in this section.

(35) Professional nursing student - An individual enrolled in a professional nursing program who has met admission criteria and is designated as a nursing student according to governing institution's policies.

(36) Program goals/outcomes - The expected competencies of program graduates with regard to professional nursing practice.

(37) Program of study - The courses and learning experiences that constitute the requirements for completion of a basic nursing program (associate degree program, baccalaureate degree program, master's degree program, or diploma program) or a post-licensure nursing program.

(38) Shall and must - Mandatory requirements.

(39) Should - A recommendation.

(40) Staff - Employees of the Board of Nurse Examiners.

(41) Supervision - Immediate availability of a faculty member, clinical preceptor, or clinical teaching assistant to coordinate, direct, and observe at first hand the practice of students.

§215.3. Program Development, Expansion, and Closure.

(a) New programs.

(1) Proposal to develop a professional pre-licensure or post-licensure nursing program.

(A) A governing institution accredited by a board recognized approval/accrediting body is eligible to submit a proposal to develop a professional nursing program. Notice of intent to establish a nursing program shall be submitted in writing 12-18 months prior to the anticipated start of the program.

(B) The proposal shall be completed under the direction/consultation of a registered nurse who holds at least a master's degree in nursing and who has teaching and administrative experience in the type of program being proposed.

(C) The proposal shall include information outlined in board guidelines.

(D) The proposal will be considered by the board following a public hearing at a regularly scheduled meeting of the board. The board may approve the proposal, may defer action on the proposal, or may deny further consideration of the proposal.

(2) Application for initial accreditation.

(A) Following approval to develop a professional nursing program, a director, faculty, and support staff shall be employed to develop the application for initial licensure as outlined in an Order of the Board.

(B) Initial accreditation must be granted prior to admission of students.

(C) The director and faculty shall plan the program of learning.

(D) The application shall include information outlined in board guidelines.

(E) The board shall review the application and supporting evidence at a regularly scheduled meeting. If the program is based upon sound educational principles and is in compliance with the board's requirements as specified in §§215.2-215.13 of this title, then initial accreditation may be granted and an initial accreditation fee assessed per §223.1 of this title (relating to Fees).

(3) Survey visits shall be conducted, as necessary, by staff until full accreditation is granted.

(b) Program Expansion.

(1) Only nursing programs that have full accreditation are eligible to initiate or modify distance education initiatives.

(2) The board's approval is necessary prior to:

(A) implementation of an initial distance education initiative by any accredited nursing program;

(B) implementation of additional distance education initiatives by a basic nursing program;

(C) addition or deletion of courses to an existing approved distance education initiative by a basic nursing program; or

(D) reactivation of a dormant or closed distance education initiative by a basic nursing program.

(3) A basic nursing program intending to establish or modify a distance education initiative or a post-licensure nursing program intending to establish an initial distance education initiative shall submit a proposal using board approved guidelines.

(4) A post-licensure nursing program with prior approval for a distance education initiative must notify the board prior to implementation when the program plans additional distance education initiatives or makes changes to the course offerings at existing distance education initiatives.

(5) An expedited proposal approval process may be used for a basic nursing program's request to modify existing distance education initiatives.

(6) Educational resources and services of the distance education initiative shall meet the same standards as those of the governing institution and shall meet the board's requirements as stated in §§215.2-215.13 of this title.

(7) The dean/director shall appoint a coordinator who meets the qualifications of nurse faculty as stated in §215.7 (c) of this title (relating to Faculty Qualifications and Faculty Organization) to supervise the implementation of distance education initiative(s) which provide the entire program of study.

(8) Documentation of notification to the Regional Council of the governing institution about plans for establishment or modification of distance education initiatives shall be provided to the board prior to implementation, as appropriate.

(9) Evidence of approval from the Texas Higher Education Coordinating Board and other regulating/accrediting bodies shall be provided to the board prior to implementation, as appropriate.

(10) When a distance education initiative of a basic nursing program which provides the entire program of study has been dormant for more than two academic years, the director shall:

(A) reactivate the distance education initiative by submitting a proposal for reactivation using the guidelines for proposals for distance education initiatives, or

(B) submit a plan to close the dormant distance education initiative as outlined in subsection (d) of this section.

(11) Distance education initiatives of basic nursing programs which have been closed may be reactivated by submitting a proposal for reactivation using the guidelines for proposals for distance education initiatives.

(12) When a distance education initiative of a post-licensure nursing program which provides the entire program of study has been dormant for more than two academic years, the director shall:

(A) notify board staff of plans to reactivate the distance education initiative, or

(B) submit a plan to close the dormant distance education initiative as outlined in (d) of this section.

(13) Distance education initiatives of post-licensure nursing programs which have been closed may be reactivated by submitting notification to board staff prior to reactivation.

(c) Transfer of Administrative Control by Governing Institutions.

(1) A governing institution of a professional nursing education program which has Full Accreditation status may request permission from the board to transfer administrative control.

(A) A governing institution that proposes to transfer administrative control of a nursing program to another governing institution accredited by a board recognized approval/accrediting body shall submit:

(i) notice of intent to transfer administrative control in writing to the board 12 months prior to the anticipated date of transfer; and

(ii) a written plan for closure of the nursing program as required by subsection (d) of this section.

(B) The governing institution which will assume responsibility for the program shall submit a Proposal to Assume Administrative Control to the board six months prior to a regularly scheduled board meeting.

(i) The proposal shall be completed under the direction/consultation of a registered nurse who holds at least a master's degree in nursing and who has teaching and administrative experience in the type of program being proposed.

(ii) The proposal shall include information outlined in board approved guidelines.

(iii) The proposal shall include documentation of Texas Higher Education Coordinating Board approval, as applicable.

(iv) The proposal will be considered by the board at a regularly scheduled meeting.

(v) The board may approve, may defer action, or may deny further consideration of the proposal.

(2) Accreditation status of transferred nursing program(s).

(A) If the governing institution that is assuming administrative control previously has been responsible for an accredited professional nursing program and does not intend to change the program of study then the professional nursing education program shall maintain its accreditation status.

(B) If the governing institution that is assuming administrative control previously has been responsible for an accredited professional nursing program and intends to alter the program of study then that governing institution shall submit a proposal to change the program of study in accordance with §215.9(h) of this title (relating to Program of Study).

(C) If the governing institution that is assuming administrative control has not previously been responsible for an accredited professional nursing program then that governing institution shall submit an application for initial accreditation in accordance with §215.3(2) of this title (relating to Program Development, Expansion and Closure).

(d) Closing a Program or Distance Education Initiative.

(1) When the decision to close a program or a distance education initiative which provides the entire program of study has

been made, the director must notify the board and submit a written plan for closure which includes the following:

(A) reason for closing the program or distance education initiative;

(B) date of intended closing;

(C) academic provisions for students;

(D) provisions made for access to and safe storage of vital school records, including transcripts of all graduates; and

(E) methods to be used to maintain requirements and standards until the program or distance education initiative closes.

(2) The program or distance education initiative shall continue within standards until all classes, which are enrolled at the time of the decision to close, have graduated. In the event this is not possible, a plan must be developed whereby students may transfer to other accredited programs.

§215.4. Accreditation.

(a) The progressive designation of accreditation status is not implied by the order of the following listing. Accreditation status is based upon each program's performance and demonstrated compliance to the board's requirements. Change from one status to another is based on NCLEX-RN examination pass rates and annual reports or survey visits. Types of accreditation include:

(1) Initial accreditation. Initial accreditation is written authorization to admit students and is granted if the program meets the requirements of the board.

(2) Full accreditation - basic program. Full accreditation is granted to a basic nursing program after the program has documented compliance with subsection (c)(2)(A) of this section. Only programs with full accreditation status may propose distance education initiatives and petition for faculty waivers.

(3) Full accreditation - post-licensure nursing programs. Full accreditation is granted to a post-licensure nursing program after one class has completed the program and is based upon evidence that the program meets the board's legal and educational requirements.

(4) Warning.

(A) Issuance of warning. When the board determines that a program is not meeting legal and educational requirements, the program is issued a warning, is provided a list of the deficiencies, and is given a specified time in which to correct the deficiencies.

(B) Failure to correct deficiencies. If the program fails to correct the deficiencies within the prescribed period the board may restrict admissions or other program activities until the deficiencies are corrected or the board may place the program on conditional accreditation or withdraw accreditation.

(5) Conditional accreditation. Conditional accreditation is granted for a time specified by the board in order to provide additional time to correct deficiencies.

(A) The program shall not admit students while on conditional status.

(B) The board may establish specific criteria to be met in order for the program's conditional accreditation status to be removed.

(C) Depending upon the degree to which the board's legal and educational requirements are met, the board may change the accreditation status to full, warning, or withdraw accreditation.

(b) Withdrawal of accreditation. A program which fails to meet legal and educational requirements of the board within the specified time shall be removed from the list of state accredited nursing programs. Reasons for withdrawal of accreditation include but are not limited to:

(1) continued lack of compliance with minimum requirements as set out in this chapter, and;

(2) failure to meet specific criteria set out by the board.

(c) Accreditation procedures. The continuing accreditation status of each program shall be determined annually by the board based upon:

(1) Review of annual report. Each accredited professional nursing program shall submit an annual report regarding its compliance with the board's legal and educational requirements. Accreditation status is determined on the basis of the program's annual report, NCLEX-RN examination pass rate, and other pertinent data when a program is not visited by staff during the examination year.

(2) Pass rate of graduates on NCLEX-RN examination.

(A) In order for the nursing program to attain or maintain full accreditation, 80% of first time candidates who complete the program of study at the main campus and 80% of first time candidates who complete the program of study through each distance education initiative must achieve a passing score on the NCLEX-RN examination for two consecutive examination years.

(B) When first time candidates who complete the program of study at the main campus or through a distance education initiative fail to achieve at least 80% during one examination year, the nursing program shall submit a self-study report that evaluates factors which contributed to the graduates' performance on the NCLEX-RN examination and a description of the corrective measures to be implemented. The report shall follow Board guidelines.

(C) A warning will be issued to the program as a whole based on the pass rate when the pass rate of first time candidates, as described in subparagraph (A) of this paragraph, is less than 80% for two consecutive examination years or for two out of three examination years.

(D) A program may be placed on conditional accreditation if, within one examination year from the date of the warning the performance of graduates fails to be at least 80% or the faculty fail to implement appropriate corrective measures.

(E) Accreditation may be withdrawn if the performance of graduates fails to be at least 80% during the examination year following the date that the program is placed on conditional accreditation.

(d) Survey visit. Each nursing program will be visited at least every six years after full accreditation has been granted, unless accredited by a board recognized voluntary accrediting body.

(1) The board may authorize staff to a conduct survey visit at any time based upon established criteria.

(2) After a program is fully accredited by the board a report from a board recognized voluntary accrediting body regarding a program's accreditation status may be accepted in lieu of a board survey visit.

(3) A written report of the survey visit, annual report, and NCLEX-RN examination pass rate will reviewed by the board at a regularly scheduled meeting.

(e) Notice of a program's accreditation status will be sent to the director, chief administrative officer of the governing institution, and others as determined by the board.

§215.5. Mission and Goals (Philosophy and Outcomes).

(a) The mission and goals (philosophy and outcomes) of the nursing program shall be consistent with the mission of the governing institution. They shall reflect the diversity of the community served and shall be consistent with professional, educational, and ethical standards of nursing.

(b) The written mission and goals (philosophy and outcomes) shall be used as a basis for planning, organizing, implementing and evaluating the program and shall be shared with the students.

(c) The program outcomes or objectives shall be consistent with the program's philosophy or mission.

(d) The faculty shall periodically review the mission and goals (philosophy and outcomes) and shall make revisions to maintain currency.

§215.6. Administration and Organization.

(a) The governing institution shall be accredited by a board recognized accrediting/approval agency.

(b) There shall be an organizational chart which demonstrates the relationship of the professional nursing program to the governing institution, and indicates lines of responsibility and authority, and channels of communication.

(c) In colleges and universities, the program shall have comparable status with other academic units in such areas as salary, rank, promotion, tenure, leave, benefits and professional development.

(d) The governing institution shall provide financial support and resources needed to operate a program which meets the legal and educational requirements of the board and fosters achievement of program goals. The financial resources shall support adequate educational facilities, equipment, and qualified administrative and instructional personnel.

(e) Each basic nursing program shall be administered by a qualified nurse faculty member who is accountable for the planning, implementation and evaluation of the professional nursing education program. The dean/director shall:

(1) hold a current license to practice as a registered nurse in the state of Texas;

(2) hold a master's degree in nursing;

(3) hold a doctoral degree, if administering a baccalaureate or master's degree program;

(4) have a minimum of three years teaching experience in the type of program being administered; and

(5) have demonstrated knowledge, skills and abilities in administration within educational programs.

(f) When the director of the program changes, the director shall submit to the board written notification of the change indicating the final date of employment.

(1) A new director qualification form shall be submitted to the board office by the governing institution for approval prior to appointing a new director for an existing program or a new nursing program.

(2) A vitae and all official transcripts shall be submitted with the new director qualification form.

(3) If an acting director is appointed to fill the position of the director, this appointment shall not exceed one year.

(4) In a fully accredited professional nursing program, if the individual to be appointed as acting director does not meet the requirements for director as specified in subsection (e) of this section.

§215.7. Faculty Qualifications and Faculty Organization.

(a) There shall be written personnel policies for nursing faculty that are in keeping with accepted educational standards and are consistent with those of the governing institution. Policies which differ from those of the governing institution shall be consistent with nursing unit mission and goals (philosophy and outcomes).

(1) Policies concerning workload for faculty and the dean/director shall be in writing.

(2) Sufficient time shall be provided faculty to accomplish those activities related to the teaching-learning process.

(3) Teaching activities shall be coordinated among full-time, part-time faculty, clinical preceptors and clinical teaching assistants.

(4) If the director is required to teach, he or she shall carry only a minimum teaching load.

(b) A nursing education program shall employ sufficient faculty members with graduate preparation and expertise necessary to enable the students to meet the program goals. The number of faculty members shall be determined by such factors as:

(1) the number and level of students enrolled;

(2) the curriculum plan;

(3) activities and responsibilities required of faculty;

(4) the number and geographic locations of affiliate agencies and clinical practice settings; and

(5) the level of care and acuity of clients.

(c) Faculty Qualifications.

(1) Documentation of faculty qualifications shall be included in the official files of the program. Each nurse faculty member shall:

(A) hold a current license to practice as a registered nurse in the State of Texas;

(B) show evidence of teaching abilities and maintaining current knowledge, clinical expertise, and safety in subject area of teaching responsibility;

(C) hold a master's degree, preferably in nursing. A nurse faculty member holding a master's degree in a discipline other than nursing shall hold a bachelor's degree in nursing from an accredited baccalaureate program in nursing; and

(i) if teaching in a diploma or associate degree nursing program, shall have at least six semester hours of graduate level content in nursing appropriate to his/her teaching responsibilities, or

(ii) if teaching in a baccalaureate level program, shall have at least 12 semester hours of graduate level content in nursing appropriate to his/her teaching responsibilities.

(D) In fully accredited programs, if an individual to be appointed as faculty member does not meet the requirements for faculty as specified in this subsection, the dean/director is permitted to petition for a waiver of the board's requirements prior to the appointment of said individual.

(E) In baccalaureate programs, an increasing number of faculty members should hold doctoral degrees appropriate to their responsibilities.

(2) Faculty who teach non-clinical nursing courses, e.g., pathophysiology, pharmacology, research, management and statistics, shall have graduate level educational preparation appropriate to these areas of responsibility.

(d) Teaching assignments shall be commensurate with the faculty member's education and experience in nursing.

(e) The faculty shall be organized with written policies and procedures and/or bylaws to guide its activities.

(f) The faculty shall meet regularly and function in such a manner that all members participate in planning, implementing, and evaluating the nursing program. Such participation includes, but is not limited to the initiation and/or change of academic policies, personnel policies, curriculum, utilization of affiliate agencies, and program evaluation.

(1) Committees necessary to carry out the functions of the program shall be established with duties and membership of each committee clearly defined in writing.

(2) Minutes of faculty organization and committee meetings shall document the reasons for actions and the decisions of the faculty and shall be available for reference.

(g) There shall be written plans for faculty orientation, development, and evaluation.

(1) Orientation of new faculty members shall be initiated at the onset of employment.

(2) A program of faculty development shall be offered to encourage and assist faculty members to meet the nursing program's needs as well as individual faculty member's professional development needs.

(3) A variety of means shall be used to evaluate faculty performance such as self, student, peer and administrative evaluation.

§215.8. Students.

(a) Students should have mechanisms for input into the development of academic policies and procedures, curriculum planning, and evaluation of teaching effectiveness.

(b) The number of students admitted to the program shall be determined by the number of qualified faculty, adequate educational facilities and resources, and the availability of appropriate clinical learning experiences for students.

(c) Written policies regarding nursing student admission and progression shall be developed and implemented in accordance with the requirements that the governing institution must meet to maintain accreditation. Student policies which differ from those of the governing institution shall be in writing and shall be made available to faculty and students. In addition to governing institution policies, nursing programs should adopt policies regarding:

(1) repetition of course;

(2) clinical safety;

(3) criteria for dismissal from courses or the program when unsafe behavior occurs; and

(4) due process.

(d) Policies shall facilitate mobility/articulation, be consistent with acceptable educational standards, and be available to students and faculty.

(e) Students shall have the opportunity to evaluate faculty, courses, and learning resources and these evaluations shall be documented.

(f) Individuals enrolled in accredited professional nursing programs preparing students for initial licensure shall be provided verbal and written information regarding conditions that may disqualify graduates from licensure and of their rights to petition the Board for a Declaratory Order of Eligibility. Required eligibility information includes:

(1) Texas Civil Statutes, Articles 4519a and 4525;

(2) Sections 213.27-213.30 of this title (relating to Good Professional Character, Licensure of Persons with Criminal Convictions, Criteria and Procedure Regarding Intemperate Use and Lack of Fitness); and

(3) Declaratory Order Petition Request Form.

(g) Written receipt of the required information shall be documented on the Licensure Eligibility Form which contains, at a minimum, the following elements:

(1) name, date of birth, and social security number of the individual enrolled in the accredited professional nursing program;

(2) statement that the information cited in subsection (c) of this section was received and explained; and

(3) signature of the individual who received the information and date of receipt.

(h) The nursing program shall maintain written receipt of eligibility notification for up to six months after the individual enrolled completes the nursing program or permanently withdraws from the nursing program.

(i) The Director of the Nursing Program shall submit an affidavit each year with the Annual Report which verifies that enrolled students received the eligibility information as indicated subsection (g) of this section.

§215.9. Program of Study.

(a) The program of study shall be:

(1) at least the equivalent of two academic years and shall not exceed four calendar years;

(2) planned, implemented, and evaluated by the faculty;

(3) based on the mission and goals (philosophy and outcomes);

(4) organized logically, sequenced appropriately;

(5) based on sound educational principles;

(6) designed to prepare graduates to practice according to the Standards of Nursing Professional Practice as set forth in the Board's Rules and Regulations; and

(7) designed and implemented to prepare students to demonstrate the essential competencies.

(b) There shall be a reasonable balance between non-nursing courses and nursing courses which are offered in a supportive sequence with rationale and are clearly appropriate for collegiate study.

(c) There shall be a rationale for the ratio of contact hours assigned to classroom and clinical learning experiences. The recommended ratio is three contact hours of clinical learning experiences for each contact hour of classroom instruction.

(d) The program of study should facilitate articulation among programs.

(e) The program of study shall include, but not be limited to the following areas:

(1) non-nursing courses, clearly appropriate for collegiate study, offered in a supportive sequence with rationale.

(2) nursing courses which include didactic and clinical learning experiences that teach students to use a systematic approach to clinical decision making and prepare students to safely practice professional nursing through the promotion, prevention, rehabilitation, maintenance, and restoration of the health of individuals of all ages.

(A) Course content shall be appropriate to the role expectations of the graduate.

(B) Professional values including ethics, safety, diversity, and confidentiality shall be addressed.

(C) The Nursing Practice Act, Standards of Professional Nursing Practice, Unprofessional Conduct Rules, Delegation Rules, and other laws and regulations which pertain to various practice settings shall be addressed.

(3) Nursing courses shall prepare students to recognize and analyze health care needs, select and apply relevant knowledge and appropriate methods for meeting the health care needs of individuals and families, and evaluate the effectiveness of the nursing care.

(4) Baccalaureate and entry-level master's degree programs in nursing shall include learning activities in basic research and management/leadership, and didactic and clinical learning experiences in community health nursing.

(f) The learning experiences shall provide for progressive development of values, knowledge, judgement, and skills.

(1) Didactic learning experiences shall be provided either prior to or con- current with the related clinical learning experiences.

(2) Clinical learning experiences shall be sufficient in quantity and quality to provide opportunities for students to achieve the stated program outcomes.

(3) Students shall have sufficient opportunities in simulated or clinical settings to develop manual technical skills, using contemporary technologies, essential for safe, effective nursing practice.

(4) Learning opportunities shall assist students to develop communication and interpersonal relationship skills.

(g) Faculty shall develop and implement evaluation methods and tools to measure students' cognitive, affective and psychomotor achievement using sound educational principles.

(h) Staff approval is required prior to implementation of major curriculum changes. Proposed changes shall include information outlined in board guidelines and shall be reviewed using board standards.

(1) Changes that require approval include:

(A) changes in program mission and goals (philosophy and outcomes) which result in a reorganization or reconceptualization of the entire curriculum;

(B) an increase or decrease in program length by more than 25%;

(C) the addition of transition or bridging courses that facilitate articulation into the existing program of study; and

(D) the addition of tracks/alternative programs of study that provide educational mobility.

(2) Documentation of Governing Institution approval or Texas Higher Education Coordinating Board approval must be provided prior to implementation of changes, as appropriate.

(3) All other revisions such as editorial updates of mission and goals or redistribution of course content or course hours shall be reported to the Board in the Annual Report.

(i) A professional nursing program with full accreditation may submit a proposal for an innovative approach to nursing education to the board for approval prior to implementation.

(1) A nursing program that proposes to initiate an innovative approach to nursing education shall submit a proposal 90 days prior to a regularly scheduled board meeting:

(A) the proposal shall include information outlined in board guidelines.

(B) the proposal will be considered by the board at a regularly scheduled board meeting. The board may approved, may defer action, or may deny further consideration of the proposal.

(2) If the proposed innovative approach to nursing education includes the creation of a distance education initiative or a major change in the program of study, the proposal must meet the requirements outlined in §215.3(b) of this title (relating to Program Development, Expansion, and Closure) or §215.9(h) of this section, respectively.

(3) Approved innovative approaches may be implemented one time only.

(A) The program must submit a written report of outcomes resulting from the innovative educational experience within 90 days of its completion.

(B) A request for an innovative approach to become a permanent part of an accredited nursing program must be submitted by the Director of the program after the final evaluation of the project has been submitted and no less than 60 days prior to a regularly scheduled meeting of the board, using board guidelines.

§215.10. Management of Clinical Learning Experiences and Resources.

(a) In all cases faculty shall be responsible and accountable for managing clinical learning experiences and observational experiences of students.

(b) Faculty shall develop criteria for the selection of affiliate agencies or clinical practice settings which address safety and the need for students to achieve the program outcomes (goals) through the practice of nursing care or observational experiences.

(c) Faculty shall select and evaluate affiliate agencies or clinical practice settings which provide students with opportunities to achieve the goals of the program.

(1) Written agreements between the program and the affiliate agencies shall specify the responsibilities of the program to the agency and the responsibilities of the agency to the program.

(2) Agreements shall be reviewed periodically and include provisions for adequate notice of termination.

(d) The faculty member shall be responsible for the supervision of students in clinical learning experiences.

(1) When a faculty member is the only person officially responsible for a clinical group, then the group may total no more than 10 students. The faculty member must supervise that group in only one facility at a time, unless some portion or all of the clinical group are assigned to observational experiences in additional settings.

(2) Direct faculty supervision is not required for an observational experience.

(A) Observational experiences may be used to supplement, but not replace patient care experiences, and must serve the purpose of student attainment of clinical objectives.

(B) Observational experiences should comprise no more than 20% of the clinical contact hours for a course and no more than 10% of the clinical contact hours for the program-of-study.

(e) Faculty may use clinical preceptors or clinical teaching assistants to enhance clinical learning experiences and to assist faculty in the supervision of students.

(1) Faculty shall develop written criteria for the selection of clinical preceptors and clinical teaching assistants.

(2) When clinical preceptors or clinical teaching assistants are used, written agreements between the professional nursing program, clinical preceptor or clinical teaching assistant, and the affiliating agency, when applicable, shall delineate the functions and responsibilities of the parties involved.

(3) Faculty shall be readily available to students and clinical preceptors or clinical teaching assistants during clinical learning experiences.

(4) The designated faculty member shall meet periodically with the clinical preceptors or clinical teaching assistants and student(s) for the purpose of monitoring and evaluating learning experiences.

(5) Written clinical objectives shall be shared with the clinical preceptors or clinical teaching assistants prior to or concurrent with the experience.

(f) Clinical preceptors may be used to enhance clinical learning experiences after a student has received clinical and didactic instruction in all basic areas of nursing or within a course after a student has received clinical and didactic instruction in the basic areas of nursing for that course or specific learning experience.

(1) In courses which use clinical preceptors for a portion of clinical learning experiences, faculty shall have no more than 12 students in a clinical group.

(2) In courses which use clinical preceptors as the sole method of student instruction and supervision in clinical settings, faculty shall coordinate the preceptorships for no more than 24 students.

(3) The preceptor may supervise student clinical learning experiences without the physical presence of the faculty member in the affiliate agency or clinical practice setting.

(4) The preceptor shall be responsible for the clinical learning experiences of no more than two students per clinical day.

(5) Clinical preceptors shall have the following qualifications:

(A) competence in designated area of practice;

(B) philosophy of health care congruent with that of the nursing program; and

(C) current licensure as a registered nurse; or

(D) if not a registered nurse, a current license in Texas as a health care professional with a bachelor's degree in that field.

(g) Clinical teaching assistants may assist qualified and experienced faculty clinical learning experiences.

(1) In clinical learning experiences where a faculty member is supported by a clinical teaching assistant, the ratio of faculty to students shall not exceed 2:15 (faculty plus clinical teaching assistant: student).

(2) Clinical teaching assistants shall supervise student clinical learning experiences only when the qualified and experienced faculty member is physically present in the affiliate agency or alternative practice setting.

(3) When acting as a clinical teaching assistant, the RN shall not be responsible for other staff duties, such as supervising other personnel and/or patient care.

(4) Clinical teaching assistants shall meet the following criteria:

(A) hold a current license to practice as a registered nurse in the State of Texas;

(B) hold a bachelor's degree in nursing from an accredited baccalaureate program in nursing; and

(C) have the clinical expertise to function effectively and safely in the designated area of teaching.

§215.11. Facilities, Resources, and Services.

(a) The governing institution shall be responsible for providing:

(1) educational facilities,

(2) resources, and

(3) services which support the effective development and implementation of the nursing education program.

(b) The director and faculty shall have adequate secretarial and clerical assistance to meet the needs of the program.

(c) The physical facilities shall be adequate to meet the needs of the pro- gram in relation to the size of the faculty and the student body.

(1) The director shall have a private office.

(2) Faculty offices shall be conveniently located and adequate in number and size to provide faculty with privacy for conferences with students and uninterrupted work.

(3) Space for clerical staff, records, files, and equipment shall be adequate.

(4) There shall be mechanisms which provide for the security of sensitive materials, such as examinations and health records.

(5) Classrooms, laboratories, and conference rooms shall be conducive to learning and adequate in number, size, and type for the number of students and the educational purposes for which the rooms are used.

(d) The learning resources, library, and departmental holdings shall be current, use contemporary technology appropriate for the level of the curriculum, and be sufficient for the size of the student body and the needs of the faculty.

(1) Provisions shall be made for accessibility, availability, and timely delivery of information resources.

(2) Facilities and policies shall promote effective use, i.e., environment, accessibility, and hours of operation.

§215.12. Records and Reports.

(a) Accurate and current records shall be maintained in a confidential manner and be accessible to appropriate parties. These records shall include, but are not limited to:

(1) records of current students;

(2) transcripts/permanent record cards of graduates;

(3) faculty records;

(4) administrative records, which include minutes of faculty meetings for the past three years, annual reports, and school catalogs;

(5) the current program of study and curriculum including mission and goals (philosophy and outcomes), and course outlines;

(6) agreements with affiliate agencies; and

(7) the master plan of evaluation with most recent data collection.

(b) Records shall be safely stored to prevent loss, destruction, or unauthorized use.

(c) The director shall submit an annual report each year.

§215.13. Total Program Evaluation.

(a) There shall be a written plan for the systematic evaluation of the total program. The plan shall include methodology, frequency of evaluation, assignment of responsibility, evaluative criteria, and indicators of program and instructional effectiveness. The following broad areas shall be periodically evaluated:

(1) organization and administration of the program;

(2) mission and goals (philosophy and outcomes);

(3) program of study, curriculum, and instructional techniques;

(4) education facilities, resources, and services;

(5) affiliate agencies and clinical learning activities;

(6) students' achievement;

(7) graduates' performance on the licensing examination;

(8) graduates' nursing competence;

(9) faculty members' performance; and

(10) advisory committees.

(b) All evaluation methods and instruments shall be periodically reviewed for appropriateness.

(c) Implementation of the plan for total program evaluation shall be documented in the minutes.

(d) Major changes in the nursing program shall be evidence-based and supported by rationale.

This 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 September 28, 1998.

TRD-9815140
Katherine A. Thomas, MN, RN
Executive Director
Board of Nurse Examiners
Proposed date of adoption: December 8, 1998
For further information, please call: (512) 305–6811

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Chapter 222. Advanced Practice Nurses with Limited Prescriptive Authority

43 TAC §222.1, §222.4

The Board of Nurse Examiners proposes amendments to §222.1, concerning Definitions and §222.4 concerning Functions.

The amendments are being proposed to bring the Board's rules into compliance with statutes and expand the practice scope of advanced practice nurses. During the 75th Legislative Session, House Bill 2846 was passed relating to the provisions of health care services by advanced practice nurses including expansion of sites for limited prescriptive authority and extension of the timeline required for physician site visits in medically underserved sites.

These amendments will bring the Board's Advanced Practice Nursing rules into agreement with the Board of Medical Examiner's rules for physician supervision for limited prescriptive authority.

Katherine A. Thomas, MN, RN, Executive Director, has determined that there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

There will be no effect on local government nor businesses to comply with the rule.

Katherine A. Thomas, MN, RN, Executive Director, has determines that for each year of the first five years the rule as amended will be in effect the public is assured enhanced protection because advanced practice nurses with limited prescriptive authority will practice within authorized settings. There may be improvement of public access to care. There are no increased costs to the advanced practice nurses.

Written comments on the proposed amendments may be submitted to Kathy Thomas, Board of Nurse Examiners, P.O. Box 430, Austin, Texas 78767-0430.

The amendments are proposed under the Nursing Practice Act, (Texas Civil Statutes, Article 4514), §1, which provides the Board of Nurse Examiners with the authority and power to make and enforce all rules and regulations necessary for the performance of its duties and conducting of proceedings before it and Article 4514, §8, which provides the Board of Nurse Examiners the authority and power to adopt rules for approval of a registered nurse to practice as an advanced practice nurse.

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

§222.1. Definitions.

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

(1) Advanced practice nurse (APN) formerly known as Advanced Nurse Practitioner (ANP) - A registered professional nurse, currently licensed in the State of Texas, who is prepared for advanced nursing practice by virtue of knowledge and skills obtained through a post-basic or advanced educational program of study acceptable to the board. The advanced practice nurse is prepared to practice in an expanded role to provide health care to individuals, families, and/or groups in a variety of settings including but not limited to homes, hospitals, institutions, offices, industry, schools, community agencies, public and private clinics, and private practice. The advanced practice nurse acts independently and/or in collaboration with other health care professionals in the delivery of health care services. APNs include Nurse Practitioners, Nurse Midwives, Nurse Anesthetists and Clinical Nurse Specialists.

(2) Board - The Board of Nurse Examiners for the State of Texas.

(3) Carrying out or signing a prescription drug order - Completion of a prescription drug order presigned by the delegating physician, or the signing of a prescription by an APN after the APN has been designated with the Board of Medical Examiners by the delegating physician(s) as a person delegated to sign prescriptions.

(4) Dangerous drug - A device or a drug that is unsafe for self medication and that is not included in schedules I-V or penalty groups I-IV of chapter 481 Texas Health and Safety Code (Texas Controlled Substances Act). The term includes a device or a drug that bears or is required to bear the legend: Caution: federal law prohibits dispensing without prescription.

(5) Eligible sites - Sites serving medically underserved populations; a physician's primary practice site; or facility based practices at a licensed long term care facility or hospital.

(6) Facility-based practice - An APN's practice which is based at a licensed hospital or licensed long term care facility.

(7) Health Professional Shortage Area (HPSA) - An area, population group, or facility designated by the United States Department of Health and Human Services (USDHHS) as having a shortage of primary care physicians.

(8) Medically Underserved Area (MUA) - An area or population group designated by the USDHHS as having a shortage of personal health services; or an area defined by rule adopted by TDH that is based on demographics specific to this State, geographic factors that affect access to health care, and environmental health factors.

(9) Pharmacotherapeutics - A course that offers content in pharmacokinetics and pharmacodynamics, pharmacology of current/commonly used medications, and the application of drug therapy to the treatment of disease and/or the promotion of health.

(10) Physician's primary practice site - Any one of the following:

(A) the practice location where the physician spends the majority of his/her time;

(B) a licensed hospital, a licensed long-term care facility or a licensed adult care center where both the physician and the APN are authorized to practice, [~~or an established patient residence;~~]

[~~(C)~~] ~~a clinic operated by or for the benefit of a public school district for the purpose of providing care to the students of that district and the siblings of those students, if consent to treatment at that clinic is obtained in a manner that complies with the Family Code, Chapter 32, or an established patient's residence; or~~

(C) [~~(D)~~] where the physician is physically present with the APN.

(11) Protocols/or other orders - Written authorization to initiate medical aspects of patient care which are agreed upon and signed by the APN and the physician, reviewed and signed at least annually, and maintained in the practice setting of the APN. Protocols/or other orders shall be defined to promote the exercise of professional judgement by the APN commensurate with his/her education and experience. Such protocols/or other orders need not describe the exact steps that the APN must take with respect to each specific condition, disease, or symptom and may state types or categories of drugs which may be prescribed rather than list specific drugs.

(12) Rural health clinic - A clinic designated as a rural health clinic under the Rural Health Clinic Services Act of 1977 (Public Law No. 95-210); the designation is made by the Health Care Financing Administration (HCFA) of the USDHHS.

(13) Shall and must - Mandatory requirements.

(14) Should - A recommendation.

(15) Sites serving medically underserved populations - A medically underserved area, a health professional shortage area, a rural health clinic, a public health clinic or family planning clinic under contract with the Texas Department of Health (TDH) or Texas Department of Human Services (TDHS) or other site approved by the TDH.

(16) Physician's primary practice site - Any one of the following:

(A) the practice location where the physician spends the majority of his/her time;

(B) a licensed hospital, a licensed long-term care facility or a licensed adult care center where both the physician and the APN are authorized to practice, [~~or an established patient residence;~~]

[~~(C)~~] a clinic operated by or for the benefit of a public school district for the purpose of providing care to the students of that district and the siblings of those students, if consent to treatment at that clinic is obtained in a manner that complies with the Family Code, Chapter 32, or an established patient's residence; or

(C) [~~(D)~~] where the physician is physically present with the APN.

§222.4. Functions.

(a) The APN with a valid prescription authorization number may carry out or sign prescription drug orders under the following conditions:

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

(3) The APN carries out or signs prescription drug orders under physician supervision which consists of the following and the additional supervision requirements set out in Board of Medical Examiners (BME) Rule ˘193.8 (relating to Delegation of the Carrying

Out or Signing of Prescription Drug Orders to Physician Assistants and Advanced Practice Nurses):

(A) at a site serving medically underserved populations, the physician visits the site at least once every ten business days during which the APN is on site providing care[~~once a week~~]; the physician receives daily reports from the APN regarding complications encountered; and the physician is available for consultation by direct telecommunications;

(B)- (C) (No Change).

(4) (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 September 28, 1998.

TRD-9815141
Katherine A. Thomas, MN, RN
Executive Director
Board of Nurse Examiners
Earliest possible date of adoption: November 8, 1998
For further information, please call: (512) 305–6816

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Part XV. Texas State Board of Pharmacy

Chapter 281. General Provisions

The Texas State Board of Pharmacy proposes the repeal of §§281.1– 281.21, 281.23–281.56, 281.58–281.63, 281.67–281.75, 281.79 and 281.80 and simultaneously proposes new §§281.1– 281.16, 281.21–281.56, 281.71–281.76 concerning administrative practice and procedure. A complete revision of Chapter 281 is necessary, due in part to the newly adopted State Office of Administrative Hearings rules and to efforts to streamline administrative procedures.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that there will be no fiscal implications for state or local government as a result of enforcing or administering the rules. Ms. Dodson also has determined that, for each year of the first five-year period the rules will be in effect, the public benefit anticipated as a result of enforcing the rules will be consistency and clarity in administrative practice and procedures.

The rules as proposed will not have adverse economic effects on small businesses as defined by §2006.002 of the Texas Government Code. There are no anticipated economic costs to persons required to comply with the rules as proposed.

Comments on the proposal may be submitted to Gay Dodson, R.Ph., Executive Director/Secretary, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Box 21, Austin, Texas, 78701-3942.

22 TAC §§281.1–281.21, 281.23–281.56, 281.58–281.63, 281.67–281.75, 281.79, 281.80

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

The repeals are proposed under §§4 and 16(a) of the Texas Pharmacy Act (Article 4542a-1, Texas Civil Statutes). The Board interprets §4 as authorizing the agency to adopt rules to protect the public health, safety, and welfare through the effective control and regulation of the practice of pharmacy. The Board interprets §16(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by the rules: Texas Civil Statutes, Article 4542a-1.

§281.1. Objective and Scope.

§281.2. Definitions.

§281.3. Construction of this Chapter.

§281.4. Official Acts in Writing and Open to the Public.

§281.5. Hearings.

§281.6. Conduct and Decorum.

§281.7. Computation of Time.

§281.8. Appearances and Right to Attorney.

§281.9. Failure to Appear at Hearing.

§281.10. Recording of Hearings.

§281.11. Order of Presentation.

§281.12. Testimony under Oath.

§281.13. Limitations on Number of Witnesses.

§281.14. Motions During Hearings.

§281.15. Exhibits.

§281.16. Effective Date of Official Acts or Orders in Nonrulemaking and Noncontested Matters.

§281.17. Amendment and Suspension of Orders.

§281.18. Evidence in Noncontested Cases.

§281.19. Notice and Service in Nonrulemaking Proceedings and Noncontested Cases.

§281.20. Procedural and Substantive Severability.

§281.21. Rules Governing Cooperating Practitioners.

§281.23. Pharmacist Mental or Physical Examination.

§281.24. Grounds for Discipline for a Pharmacist License.

§281.25. Grounds for Discipline for a Pharmacy License.

§281.26. Rules Governing Penalties Against a License.

§281.27. Official Action To Be Taken.

§281.28. Notice and Service.

§281.29. Pleadings.

§281.30. Ex Parte Consultations.

§281.31. Agreements To Be in Writing.

§281.32. Denial of or Disciplinary Action Against a License.

§281.33. Depositions.

§281.34. Interrogatories to Parties.

§281.35. Admission of Facts or of Genuineness of Documents.

§281.36. Discovery, Entry on Property; Use of Reports and Statements.

§281.37. Subpoenaing Witnesses and Materials.

§281.38. Prehearing Conference.

§281.39. Briefs.

§281.40. Form and Content of Briefs, Exceptions, and Replies.

§281.41. Motions for Postponement.

§281.42. Presentation of Evidence in a Contested Case.

§281.43. Witness Placed under Rule.

§281.44. Evidence.

§281.45. Prepared Testimony.

§281.46. Exceptions.

§281.47. Excluded Testimony.

§281.48. Informal Disposition of a Contested Case.

§281.49. Final Decisions and Orders.

§281.50. Motion for Rehearing.

§281.51. Application or Reissuance or Removal of Restrictions of a License.

§281.52. Record.

§281.53. Modification of Time Periods.

§281.54. Interpreters for Deaf Parties and Witnesses.

§281.55. Enforcement of Orders, Decisions, and Rules.

§281.56. Original or Certified Copies of Record.

§281.58. Executive Sessions.

§281.59. Prerequisites to Adopting, Repealing, or Amending Rules.

§281.60. Effective Date of Rules.

§281.61. Petition for Adoption of Rules.

§281.62. Procedure for Hearings Officer Presentation.

§281.63. Exceptions to Proposal for Decision.

§281.67. President to Preside.

§281.68. Official Action by Majority.

§281.69. Initiating Proceedings before the Board.

§281.70. Hearing Docket.

§281.71. Setting Hearings.

§281.72. Place of Meeting of the Board.

§281.73 Complaints.

§281.74. Charges for Public Records.

§281.75. Vehicle Inscription Exemption.

§281.79. Amendments, Conflicting Rules Repealed.

§281.80. Effective Date.

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

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

TRD-9815181
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Proposed date of adoption: November 9, 1998
For further information, please call: (512) 305–8028

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Chapter 281. Administrative Practice and Procedures

Subchapter A. General Provisions

22 TAC §§281.1–281.16

The new sections are proposed under §4 and §16(a) of the Texas Pharmacy Act (Article 4542a-1, Texas Civil Statutes). The Board interprets §4 as authorizing the agency to adopt rules to protect the public health, safety, and welfare through the effective control and regulation of the practice of pharmacy. The Board interprets §16(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by the rules: Texas Civil Statutes, Article 4542a-1.

§281.1. Objective and Scope.

The objective of this chapter is to obtain a just, fair, and equitable determination of any matter within the jurisdiction of the board. To the end that this objective may be attained with as great expedition and at the least expense as possible to the parties and the state, the provisions of this chapter shall be given a liberal construction. The provisions of this chapter govern the procedure for the institution, conduct, and determination of all proceedings before the board. The provisions of the Administrative Procedure Act (APA), Government Code, Chapter 2001, govern where ambiguity or differences exist between the provisions of this chapter and APA.

§281.2. Definitions.

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

(1) Act - The Texas Pharmacy Act, Texas Civil Statutes, Article 4542a-1, as amended.

(2) Administrative law judge, ALJ, or judge - An individual appointed by the chief administrative law judge of the State Office of Administrative Hearings (SOAH) under Government Code, Chapter 2003, §2003.041.

(3) Alternative Dispute Resolution (ADR)- Processes used at the State Office of Administrative Hearings (SOAH) to resolve disputes outside the formal contested case hearing processes, including mediation, mediated settlement conferences, and arbitration.

(4) Agency - The Texas State Board of Pharmacy, and its divisions, departments, and employees.

(5) Administrative Procedure Act (APA) - Government Code, Chapter 2001, as amended.

(6) Authorized representative - An attorney authorized to practice law in the State of Texas or, if authorized by applicable law, a person designated by a party to represent the party.

(7) Board - The Texas State Board of Pharmacy.

(8) Business day - A weekday on which state offices are open.

(9) Contested case - A proceeding, including but not restricted to licensing, in which the legal rights, duties, or privileges of a party are to be determined by the board after an opportunity for adjudicative hearing.

(10) Diversion of controlled substances - an act or acts which result in the distribution of controlled substances from legitimate pharmaceutical or medical channels in violation of the Controlled Substances Act or rules promulgated pursuant to the Controlled Substances Act or rules relating to controlled substances promulgated pursuant to this Act.

(11) Executive director/secretary - The secretary of the board and executive director of the agency.

(12) License - The whole or part of any agency permit, certificate, approval, registration, or similar form of permission required by law.

(13) Licensee - Any individual or person to whom the agency has issued any permit, certificate, approved registration, or similar form of permission authorized by law.

(14) Licensing - The agency process relating to the granting, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license.

(15) Official act - Any act performed by the board pursuant to a duty, right, or responsibility imposed or granted by law, rule, or regulation.

(16) Party - A person or agency named or admitted as a party.

(17) Person - An individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, or any other legal entity.

(18) 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.

(19) President - The president of the Texas State Board of Pharmacy.

(20) Presiding Officer - The president of the Texas State Board of Pharmacy or, in the president's absence, the highest ranking officer present at a Board meeting.

(21) Quorum - A majority of the members of the board appointed and serving on the board.

(22) Register - The Texas Register established by the APA.

(23) Rule - Any agency statement of general applicability that implements, or prescribes law or policy by defining general standards of conduct, rights, or obligations of persons, or describes the procedure or practice requirements that prescribe the manner in which public business before an agency may be initiated, scheduled, or conducted, or interprets or clarifies law or agency policy, whether with or in the absence of an explicit grant of power to the agency to make rules. 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 agency and not affecting private rights or procedures. This definition includes regulations.

(24) State Office of Administrative Hearings (SOAH) - The agency to which contested cases are referred by the Texas State Board of Pharmacy.

(25) Sample - A prescription drug which is not intended to be sold and is intended to promote the sale of the drug.

(26) Texas Open Records Act - Government Code, Chapter 552.

§281.3. Construction of this Chapter.

(a) In the construction of this chapter, a provision of a section referring to the board, or a provision referring to the presiding officer, is construed to apply to the board or the president if the matter is within the jurisdiction of the board.

(b) Unless otherwise provided by law, any duty imposed on the board or the president may be delegated to a duly authorized representative. In such case, the provisions of any section referring to the board or the president shall be construed to also apply to the duly authorized representative(s) of the board or the president.

§281.4. Official Acts in Writing and Open to the Public.

All official acts of the board shall be evidenced by a written record. Such writings shall be open to the public in accordance with the Act and the Texas Open Records Act, Government Code Chapter 552. Any hearing and any Board meeting shall be open to the public in accordance with the Texas Open Meetings Act, Government Code, Chapter 551, provided, however, that pursuant to §14(c), Texas Pharmacy Act, the board may, in its discretion, conduct deliberations relative to licensee disciplinary actions in a closed meeting. The board in a closed meeting may conduct disciplinary hearings relating to a pharmacist or pharmacy student who is impaired because of chemical abuse or mental or physical illness. At the conclusion of its deliberations relative to licensee disciplinary action, the board shall vote and announce its decision relative to the licensee in open session. All disciplinary hearings before the State Office of Administrative Hearings shall be open to the public, including those relating to a pharmacist or pharmacy student who is impaired because of chemical abuse or mental or physical illness. Official action of the board shall not be bound or prejudiced by any informal statement or opinion made by any member of the board or the employees of the agency.

§281.5. Initiating Proceedings Before the board.

(a) Proceedings may be initiated before the board as follows:

(1) Any interested person may petition the board requesting the adoption of a rule in accordance with §281.73 of this title (relating to Petition for Adoption of Rules).

(2) In any other matter, any person desiring that the board perform some official act permitted or required by law shall request such performance in writing. Such requests shall be directed to the executive director/secretary of the board. Subject to §281.28 of this title (relating to Pleadings), any written request shall be deemed sufficient to initiate the proceedings and present the subject matter to the board for its official determination if the request reasonably gives notice to the board of the act desired. The board may also initiate proceedings on its own motion.

(b) Matters that arise through appeal pursuant to §281.28 of this title shall be initiated in accordance with this section.

§281.6. Pharmacist Mental or Physical Examination.

For the purposes of the Act, §26(a)(4), shall be applied as follows.

(1) The board may reprimand, fine, restrict, suspend, cancel, retire, or revoke any license granted by the board if the

board finds that the applicant or licensee has developed a mental or physical incapacity that in the estimation of the board would prevent a pharmacist from engaging in the practice of pharmacy with a level of skill and competence that ensures the public health, safety and welfare.

(2) Upon probable cause that the applicant or licensee has developed a mental or physical incapacity that in the estimation of the board would prevent a pharmacist from engaging in the practice of pharmacy with a level of skill and competence that ensures the public health, safety, the following is applicable:

(A) The executive director/secretary, legal counsel of the agency, or other representative of the agency as designated by the executive director/secretary, shall request the pharmacist or applicant to submit to a mental or physical examination by a physician or physicians designated by the board.

(B) The pharmacist or applicant shall be notified in writing, by either personal service or certified mail with return receipt requested, of the request to submit to the examination.

(C) The pharmacist or applicant shall submit to the examination within 30 days of the date of the receipt of the request.

(D) The pharmacist or applicant shall authorize the release of the results of the examination and the results shall be submitted to the board within 15 days of the date of the examination.

(3) If the pharmacist or applicant does not comply with the provisions of paragraph (2) of this section, the following is applicable.

(A) The executive director/secretary shall cause to be issued an order requiring the pharmacist or applicant to show cause why he/she will not submit to the examination.

(B) The executive director/secretary shall schedule a hearing before the board or the State Office of Administrative Hearings on the order, within 30 days after notice is served on the pharmacist or applicant.

(C) The pharmacist or applicant shall be notified of the hearing by either personal service or certified mail with return receipt requested.

(D) At the hearing, the pharmacist or applicant and if applicable, the pharmacist's or applicant's attorney, are entitled to present any testimony and other evidence to show why the pharmacist should not be required to submit to the examination.

(E) After the hearing, the board shall issue an order either requiring the pharmacist or applicant to submit to the examination or withdrawing the request for examination.

§281.7. Grounds for Discipline for a Pharmacist License.

(a) For the purposes of the Act, §26(a), "unprofessional conduct" shall include, but not be limited to:

(1) dispensing a prescription drug pursuant to a forged, altered, or fraudulent prescription;

(2) dispensing a prescription drug order pursuant to a prescription from a practitioner as follows:

(A) the dispensing of a prescription drug order not issued for a legitimate medical purpose or in the usual course of professional practice shall include the following:

(i) dispensing controlled substances or dangerous drugs to an individual or individuals in quantities, dosages, or for periods of time which grossly exceed standards of practice, approved labeling of the federal Food and Drug Administration, or the guidelines published in professional literature; or

(ii) dispensing controlled substances or dangerous drugs when the pharmacist knows or reasonably should have known that the controlled substances or dangerous drugs are not necessary or required for the patient's valid medical needs or for a valid therapeutic purpose;

(B) the provisions of subparagraph (A)(i) and (ii) of this paragraph are not applicable for prescriptions dispensed to persons with intractable pain or to a narcotic drug dependent person in accordance with the requirements of Title 21, Code of Federal Regulations, 1306.07;

(3) delivering or offering to deliver a prescription drug or device in violation of this Act, the Controlled Substances Act, the Dangerous Drug Act, or rules promulgated pursuant to these Acts;

(4) to acquire or possess or attempt to acquire or possess prescription drugs in violation of this Act, the Controlled Substances Act, or Dangerous Drug Act or rules adopted pursuant to these Acts;

(5) distributing prescription drugs or devices to a practitioner or a pharmacy not in the course of professional practice or in violation of this Act, the Controlled Substances Act, Dangerous Drug Act, or rules adopted pursuant to these Acts;

(6) refusing or failing to keep, maintain or furnish any record, notification or information required by this Act, the Controlled Substances Act, Dangerous Drug Act, or any rule adopted pursuant to these Acts;

(7) refusing an entry into any pharmacy for any inspection authorized by the Act;

(8) making false or fraudulent claims to third parties for reimbursement for pharmacy services;

(9) operating a pharmacy in an unsanitary manner;

(10) making false or fraudulent claims concerning any drug;

(11) persistently and flagrantly overcharging for the dispensing of controlled substances;

(12) dispensing controlled substances or dangerous drugs in a manner not consistent with the public health or welfare;

(13) failing to practice pharmacy in an acceptable manner consistent with the public health and welfare;

(14) refilling a prescription upon which there is authorized "prn" refills or words of similar meaning, for a period of time in excess of one year from the date of issuance of such prescription;

(15) engaging in any act, acting in concert with another, or engaging in any conspiracy resulting in a restraint of trade, coercion, or a monopoly in the practice of pharmacy;

(16) sharing or offering to share with a practitioner compensation received from an individual provided pharmacy services by a pharmacist;

(17) obstructing a board employee in the lawful performance of his duties of enforcing the Act;

(18) engaging in conduct that subverts or attempts to subvert any examination or examination process required for a license to practice pharmacy. Conduct that subverts or attempts to subvert the pharmacist licensing examination process includes, but is not limited to:

(A) copying, retaining, repeating, or transmitting in any manner the questions contained in any examination administered by the board or questions contained in a question pool of any examination administered by the board;

(B) copying or attempting to copy another candidate's answers to any questions on any examination required for a license to practice pharmacy;

(C) obtaining or attempting to obtain confidential examination materials compiled by testing services or the Board;

(D) impersonating or acting as a proxy for another in any examination required for a license to practice pharmacy;

(E) requesting or allowing another to impersonate or act as a proxy in any examination required for a license to practice pharmacy; or

(F) violating or attempting to violate the security of examination materials or the examination process in any manner;

(19) violating the provisions of an agreed board order or board order;

(20) dispensing a prescription drug while not acting in the usual course of professional pharmacy practice;

(21) failing to provide or providing false or fraudulent information on any application, notification, or other document required under this Act, the Dangerous Drug Act, or Controlled Substances Act, or rules adopted pursuant to those Acts;

(22) physically abusing a board employee during the performance of such employees lawful duties;

(23) failure to establish or maintain effective controls against the diversion or loss of controlled substances or dangerous drugs, loss of controlled substance or dangerous drug records, or failure to ensure that controlled substances or dangerous drugs are dispensed in compliance with state and federal laws or rules, by a pharmacist who is:

(A) a pharmacist-in-charge of a pharmacy;

(B) a sole proprietor or individual owner of a pharmacy;

(C) a partner in the ownership of a pharmacy; or

(D) a managing officer of a corporation, association, or joint-stock company owning a pharmacy. A pharmacist, as set out in subparagraphs (B)-(D) of this paragraph, is equally responsible with an individual designated as pharmacist-in-charge of such pharmacy to ensure that employee pharmacists and the pharmacy are in compliance with all state and federal laws or rules relating to controlled substances or dangerous drugs;

(24) failure to respond within the time specified on a warning notice to such warning notice issued as a result of a compliance inspection;

(25) responding to a warning notice as a result of a compliance inspection in a manner that is false or misleading;

(26) being the subject of civil fines imposed by a federal or state court as a result of violating the Controlled Substances Act or Dangerous Drug Act;

(27) the sale, purchase, or trade or the offer to sell, purchase, or trade of prescription drug samples; provided however, this paragraph does not apply to:

(A) prescription drugs provided by a manufacturer as starter prescriptions or as replacement for such manufacturer's outdated drugs;

(B) prescription drugs provided by a manufacturer in replacement for such manufacturer's drugs that were dispensed pursuant to written starter prescriptions; or

(C) prescription drug samples possessed by a pharmacy of a health care entity which provides health care primarily to indigent or low income patients at no or reduced cost and if:

(i) the samples are possessed in compliance with the Prescription Drug Marketing Act of 1987;

(ii) the pharmacy is owned by a charitable organization described in the Internal Revenue Code of 1986, or by a city, state or county government; and

(iii) the samples are for dispensing or provision at no charge to patients of such health care entity.

(28) the sale, purchase, or trade or the offer to sell, purchase, or trade of prescription drugs:

(A) sold for export use only;

(B) purchased by a public or private hospital or other health care entity; or

(C) donated or supplied at a reduced price to a charitable organization described in the Internal Revenue Code of 1986, §501(c)(3);

(D) provided that subparagraphs (A)-(C) of this paragraph do not apply to:

(i) the purchase or other acquisition by a hospital or other health care entity which is a member of a group purchasing organization or from other hospitals or health care entities which are members of such organization;

(ii) the sale, purchase, or trade of a drug or an offer to sell, purchase, or trade a drug by an organization described in paragraph (28)(C) of this subsection to a nonprofit affiliate of the organization to the extent otherwise permitted by law;

(iii) the sale, purchase or trade of a drug or an offer to sell, purchase, or trade a drug among hospitals or other health care entities which are under common control;

(iv) the sale, purchase, or trade of a drug or an offer to sell, purchase, or trade a drug for emergency medical reasons including the transfer of a drug between pharmacies to alleviate temporary shortages of the drug arising from delays in or interruptions of regular distribution schedules;

(v) the dispensing of a prescription drug pursuant to a valid prescription drug order to the extent otherwise permitted by law;

(29) the sale, purchase, or trade or the offer to sell, purchase, or trade of:

(A) misbranded prescription drugs; or

(B) prescription drugs beyond the manufacturer's expiration date;

(30) failure to repay a guaranteed student loan, as provided in the Texas Education Code, §57.491, or;

(31) failure to respond and to provide all requested records within the time specified in an audit of continuing education

records under §295.8 of this title (relating to Continuing Education Requirements).

(b) For the purposes of the Act, §26(a)(3), the term "gross immorality" shall include, but not be limited to:

(1) conduct which is willful, flagrant, or shameless, and which shows a moral indifference to standards of the community;

(2) engaging in an act which is a felony; or

(3) engaging in an act that constitutes sexually deviant behavior.

(c) For the purposes of the Act, §26(a)(5), the terms "fraud," "deceit," or "misrepresentation" in the practice of pharmacy or in seeking a license to act as a pharmacist shall be defined as follows.

(1) "Fraud" means an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him, or to surrender a legal right, or to issue a license; a false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives or is intended to deceive another.

(2) "Deceit" means the assertion, as a fact, of that which is not true by any means whatsoever to deceive or defraud another.

(3) "Misrepresentation" means a manifestation by words or other conduct which is a false representation of a matter of fact.

§281.8. Grounds for Discipline for a Pharmacy License.

For the purposes of subdivision (9) of subsection (b) of §26 of the Act, a pharmacy fails to establish and maintain effective controls against diversion of prescription drugs when:

(1) there is inadequate security to prevent unauthorized access to prescription drugs;

(2) there is inadequate security to prevent the diversion of prescription drugs;

(3) during the time an individual's license to practice pharmacy is revoked, canceled, or suspended, the pharmacy employs or allows such individual access to prescription drugs;

(4) the pharmacy possesses or engages in the sale, purchase, or trade or the offer to sell, purchase, or trade prescription drug samples; provided however, this paragraph does not apply to:

(A) prescription drugs provided by a manufacturer as starter prescriptions or as replacement for such manufacturer's outdated drugs;

(B) prescription drugs provided by a manufacturer in replacement for such manufacturer's drugs that were dispensed pursuant to written starter prescriptions; or

(C) prescription drug samples possessed by a pharmacy of a health care entity which provides health care primarily to indigent or low income patients at no or reduced cost and if:

(i) the samples are possessed in compliance with the Prescription Drug Marketing Act of 1987;

(ii) the pharmacy is owned by a charitable organization described in the Internal Revenue Code of 1986, or by a city, state or county government; and

(iii) the samples are for dispensing or provision at no charge to patients of such health care entity;

(5) the pharmacy possesses or engages in the sale, purchase, or trade or the offer to sell, purchase, or trade of prescription drugs:

(A) sold for export use only;

(B) purchased by a public or private hospital or other health care entity; or

(C) donated or supplied at a reduced price to a charitable organization described in the Internal Revenue Code of 1986, §501(c)(3), and possessed by a pharmacy other than one owned by the charitable organization;

(D) provided that subparagraphs (A)-(C) of this paragraph do not apply to:

(i) the purchase or other acquisition by a hospital or other health care entity which is a member of a group purchasing organization or from other hospitals or health care entities which are members of such organization;

(ii) the sale, purchase, or trade of a drug or an offer to sell, purchase, or trade a drug by an organization described in paragraph (4)(C)(ii) of this section to a nonprofit affiliate of the organization to the extent otherwise permitted by law;

(iii) the sale, purchase or trade of a drug or an offer to sell, purchase, or trade a drug among hospitals or other health care entities which are under common control;

(iv) the sale, purchase, or trade of a drug or an offer to sell, purchase, or trade a drug for emergency medical reasons including the transfer of a drug between pharmacies to alleviate temporary shortages of the drug arising from delays in or interruptions of regular distribution schedules;

(v) the dispensing of a prescription drug pursuant to a valid prescription drug order to the extent otherwise permitted by law; or

(6) the sale, purchase, or trade or the offer to sell, purchase, or trade of:

(A) misbranded prescription drugs; or

(B) prescription drugs beyond the manufacturer's expiration date.

§281.9. Rules Governing Penalties Against a License.

For the purpose of the Act, §28(a), (Texas Civil Statutes, Article 4542a-1):

(1) "Cancellation" means the invalidation of a license for an indefinite period; provided, however, upon the expiration of 12 months from and after the effective date of the order canceling a license, application may be made for reissuance of such license.

(2) "Diversion of controlled substances" means an act or acts which result in the distribution of controlled substances from legitimate pharmaceutical or medical channels in violation of the Controlled Substances Act or rules promulgated pursuant to the Controlled Substances Act or rules relating to controlled substances promulgated pursuant to this Act.

(3) "Probation" means the suspension of a sanction imposed against a license during good behavior, for a term and under conditions as determined by the board.

(4) "Reprimand" means a public and formal censure against a license.

(5) "Restriction" means to limit, confine, abridge, narrow, or restrain a license for a term and under conditions determined by the board.

(6) "Revocation" means a license is void and may not be reissued; provided, however, upon the expiration of 12 months from and after the effective date of the order revoking a pharmacist license, application may be made to the board by the former licensee for the issuance of a license upon the successful completion of any examination required by the board.

(7) "Suspension" means a license is of no further force and effect for a period of time as determined by the board.

(8) "Retire" means a license has been withdrawn and is of no further force and effect.

§281.10. Denial of or Disciplinary Action Against a License.

(a) If an applicant's original application or request for renewal of a license is denied, he shall have 30 days from the date of denial to make a written request for a hearing. If so requested, the hearing will be granted and the provisions of APA and this chapter with regard to a contested case shall apply.

(b) No disciplinary action against a license is effective unless, prior to the institution of proceedings, the agency gave notice by personal service or by registered or certified mail to the licensee or the licensee's attorney of facts or conduct alleged to warrant the intended action, and the licensee is given an opportunity to show compliance with all requirements of law for the retention of the license

§281.11. Rules Governing Cooperating Practitioners.

For the purposes of the Act, §38(c), a person acting under the supervision of a Board employee engaged in the lawful enforcement of the Act shall include, but not be limited to, a practitioner who provides prescriptions for use in investigations of licensees when such prescriptions are issued by a practitioner at the request of and under the supervision of a Board investigator.

§281.12. Closed Meetings.

(a) A closed meeting of the board shall not be held unless a quorum of the board has first been convened in open meeting. If during such open meeting, a motion is passed by the board to hold a closed meeting, the presiding officer shall publicly announce that a closed meeting will be held and identifies the section or sections of the Government Code, Chapter 551 (Texas Open Meetings Act) under which the closed meeting is held.

(b) The presiding officer shall announce the date and time at the beginning and end of the closed meeting.

(c) The agency shall keep a certified agenda of the closed meeting which shall be certified by the presiding officer as being a true and correct record of the proceedings. The certified agenda shall:

(1) include an announcement of the date and time by the presiding officer at the beginning and end of the closed meeting; and

(2) state the subject matter of each deliberation and include a record of any further action taken.

(d) In lieu of the certified agenda outlined in subsection (c) of this section, the board may make a tape recording of the closed meeting which shall include the announcement made by the presiding officer at the beginning and end of the closed meeting.

(e) Any actions deliberated during a closed meeting shall be announce in an open session immediately following the conclusion of the closed meeting. A final action, decision, or vote on a matter deliberated in a closed meeting shall be made in an open meeting announced in an open session.

(f) The presiding officer shall place the certified agenda or tape in an envelope, seal and date the envelope and deliver the envelope to the executive director/secretary.

(g) The certified agenda or tape shall be maintained at the board office for at least two years from the date of the closed meeting. If an action involving the closed meeting is brought within that two-year period, the certified agenda shall be maintained while the action is pending.

(h) The certified agenda or tape shall be available for inspection by the judge of a district court as specified in the Government Code, Chapter 551.104(b), if litigation has been initiated involving a violation of this section.

(i) If the closed meeting is for the purpose of considering disciplinary action against a licensee, an attorney employed by the Office of the Attorney General may be present to advise the board on legal considerations.

§281.13. Official Action by Majority.

Any official act or decision of the board shall be concurred in by a majority of its members present at a meeting. Such act or decision shall be based upon information presented to members present at official meetings of the board. There shall be at least a quorum of the board members present at any official meeting of the board. Private solicitation of individual members in an effort to in any way influence their official actions through information or arguments not simultaneously presented to other members of the board is improper.

§281.14. Charges for Public Records.

In accordance with Government Code, Chapter 552, the following specifies the charges the agency will make for copies of public information.

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

(A) Standard-size copy A printed impression on one side of a piece of paper that measures up to 8 1/2 by 14 inches. Each side of the paper on which an impression is made is counted as a single copy. A piece of paper printed on both sides is counted as two copies.

(B) Copy charge a charge for costs incurred in copying standard-size paper copies reproduced by an office machine copier or a computer printer.

(C) Postage and shipping charge A charge for costs incurred in sending information to a requestor, such as cost of postage, envelop, or long-distance phone call for facsimile transmission.

(D) Personnel charge A charge imposed for costs incurred for personnel time expended in processing a request for public information. This charge may include the time any employee spends reading/reviewing the initial request for records, making copies of records, conducting a file search, conducting a computer search, preparing and reviewing the response to the records request (administrative oversight/review), and any other type of personnel time necessary to respond to the request.

(E) Overhead charge A charge for direct and indirect costs incurred in addition to the personnel charge. This charge covers such costs as depreciation of capital assets, rent, maintenance and repair, utilities, and administrative overhead.

(F) Microfiche and microfilm charge A charge for costs incurred in making a copy of microfiche or microfilm.

(G) Remote document retrieval charge A charge for costs incurred in obtaining information not in current use in remote storage locations.

(H) Computer resource charge A charge for costs incurred in obtaining information on computers based on the amortized cost of acquisition, lease, operation, and maintenance of computer resources. This charge may also include programming time if a request requires a programmer to enter data in order to execute an existing program or create a new program so that requested information may be accessed.

(2) Charges.

(A) the charge for providing copies of public information shall be determined in accordance with the rules promulgated by the General Services Commission at 1 TAC §§111.61 111.70.

(B) If a request for information may result in charges estimated to exceed $100, the agency may require the requester to make a deposit in the anticipated approximate amount of the charges, which may be applied to the costs incurred in responding to the request.

(C) If a particular request may involve considerable time and resources to process, the agency may advise the requesting party of what may be involved and provide an estimate of date of completion and the charges that may result.

(D) The agency has the discretion to furnish public records without charge or at a reduced charge if the agency determines that a waiver or reduction is in the public interest because furnishing the information primarily benefits the general public.

(E) Nothing herein shall prevent the agency from charging for its publications, such as the Texas State of Pharmacy Law Reference Manual, or portions thereof.

§281.15. Vehicle Inscription Information.

(a) Exemption. As specified in the Act §17(s), vehicles assigned to or used by the compliance or investigation divisions for enforcement of pharmacy laws and rules are exempt from bearing the inscription required in Article 6701m-1 of Texas Civil Statutes. These vehicles are to be used primarily in the inspection of pharmacies and the investigation of violations of state and federal laws and rules relating to the practice of pharmacy. In addition, as specified in §17(s) of the Texas Pharmacy Act, the vehicles may be registered with the Texas Department of Transportation in an alias name for investigative personnel.

(b) Purpose. The purpose of exempting these vehicles from the inscription requirements of Article 6701m-1 is to increase the effectiveness of agency compliance officers and investigators in detecting and investigating violations of state and federal laws relating to the practice of pharmacy, thereby allowing compliance and investigative personnel to accomplish their tasks undetected, and to provide a greater degree of safety for these staff and the state property being used in the enforcement and a greater degree of case integrity.

§281.16. Enforcement of Orders, Decisions, and Rules.

If it appears to the agency that a person is engaging in or is about to engage in a violation of a final order or decision or a rule of the agency or is failing or refusing to comply with a final order or decision or a rule of the board, the attorney general, on the request of the agency and in addition to any other remedy provided by law, may bring an action in a district court in Travis County, Texas, to exercise judicial review of the final order or decision or the rule, to enjoin or restrain the continuation or commencement of the violation, or to compel compliance with the final order or decision or the rule.

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

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

TRD-9815182
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Proposed date of adoption: November 9, 1998
For further information, please call: (512) 305–8075

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Subchapter B. General Procedures in Contested Cases

22 TAC §§281.21–281.56

The new sections are proposed under §4 and §16(a) of the Texas Pharmacy Act (Article 4542a-1, Texas Civil Statutes). The Board interprets §4 as authorizing the agency to adopt rules to protect the public health, safety, and welfare through the effective control and regulation of the practice of pharmacy. The Board interprets §16(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by the rules: Texas Civil Statutes, Article 4542a-1.

§281.21. Complaints.

Complaints may be filed with the agency in writing or by submitting a completed complaint form. A complaint form shall be maintained at the agency's office for use at the request of any complainant. The complaint form shall request information necessary for the proper processing of the complaint by the agency, including, but not limited to:

(1) complainant's name, address, and phone number;

(2) name, address and phone number of subject of complaint, if known;

(3) date of incident;

(4) description of drug(s) involved, if any; and

(5) description of incident giving rise to complaint.

§281.22. Informal Disposition of a Contested Case.

(a) Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, default, or dismissal.

(b) Prior to the imposition of disciplinary sanction(s) against a license, the licensee shall be offered an opportunity to attend an informal conference and show compliance with all requirements of law, in accordance with §2001.054(c) of the Administrative Procedure Act.

(c) Informal conferences shall be attended by the executive director/secretary or designated representative, legal counsel of the agency or an attorney employed by the office of the attorney general, and other representative(s) of the agency as the executive director/

secretary and legal counsel may deem necessary for proper conduct of the conference. The licensee and/or the licensee's authorized representative(s) may attend the informal conference and shall be provided an opportunity to be heard.

(d) In any case where charges are based upon information provided by a person (complainant) who filed a complaint with the board, the complainant may attend the informal conference, unless the proceedings are confidential under §27A of the Texas Pharmacy Act or other applicable law. A complainant who chooses to attend an informal conference shall be provided an opportunity to be heard with regard to charges based upon the information provided by the complainant. Nothing herein requires a complainant to attend an informal conference.

(e) Informal conferences shall not be deemed meetings of the board and no formal record of the proceedings at such conferences shall be made or maintained.

(f) Any proposed consent order shall be presented to the board for its review. At the conclusion of its review, the board shall approve or disapprove the proposed consent order. Should the board approve the proposed consent order, the appropriate notation shall be made in minutes of the board and the proposed consent order shall be entered as an official action of the board. Should the board disapprove the proposed consent order, the matter shall be scheduled for public hearing.

§281.23. Referring a Contested Case to the State Office of Administrative Hearings.

(a) The State Office of Administrative Hearings (SOAH) acquires jurisdiction over a case when the agency refers a matter to SOAH by:

(1) submitting to SOAH the required docket forms accompanied by legible copies of all pertinent documents, including but not limited to the complaint, petition, application, or other document describing the agency action giving rise to a contested case; and

(2) requesting the setting of hearing, the assignment of an administrative law judge and/or the setting of alternative, dispute resolution proceeding, including but not limited to mediated settlement conference, mediation, or arbitration.

(b) Upon the agency request for the setting of a hearing, SOAH will provide the agency with the date, time, and place of the hearing.

(c) If the agency requests the assignment of an administrative law judge, SOAH will assign a judge to consider motions and other pre-hearing matters.

(d) If the agency requests an alternative dispute resolution proceeding, SOAH will initiate the processes necessary to select a mediator or arbitrator and provide the parties with the date, time, and place of the alternative dispute resolution proceeding.

(e) After a case has been placed on SOAH's docket, any party may move for appropriate relief, including but not limited to discovery and evidentiary rulings, continuances, and settings.

§281.24. Venue.

Hearings for contested cases shall be conducted at the site designated by SOAH in accordance with applicable law. Unless required by law or unless agreed to by all parties, hearings will be conducted outside of Austin only after the ALJ considers all relevant factors raised by the parties, including but not limited to legislative restrictions on travel, the amount in controversy, the estimated length of the hearing, the availability of facilities, costs to private parties and referring agencies, and the locations of witnesses.

§281.25. Notice and Service.

(a) The notice of a hearing in a contested case shall include the following:

(1) a statement of time, place, and nature of the hearing;

(2) a statement of the legal authority and jurisdiction under which the hearing is to be held.

(3) a reference to applicable law, including, but not limited to applicable statutes, and rules and regulations.

(4) a short statement of the matters asserted;

(5) a disclosure, in ten-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; and

(6) a specific citation to 1 TAC Chapter 155 (relating to SOAH Rules of Procedure).

(b) If the agency or other party is unable to set forth a detailed statement of the matters asserted at the time notice under this section is served, an initial notice may be limited to a statement of the issues involved. Upon a timely written application for a more definite and detailed statement of the matters asserted, such shall be furnished not less than three days before the date set for hearing.

(c) An ALJ may issue orders regarding the date, time, and place for hearings, and orders affecting the scope of the proceeding.

(d) Notice of hearing may be served by delivering a copy to the party to be served, either in person, or by courier receipted delivery, or by certified or registered mail, return receipt requested, to the party's last known address as shown by agency records.

(e) Service by mail shall be complete upon deposit of the documents, enclosed in a postpaid, properly addressed wrapper, in a post office, or official depository under the care and custody of the United States Postal Service.

(f) A copy of any pleading filed by any party in a proceeding shall be mailed or otherwise delivered by the party filing the same to every other party or such party's attorney. A certificate by the party, attorney, or representative who files a pleading, stating that it has been served on the other parties is prima facie evidence of such service. The following form of certificate is sufficient:

(1) I hereby certify that I have this day of (month), (year) served copies of the foregoing pleading upon all other parties to this proceeding, by (here state the manner of service).

(2) By: _____

§281.26. Filing Documents or Serving Documents.

The following requirements govern the filing or service on the ALJ of documents in contested cases pending before SOAH unless modified by order of the ALJ.

(1) Place for Filing Original Materials. The original of all pleadings and other documents requesting action or relief in a contested case shall be filed with SOAH once it acquires jurisdiction under §281.23 of this title (relating to Referring a Contested Case to the State Office of Administrative Hearings) provided however, that unless otherwise provided by law, after a proposal for decision has been issued, originals of documents requesting relief, such as exceptions to the proposal for decision or requests to reopen the hearing, shall be filed with the agency, and a copy shall be filed

with SOAH. All such documents shall be directed to: Docketing Division, State Office of Administrative Hearings, 300 West 15th Street, Room 504, P.O. Box 13025, Austin, Texas 78711-3025. The file stamp affixed by SOAH shall set the time and date of filing. Unless otherwise ordered by the ALJ, only the original copy of any pleading or document shall be filed; no additional copies will be accepted. Unless otherwise provided by law, after a proposal for decision has been issued pursuant to §281.51 of this title (relating to Proposal for Decision), originals of documents requesting relief, such as exceptions to the proposal for decision or requests to reopen the hearing, shall be filed with the agency, and a copy shall be filed with SOAH.

(2) Confidential Materials. Materials or documents made confidential by law shall be filed in accordance with §281.26 (relating to Filing Documents or Serving Documents). Materials or documents may be submitted for in camera review as provided in §281.26 of this title.

(3) Documents Produced in Discovery.

(A) 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 SOAH or served on the ALJ, except by order of the ALJ. The party responsible for service of the discovery materials shall retain a true and accurate copy of the original documents and become their custodian.

(B) Motions requesting relief in a discovery dispute shall be accompanied by only those portions of discovery materials relevant to the dispute.

(C) 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 SOAH or offered into evidence.

(4) Time of Filing. Documents may be filed with or served on SOAH until 5:30 p.m. local time on business days, unless otherwise ordered by the ALJ.

(5) Facsimile Filings. Documents containing twenty or fewer pages, including exhibits, may be filed with SOAH, by facsimile transmission according to the following requirements. The quality of the original hard copy shall be clear and dark enough to transmit legibly. The first sheet of the transmission shall indicate the number of pages being transmitted, and shall contain a telephone number to call if there are problems with the transmission. Neither the original nor any additional copies of facsimile filings should be filed with SOAH. The sender shall maintain the original of the document with the original signature affixed. The date and time imprinted by SOAH's facsimile machine on the transaction report that accompanies the document will determine the date and time of filing or of service on the ALJ. Documents received after 5:30 p.m. local time shall be deemed filed the first day following that is not a Saturday, Sunday or other day on which SOAH is closed.

§281.27. Service of Documents on Parties.

(a) Service on all parties. Any person filing a document with SOAH in a case shall, on the same date as the document is filed, provide a copy to each party or the party's authorized representative by hand- delivery; by regular, certified or registered mail; by electronic mail, upon agreement of the parties; or by facsimile transmission; provided however, when a party files a business record affidavit, pursuant to Texas Rules of Civil Evidence 902(10), or a transcript, the party may give notice of the filing without the necessity of providing a copy to each party. By order, the ALJ may exempt a party from serving other documents upon all parties.

(b) Certificate of service. The person filing the document shall include a certificate of service that certifies compliance with this section. If a filing does not contain a certificate of service or otherwise show service on all other parties, and on the ALJ if applicable, SOAH may:

(1) return the filing;

(2) send notice of noncompliance to all parties, stating the filing will not be considered until all parties have been served; or

(3) send a copy of the filing to all parties.

(c) Presumed time of receipt of served documents. The following rebuttable presumptions shall apply regarding a party's receipt of documents served by another party:

(1) If a document was hand-delivered to a party in person or by agency, the ALJ shall presume that the document was received on the date of filing at SOAH.

(2) If a document was served by courier-receipted delivery, the ALJ shall presume that the document was received no later than the day after filing at SOAH.

(3) If a document was sent by regular mail, certified mail, or registered mail, the ALJ shall presume that it was received no later than five days after mailing.

(4) If a document was served by facsimile transmission or by electronic mail, if parties have so agreed, before 5:30 p.m. on a business day, the ALJ shall presume that the document was received on that day; otherwise, the ALJ shall presume that the document was received on the next business day.

(d) 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 SOAH.

(2) The sender has the burden of proving date and time of receipt of the document.

§281.28. Pleadings.

All requests for relief in a contested case not made on the record at a prehearing conference or at a hearing shall be typewritten or printed on paper 8 1/2 inches wide and 11 inches long, and timely filed at SOAH. Photocopies are acceptable, provided all copies are clear and legible. All pleadings shall contain or be accompanied by:

(1) The name of the party seeking relief;

(2) The docket number assigned to the case by SOAH;

(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, as required by §281.25 of this title (relating to Notice and Service);

(8) Any other matter required by statute or rule;

(9) A certificate of conference, if required;

(10) Supporting affidavits or other proof, when the party filing the request has asserted "good cause" in the request; and

(11) The signature of the submitting party or the party's authorized representative.

§281.29. Motions.

(a) Purpose and effect of motions. To change a setting or obtain a ruling, order, or any other procedural relief from the ALJ, a party is required to file a motion. Where the provisions of statute or rule do not automatically establish a needed procedure, the party seeking to amend or supplement the procedure should file a written motion. The mere filing or pendency of a motion, even if uncontested, does not alter or extend any time limit or deadline established by statute, rule, or order, or any setting by SOAH or the ALJ.

(b) General requirements. Except for motions seeking to intervene or be granted party status, to amend a party's pleadings, or to continue a scheduled conference or hearing, all motions shall be filed no later than seven days before the date of the hearing; except, for good cause demonstrated in the motion, the ALJ may consider a motion filed after that time or presented orally at a hearing. A motion for the extension of an established deadline shall include a proposed date, indicate that the movant has contacted all parties, and state whether there is opposition to the proposed date. If the other parties cannot be contacted, the movant shall describe in detail the movant's attempts to contact the other parties.

(c) Responses to motions generally. Responses to motions described in subsection (c) of this section shall be in writing, and filed on the earlier of five days after receipt of the motion, or the date and time of the hearing, provided however, that responses to written motions that may be late-filed for good cause shown on the date of the hearing, may be presented orally at hearing.

(d) Motions to intervene. Motions to join an action as a party shall be filed no later than 20 days prior to the date the case is set for hearing. Responses to such motions shall be filed no later than seven days after the motion is served on or otherwise received by other parties.

(e) Motions for continuance. Motions for continuance shall:

(1) make specific reference to all other motions for continuance previously filed in the case by the movant, and shall set forth the specific grounds upon which the party seeks the continuance;

(2) indicate that the movant has contacted all parties and state whether there is opposition to the motion, or, if the movant is unsuccessful in contacting all other parties, describe in detail the movant's attempts to contact the other parties;

(3) if seeking a continuance to a date certain, include a proposed date or dates (preferably a range of dates) and indicate whether the parties contacted agree on the proposed new date(s);

(4) be filed no later than five days before the date of the hearing, except, for good cause demonstrated in the motion, the ALJ may consider a motion filed after that time or presented orally at the hearing; and

(5) be served on the other parties according to applicable filing and service requirements, except that a motion for continuance filed five days or less before the date of the hearing shall be served by hand or facsimile delivery on the same date it is filed with SOAH, or by overnight delivery on the next day, unless the motion demonstrates or the record shows such service is impracticable.

(f) Responses to written motions for continuance. Responses to written motions for continuance shall be in writing, except responses to written motions for continuance filed on the date of the hearing may be presented orally at the hearing. Written responses to motions for continuance shall be filed on the earlier of three days after the receipt of the motion, or the date and time of the hearing.

(g) Amendment of pleadings. A party may amend its pleadings by written filing at such time as not to operate as a surprise to other parties; provided that any pleading which substantially affects the scope of the hearing may not be filed later than seven days before the date the hearing actually commences, except by agreement of all parties and consent of the ALJ.

§281.30. Briefs.

Briefs may be filed at any time prior to hearing. With leave of the ALJ and, subject to any conditions that the ALJ may impose, the parties may file briefs subsequent to the hearing. Briefs, written exceptions, and pleadings in a contested case shall be stated concisely with argument and properly cited authorities organized and directed to each point. The specific purpose for which evidence is relied upon shall be stated and citations to the page number of the record or exhibit referenced shall be made.

§281.31. Orders.

(a) The ALJ has broad authority to issue orders to regulate the conduct of the proceeding, rule on motions, establishing deadlines, clarifying the scope of the proceeding, scheduling and conducting prehearing or posthearing conferences for any purpose related to any matter in the case, setting out additional requirements for participation in the case, and taking any other steps conducive to a fair and efficient process.

(b) Rulings on matters related to the case not made orally at a recorded prehearing conference or at a hearing shall be in writing and furnished to all parties of record.

(c) The ALJ may order the consolidation of dockets or joint hearing on dockets if there are common issues of law and fact, and if consolidation or a joint hearing will aid the fair and efficient handling of contested matters. The ALJ may also order severance of issues if separate hearings on such issues will aid the fair and efficient handling of contested matters.

(d) The ALJ may order referral of the case to a mediated settlement conference or other appropriate alternative dispute resolution procedure as provided by the Government Code, Chapter 2008, and Government Code, Chapter 2003.

(e) Where authorized by law, the ALJ may issue a final order resolving the contested issues in a case and ruling on all requests for relief.

§281.32. Stipulations.

(a) The parties may stipulate to any factual matters and, subject to the ALJ's approval, may also stipulate to any procedural matters, provided however, that any agreements as to procedural matters that would modify a schedule or procedure ordered by the ALJ must be set forth in a written motion submitted promptly upon the making of the agreement.

(b) A stipulation may be filed in writing or entered on the record at the hearing. The ALJ may require additional development of stipulated matters.

§281.33. Discovery.

(a) In contested cases, parties shall have the discovery rights provided in this section. For cases not adjudicated under this section or the APA, discovery shall be allowed as ordered by the ALJ.

(b) Parties may obtain discovery regarding any matter not privileged or exempted by the Texas Rules of Civil Procedure, Texas Rules of Civil Evidence, or other rule or law, that is relevant to the subject matter of the proceeding.

(c) Discovery in a contested case may commence when SOAH acquires jurisdiction and no discovery may be sought after the commencement of the contested case hearing on the merits, unless permitted by the ALJ upon a showing of good cause.

(d) Parties may obtain discovery by the following methods: oral or written depositions; written interrogatories to a party; requests of a party for admission of facts and the genuineness or identity of documents; requests and motions for production, examination, and copying of documents and other tangible materials; and requests and motions for entry upon and examination of real property.

(1) Interrogatories. Unless the ALJ directs otherwise, each party may serve no more than two sets of interrogatories to any other party. The number of questions, including subsections, in a set of interrogatories shall be limited so as not to require more than thirty answers.

(A) Written interrogatories shall be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer or agent thereof, who shall furnish such information as is available to the party. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be attested to by the person making them. The party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within the time specified by the party serving the interrogatories, which specified time shall not be less than 15 days after the service of the interrogatories, unless the ALJ, upon motion and notice for good cause shown, enlarges or shortens the time.

(B) Whenever a party is represented by an attorney, service of interrogatories and answers to interrogatories shall be made on the attorney unless service upon the party is ordered by the ALJ. True copies of the interrogatories and of any answers shall be served on all other parties or their attorneys at the time that any interrogatories or answers are served.

(C) Interrogatories may relate to any matters which can be inquired into under the Texas Rules of Civil Procedure, Rule 166b, but the answers, subject to any objections as to admissibility, may be used only against the party who answers or whose attorney answers the interrogatories. A party may be required in the party's answers to identify each person whom the party expects to call as an expert witness at the hearing, and to state the subject matter about which the expert is to testify.

(D) Interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered, but the ALJ, on motion of the deposition witness or the party interrogated, may make such protective order as justice may require. The provisions of the Texas Rules of Civil Procedure, Rule 166b, are applicable for the protection of the party from whom answers to interrogatories are sought under this section.

(E) Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of such business records, or from a compilation, abstract, or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit, or inspect such records and to make copies, compilations, abstracts, or summaries.

(2) Admissions. A party may serve upon any other party a written request for the admission of the truth of any matters within the scope of subsection (b) of this section that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of the documents shall be served with the request unless they have been or are otherwise furnished or are made available for inspection and copying. Service shall be in accordance with §281.27 of this title (relating to Service of Documents on Parties).

(A) Each matter as to which an admission is requested shall be separately set forth. The matter is admitted without necessity of an ALJ order unless the party to whom the request is directed timely serves upon the party requesting the admission a written answer or objection addressed to the request, signed by the party or the party's attorney. If objection is made, the reason for the objection shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons that the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify its answer and deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless it states that it has made reasonable inquiry and that the information known or easily obtainable by it is insufficient to enable it to admit or deny. A party who considers that a matter of which an admission is requested presents a genuine issue for hearing may not, on that ground alone, object to the request; it may, subject to the provisions of the Government Code, Section 2003.0421, deny the matter or set forth reasons why the party cannot admit or deny it.

(B) Any matter admitted under this section is conclusively established as to the party making the admission unless the ALJ on motion permits withdrawal or amendment of the admission. Subject to the duty to supplement discovery under this section, the ALJ may permit withdrawal or amendment of responses and deemed admissions upon a showing of good cause for such withdrawal or amendment or in the interest of justice, if the ALJ finds that the parties relying upon the responses and deemed admissions would not be unduly prejudiced and that the presentation of the merits of the action will be subserved thereby. Any admission made by a party under this section is for the purpose of the pending action only and neither constitutes an admission by the party for any other purpose nor may be used against the party in any other proceeding.

(3) Depositions.

(A) On its own motion or on the written request of any party to a contested case pending before it, and on deposit of sums with the executive director/secretary that will reasonably insure payment of the amounts estimated to accrue under this section, the board shall issue a commission, addressed to the several officers authorized by statute to take depositions to require that the deposition of a witness be taken, which commission shall authorize the issuance of any subpoenas necessary to require that the witness appear and produce, at the time the deposition is taken, books, records, papers,

or other objects as may be necessary and proper for the purposes of the proceedings. The deposition of a member of the board may not be taken after a date has been set for hearing.

(B) The place of taking the deposition shall be in the county where the witness resides or is employed or regularly transacts business in person.

(C) The commission shall authorize and require an officer to whom it is addressed to examine the witness before the officer on the date and at the place named in the commission and to take answers under oath to questions that may be propounded to the witness by the parties to the proceeding or their attorneys, the board, or the attorneys for the agency. The commission shall require the witness to remain in attendance from day to day until the deposition is begun and completed.

(D) The officer taking the oral deposition may not sustain objections to any of the testimony taken, or exclude any of it. The objections of the parties or attorneys engaged in taking testimony shall be reserved for determination by the hearing officer or ALJ. The hearing officer or ALJ is not confined to objections made at the taking of the testimony.

(E) The testimony shall be reduced to writing or typewriting by the officer taking the deposition, or by a person under the officer's personal supervision, or by the deposition witness in the officer's presence, and by no other person, and shall after it has been reduced to writing or typewriting, be subscribed to by the deponent.

(F) When the testimony is fully transcribed, the deposition shall be submitted to the witness for examination and read to or by the witness, unless the examination and reading are waived in writing by the witness and by the parties. However, if the witness is a party to the contested case pending before the agency and has an attorney of record, the deposition officer shall notify the attorney of record in writing by registered or certified mail that the deposition is ready for examination and reading at the office of the deposition officer. If the witness does not appear and examine, read, and sign the deposition before the twenty-first day after the date on which the notice is mailed, the deposition shall be returned as provided in this chapter for unsigned depositions. In any event, the witness shall sign the deposition at least three days before the date of the hearing, or it shall be returned as provided in this chapter for unsigned depositions. Any changes in form or substance that the witness desires to make shall be entered on the deposition by the officer with a statement of the reasons given by the witness for making the changes. The deposition shall then be signed by the witness, unless the parties present at the taking of the deposition by stipulation waive the signing or the witness is ill, cannot be found, or refuses to sign. If the deposition is not signed by the witness, the officer shall sign it and state on the record the fact of the waiver, illness, or absence of the witness or the fact of the refusal to sign, together with the reason, if any, given for failure to sign. The deposition may then be used as though signed by the witness.

(G) Any deposition may be returned to the agency either by mail, or by a party interested in taking the deposition, or by any other person. If returned by mail, the agency shall endorse on the deposition that it was received from the post office and shall cause the agency employee so receiving the deposition to sign it. If not sent by mail, the person delivering it to the agency shall make affidavit before the agency that he received it from the officer before whom it was taken, that it has not been out of his possession since, and that it has undergone no alteration.

(H) A deposition, after being filed with the agency, may be opened by any employee of the agency at the request of either party or his attorney. The employee shall endorse on the deposition on what day and at whose request it was opened, sign the deposition, and it shall remain on file with the agency for the inspection of any party. A party is entitled to use a deposition in the contested case pending before the agency without regard to whether cross interrogatories have been propounded.

(I) A witness or deponent in a contested case who is not a party and who is subpoenaed or otherwise compelled to attend a hearing or proceeding to give a deposition or to produce books, records, papers, or other objects that may be necessary and proper for the purposes of any proceeding under the authority of the Act is entitled to receive:

(i) mileage and/or commercial airfare and/or public transportation at the rate allowed for state employees for going to and returning from the place of the hearing or the place where the deposition is taken, if the place is more than 25 miles from the person's place of residence;

(ii) a fee of not less than $25 a day for each day or part of a day the person is necessarily present as a witness or deponent; and

(iii) reimbursement of the meal and lodging expenses at the rate provided for state employees for going to and returning from the place of the hearing or the place where the deposition is taken.

(J) Mileage and fees to which a witness is entitled under this section shall be paid by the party at whose request the witness appears or the deposition is taken, on presentation of proper vouchers sworn by the witness and approved by the agency. In the case of failure of a person to comply with a subpoena or commission issued by the agency, the agency may take any action provided by law.

(4) Orders for Production or Inspection.

(A) On the motion of a party and on notice to all other parties, and subject to limitations of the kind provided for discovery under the Texas Rules of Civil Procedure Rule, the hearing officer or ALJ may order any party:

(i) to produce and to permit the party making the motion or a person on behalf of that party to inspect and to copy or photograph a designated document, paper, book, account, letter, photograph, or tangible thing in the party's possession, custody, or control that is not privileged and constitutes or contains, or is reasonably calculated to lead to the discovery of, evidence that is material to a matter involved in the contested case; and

(ii) to permit entry to designated land or other property in the party's possession or control to inspect, measure, survey, or photograph the property or a designated object or operation on the property that may be material to a matter involved in the contested case.

(B) The order must specify the time, place, and manner of making the inspection, measurement, or survey or of making copies or photographs and may prescribe other terms and conditions that are just.

(C) The identity and location of any potential party or witness in a contested case may be obtained from any communication or other paper in the possession, custody, or control of a party, and any party may be required to produce and permit the inspection and

copying of the reports, including factual observations and opinions, of an expert who will be called as a witness. Provided, that the rights granted in this section shall not extend to other written statements of witnesses or other written communications passing between agents or representatives or the employees of any party to the suit or to other communications between any party and such party's agents, representatives, or other employees, where made after the occurrence or transaction on which the contested case is based, and made in connection with the prosecution, investigation, or defense of the contested case or the circumstances from which the case arose.

(D) Any person, whether or not a party, is entitled to obtain, on request, a copy of any statement in a party's possession, custody, or control that the person has previously made about the contested case or its subject matter. If the request is refused, the person may move for an order of production under this subsection. For the purpose of this subsection, a statement previously made is:

(i) a written statement signed or otherwise adopted or approved by the person making it; or

(ii) a stenographic, mechanical, electrical, or other recording, or a transcription of the recording, which is a substantially verbatim recital of an oral statement by the person making it and that was contemporaneously recorded.

(e) Written interrogatories, requests for admission, requests and motions for production, and requests for entry upon and examination of real property shall initially be directed to the party from which discovery is being sought. Copies of discovery requests and answers to those requests shall not be filed with SOAH unless directed by the ALJ or when in support of a motion to compel, motion for protective order, or motion to quash.

(f) The ALJ may establish deadlines as necessary for discovery requests and responses. if the ALJ does not establish a deadline, responses to discovery requests, except for notices of depositions, shall be made within 20 days after receipt. Parties may extend response deadlines in accordance with §281.32 of this title (relating to Stipulations) or by motion submitted to the ALJ if the parties are unable to agree. If such motion is timely filed by a party, it may be granted for good cause shown.

(g) A responding party is under a continuing duty to reasonably supplement its discovery responses under the circumstances specified in the Texas Rules of Civil Procedure, Rule 166b(6).

(h) Objections to discovery requests shall be filed within ten days after receipt.

(1) The objections shall be a separate pleading. The discovery request to which an objection is being filed shall be stated and the specific grounds for the objection shall be separately stated for each question. If an objection pertains to only part of a question, that part shall be clearly identified. All arguments upon which the objecting party relies shall be presented in full in the objection.

(2) If an objection is founded upon a claim of privilege or exemption under Texas Rules of Civil Procedure 166b(3), the ALJ may require the objecting party to provide an index that lists, for each document claimed privileged or exempt from discovery: the date and title of the document; the preparer or custodian of the information; to whom the document was sent and from whom it was received; and the claimed privilege(s) or exemption(s). A full a complete explanation of the claimed privilege or exemption shall be provided. The index and explanations may be public documents if so determined by the ALJ after review of the index and accompanying explanations. The documents claimed to be privileged or exempted from discovery shall be provided to the ALJ in camera by the deadline established by the ALJ.

(i) The party seeking discovery shall file a motion to compel within ten days of receipt of the pertinent objection or alleged failure to comply with discovery. Absence of a motion to compel filed by the party seeking discovery will be construed as an indication that the parties have resolved their discovery dispute. All motions to compel shall include a certificate of conference:

(1) averring the parties conferred, negotiated in good faith, and were unable to resolve the dispute prior to submitting the dispute to the ALJ for resolution; or

(2) averring the movant has made reasonable, but unsuccessful, attempts to contact opposing counsel and succinctly describing the attempts made.

(j) The ALJ may issue any order in the interest of justice necessary to protect the person or party seeking relief from undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional, or property rights. Any person or party from whom discovery is sought may file a motion for a protective order, specifying the grounds for the protective order. Motions and responses may include affidavits, discovery pleadings, or other pertinent documents. The ALJ's authority as to such orders extends to, but is not limited by, any of the following:

(1) ordering that requested discovery not be sought in whole or in part, or that the extent or subject matter of discovery be limited, or that it not be undertaken at the time or place specified;

(2) ordering that the discovery be undertaken only by such method or upon such terms and conditions or at the time and place directed by the ALJ; or

(3) ordering that for good cause shown, results of discovery be sealed or otherwise adequately protected, that their distribution be limited, or that their disclosure be restricted. Any order under this paragraph shall be made in accordance with the APA, the referring agency's statute, and other applicable rule or law.

(k) An agreement affecting a deposition upon oral examination is enforceable if the agreement is recorded in the deposition transcript. Unless the ALJ orders otherwise, the parties may, by written agreement:

(1) provide that depositions be taken at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions; and

(2) modify the procedures provided by these rules for other methods of discovery.

§281.34. Subpoenas.

Upon on its own motion or upon the written request of any party to a contested case pending before it, and on deposit of sums with the executive director/secretary that will reasonably insure payment in the amounts estimated to accrue under §281.33 of this title (relating to Discovery), the agency shall issue a subpoena addressed to an authorized agency employee or sheriff or any constable to require the attendance of witnesses and the production of books, records, papers, or other objects as may be necessary and proper for the purpose of the proceedings.

§281.35. Summary Dispositions.

(a) In response to a party's motion or after an ALJ notifies the parties of an intent to dispose of a case by summary disposition and allows time for responses, the ALJ may issue a proposal for decision resolving a contested case without an evidentiary hearing if

the pleadings, affidavits, materials obtained by discovery, admissions, matters officially noticed, stipulations, or evidence of record shows there is no genuine issue as to any material fact and that the moving party is entitled to a decision in its favor as a matter of law.

(b) A contested case referred to SOAH, or a portion of the case, is subject to dismissal from SOAH's docket or a recommendation to the agency of dismissal for:

(1) lack of jurisdiction over the matter by the agency;

(2) lack of statute, rule, or contract authorizing SOAH to conduct the proceeding;

(3) mootness of the case;

(4) failure of the moving party to prosecute the case in accordance with requirements of statute, rule, or ALJ order;

(5) failure to state a claim for which relief can be granted; or

(6) unnecessary duplication of proceedings.

(c) If a moving party withdraws its entire claim or parties settle all matters in controversy, an ALJ may dismiss a matter from SOAH's docket by order with or without prejudice. The ALJ may order a withdrawn or settled matter severed before dismissal, if other related matters in the docket remain in controversy.

§281.36. Procedure at Hearing.

(a) At hearing, the ALJ shall exercise reasonable control over the mode and order of presenting preliminary matters, pending motions, opening statements, witness testimony and other evidence, oral or written closing argument, and other processes.

(b) The party with the burden of proof will present evidence first. If placement of the burden of proof is not ascertainable after reference to statute or consideration of the agency's policy as documented in the record in accordance with §281.49 of this title (relating to Consideration of Policy in a Contested Case), the ALJ will place the burden of proof on a specific party or parties, considering factors including, but not limited to: the status of the parties (e.g., movant, applicant, appellant, respondent, protestant, intervener); the parties' relative access to and control over information pertinent to the merits of the case; and a requirement that a party prove a negative.

§281.37. Hearing Conducted by the State Office of Administrative Hearings.

(a) An ALJ who conducts a contested case hearing shall consider applicable agency rules or policies in conducting the hearing. The agency shall provide the ALJ with a written statement of applicable rules or policies.

(b) The agency shall not supervise the ALJ in its consideration of agency rules or policies, and may not attempt to influence the findings of fact or the ALJ's application of the law in a contested case except by proper evidence and legal argument.

(c) The agency may change a finding of fact or conclusion of law made by the ALJ, or may vacate or modify an order issued by the ALJ, only if the agency determines:

(1) that the ALJ did not properly apply or interpret applicable law, agency rules or written policies provided under subsection (a) of this section, or prior administrative decisions;

(2) that a prior administrative decision on which the ALJ relied is incorrect or should be changed; or

(3) that a technical error in a finding of fact should be changed.

(d) The agency shall state in writing the specific reason and legal basis for a change made under subsection (c) of this section.

§281.38. Computation of Time.

(a) Unless otherwise required by statute, 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 the which SOAH is closed, in which case the time period will be deemed to end on the next day that SOAH 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 to act is five days or less, the intervening Saturdays, Sundays, and legal holidays are not counted.

(b) Disputes regarding the computation of time for periods not specified by this chapter, Board order, or by an ALJ order where applicable, will be resolved by reference to applicable law and upon consideration of agency policy as documented in accordance with §281.49 of this title (relating to Consideration of Agency Policy in a Contested Case).

§281.39. Representation of Parties.

(a) An individual may represent himself or herself before SOAH or may appear by authorized representative, who shall enter their appearance with SOAH.

(b) Each party to a case is entitled to the assistance of counsel before SOAH, although a party may expressly waive the right to assistance of counsel. A party's attorney of record shall remain the attorney of record in the absence of a formal request to withdraw and an ALJ order approving the request.

§281.40. Participation by Telephone.

(a) Upon timely motion containing the pertinent telephone number(s), a party may request to appear by telephone or video conferencing or to present the testimony of a witness by such methods. The party requesting to appear or present testimony by telephone or video conferencing has the burden to show that good cause exists for the granting of the request. If the request is granted, a party may appear or a witness may testify by telephone or video conferencing if each participant in the hearing has an opportunity to participate in and hear the proceeding. Unless all parties agree to the request, the requesting party must demonstrate:

(1) how witnesses will be separated;

(2) how coaching of witnesses will be prevented;

(3) why observing a witness's demeanor is not essential to the case; and,

(4) how the witness's identity will be verified.

(b) The ALJ may conduct a prehearing conference by telephone or video conferencing upon adequate notice to the parties, even in the absence of party motion.

(c) All substantive and procedural rights set forth within this chapter, shall apply to telephone and video conferencing prehearings and hearings, subject only to the limitations of the physical arrangement.

(d) Documentary evidence to be offered at a telephone or video conferencing prehearing conference or hearing shall be served on all parties and filed with SOAH at least three days before the prehearing or hearing unless the ALJ, by written order, amends the filing deadline.

(e) For a telephone or video conferencing hearing or prehearing conference, the failure to answer or otherwise free the telephone or video conferencing line, or the failure to be ready to proceed with the prehearing conference or hearing as scheduled, may be considered a failure to appear and grounds for default if the fact of such failure remains upon the expiration of 10 minutes after the scheduled time for hearing or prehearing conference.

§281.41. 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 ALJ, shall follow any additional guidelines of decorum prescribed by the ALJ in the proceeding, and shall adhere to the times scheduled for beginning the proceeding, for each period of recess, and for ending the proceeding. Attorneys shall adhere to the standards of conduct set forth in the Texas Lawyers' Creed as promulgated by the Texas Supreme Court.

(b) To maintain and enforce proper conduct and decorum, and to assure promptness at a proceeding, the ALJ may take appropriate action, including but not limited to:

(1) issuing a warning;

(2) excluding a person or persons from a proceeding; and

(3) recessing the proceeding.

§281.42. Failure to Attend Hearing and Default.

(a) If, after receiving notice of hearing as prescribed by §281.25 of this title (relating to Notice and Service), a party fails to appear in person or by representative on the day and time set for hearing or fails to appear by telephone in accordance with §281.40 of this title (relating to Participation by Telephone), the ALJ may proceed in that party's absence and, as authorized by applicable law, 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 or order, where provided by law, against the defaulting party in which the factual allegations against that 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 §281.25 of this title (relating to Notice and Service), was provided to the defaulting party, and such notice includes disclosure, in ten point, bold-faced 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) For purposes of subsection (c) of this section, proper notice may be established by proof that the notice was sent to the party's last known address as shown in the agency's records by certified or registered mail, return receipt requested, with no requirement of actual receipt by the defaulting party or the defaulting party's agent.

(e) When motions for rehearing are permitted by applicable law, such motions requesting the reopening of the record shall be filed with the agency and not with SOAH, unless otherwise specifically provided by law.

(f) This section does not preclude the agency from informally disposing of a case by default under the agency's statute or rules in the event the respondent fails to file a timely written response or other responsive pleading required by the agency's statute or rules. A party may request entry of an ALJ order abating or continuing the proceedings to pursue informal disposition.

§281.43. Public Attendance and Comment at Hearing.

(a) Unless otherwise required by law, all proceedings before SOAH are open to the public.

(b) The ALJ has the authority to remove persons whose conduct impedes the orderly progress of the hearing, and to take steps necessary to limit attendance to that which may be required by any physical limitations of the hearing facility.

(c) When required by statute, members of the public shall be allowed to make public comment addressing matters pertinent to the issues in the case. Unless otherwise provided by law, public comment is not part of the evidentiary record of the case unless sworn, subject to cross-examination, offered by a party in accordance with the ALJ's orders and received in accordance with the Texas Rules of Civil Evidence as made applicable by the Administrative Procedure Act.

§281.44. Interpreters for Deaf or Hearing Impaired Parties and Witnesses.

In a contested case, the agency shall provide an interpreter whose qualifications are approved by the Texas Commission for the Deaf and Hard of Hearing to interpret the proceedings for a party or subpoenaed witness who is deaf or hearing impaired. In this section, "deaf or hearing impaired" means having a hearing impairment, whether or not accompanied by a speech impairment, that inhibits comprehension of the proceedings or communication with others.

§281.45. Evidence.

(a) Relevancy of evidence. In a contested case, evidence that is irrelevant, immaterial, or unduly repetitious, as those terms are defined by the Texas Rules of Civil Evidence, shall be excluded. However, consistent with the APA, the rules of evidence as applied in a non-jury civil case in district court govern contested case hearings conducted by SOAH, except that evidence inadmissible under those rules may be admitted if it is necessary to ascertain facts not reasonably susceptible of proof under those rules, and provided is not precluded by statute.

(b) Objections to evidence. Objections to an offer of evidence in a contested case may be made and shall be noted in the record.

(c) Exclusion of witnesses. At the request of a party, or on the ALJ's own motion, the ALJ shall order witnesses excluded from the hearing room so they cannot hear the testimony of other witnesses, instructing them not to converse about the case with each other or any person other than the attorneys in the proceeding, except by permission of the judge, and not to read any report of, or comment upon, the testimony in the case while under order of this subsection. This does not authorize exclusion of a party who is a natural person or the spouse of such natural person, or an officer or employee of a party that is not a natural person designated as its representative by the party, or a person whose presence is shown by a party to be essential to the presentation of its case.

(d) Prefiled testimony. At a prehearing conference, the ALJ may require that exhibits and the testimony of witnesses to be called at hearing be reduced to written form, filed at SOAH prior to the hearing, and served on other parties, if the hearing will be expedited and the interests of the parties will not be substantially prejudiced.

(e) Exhibits.

(1) Exhibits offered into evidence may not be of such a size or nature that they unduly encumber the records of SOAH.

Physical evidence that is bulky, dangerous, perishable, or otherwise not suitable for inclusion in agency records shall not be offered into the record; instead, proponents shall make reasonable efforts to use photographs, recordings, or other mechanical or electronic means to substitute for physical evidence that would encumber SOAH's records.

(2) Documents offered into evidence shall be legible, and shall not exceed 8 1/2 inches by 11 inches unless good cause is shown why they could not be reduced. Any document in excess of 50 pages shall be accompanied by a table of contents or index. Maps, drawings, blueprints, and other documents not reasonably susceptible to reduction shall be rolled or folded so as not to encumber the records. The ALJ may exclude exhibits not conforming to this subsection.

(3) Each exhibit to be offered shall first be tendered for numbering by the ALJ or court reporter. Copies of the original exhibits shall be furnished by the party offering the exhibit to the presiding ALJ and to each party present at the hearing, unless otherwise ordered by the ALJ.

(f) Documentary Evidence.

(1) A copy or excerpt of documentary evidence may be received in a contested case if an original document is not readily available. On request, a party shall be given an opportunity to compare the copy or excerpt with the original document.

(2) An exhibit excluded from evidence will be considered withdrawn by the offering party, and will be returned to the party, unless the party makes an offer of proof in accordance with the Texas Rules of Civil Evidence.

(g) In connection with a hearing held under this chapter, official notice may be taken of all facts that are judicially cognizable, and generally recognized facts within the area of the state agency's specialized knowledge.

(1) Each party shall be notified either before or during the hearing, or by reference in a preliminary report or otherwise, of the material officially noticed, including staff memoranda or information.

(2) Each party is entitled to be given an opportunity to contest material that is officially noticed.

(3) The special skills or knowledge of the state agency and its staff may be used in evaluating the evidence.

§281.46. Making a Record of a Contested Case.

(a) A record of all contested case proceedings will be made. At the ALJ's discretion and order, 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. For any proceeding in a docket set to last no longer than one day, SOAH is responsible for making a tape recording of the hearing or prehearing conference.

(1) The agency shall arrange for a stenographic recording of all docketed proceedings on a regular basis by filing a statement of intent to do so with the SOAH Director of Docketing and the Director of the Central Hearings Panel Division. This statement shall remain in effect for all proceedings conducted by SOAH on behalf of the agency unless the statement is revoked in writing. The agency shall make arrangements for stenographic recording of all proceedings while the statement is effective, unless the ALJ waives the requirement for a prehearing conference or as provided in subsection (b) of this section.

(2) The agency may arrange for a videotape recording of any or all docketed proceedings, in addition to, or instead of a stenographic recording by filing a statement of intent to do so, as specified in subsection (a)(1) of this section. If a docketed proceeding is set to last longer than one day, the agency is subject to subsection (b) of this section.

(b) For any proceeding in a docket set to last longer than one day, the agency shall arrange for a court reporter to be present, unless the agency files notice by the time specified under §281.29 of this title (relating to Motions) for motions that it prefers another means of making the official records and specifies the means desired. The court reporter shall prepare a stenographic record of the proceeding but shall not prepare a transcript unless a party or the ALJ so requests.

(c) The tape recording made by SOAH under subsection (a) of this section, the videotape made by the agency under subsection (a) of this section if a statement is on file, or the stenographic recording prepared under subsection (b) of this section is the official record of the proceeding for purposes of all actions within SOAH's jurisdiction. The ALJ 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.

(d) Any party may use a means of making an unofficial record of the proceeding that is in addition to the means specified in the rules or by the ALJ.

(1) The party shall file and serve a notice of intent to use an additional means at least two days before the proceeding. The party shall make all arrangements associated with the additional means.

(2) The ALJ 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. At the proceeding the ALJ may order that the additional means sought to be used shall be the method of preparing the official record of the proceeding and dispense with any other means required by this section, unless there is a timely objection at the beginning of the proceeding.

(e) On the written request to the agency by a party to a contested case or upon request of the ALJ, a written transcript of all or part of the proceedings shall be prepared by a court reporter from the means used to make the official record of the proceeding. If the proceeding has been taped or video recorded, the agency shall inform SOAH of the need to deliver the original recording to a court reporter, selected by the agency, for preparation of the transcript.

§281.47. Record.

(a) The record in a contested case shall include:

(1) all pleadings, motions, and intermediate rulings;

(2) evidence received or considered;

(3) a statement of matters officially noticed;

(4) questions and offers of proof, objections, and rulings thereon;

(5) proposed findings and exceptions;

(6) any decision, opinion, or report by the ALJ; and

(7) memoranda or data generated by agency and submitted to and considered by the ALJ.

(b) On the written request of a party to a contested case, proceedings, or any part of the proceedings, shall be transcribed. The agency may pay the cost of a transcript or may assess the cost to one or more parties. This chapter does not limit the agency to a stenographic record of proceedings.

§281.48. Original or Certified Copies of Record.

A party who appeals a final decision in a contested case shall pay all of the cost of preparation of any original or certified copy of the record of the agency proceedings that is required to be transmitted to the reviewing court.

§281.49. Consideration of Agency Policy in a Contested Case.

(a) Any party relying on a specific agency policy not incorporated in a rule has the burden of authenticating the policy and showing it to be applicable to a factual or legal issue in the case.

(b) In resolving contested issues in the case, the ALJ shall consider any applicable agency policy that is not set forth in the agency's rules, but the existence of which can supported by evidence. The ALJ's decision or recommendation on whether to apply an agency's policy as requested by a party will depend upon the substance, purpose, and effect of the policy and factors including, but not limited to the following:

(1) the extent to which the parties were given notice of the policy and adequate opportunity to address it in the presentation of their cases and arguments;

(2) the specificity of the policy statement and its applicability and relevance to the issues in the case;

(3) the status of the policy within the agency as evidenced by the history of its adoption, the frequency and consistency with which it has been applied, and the level of formality of the process required for amendment;

(4) the highest level within the agency at which the policy has been adopted or ratified;

(5) whether the policy is a substantive principle coming within the agency's subject matter expertise and jurisdiction, or pertains more to contested case procedure and practice; and

(6) whether application of the policy would violate applicable constitutional or statutory provisions, or would be inconsistent with applicable decisions by Texas courts.

§281.50. Ex Parte Consultations.

(a) Unless required for the disposition of an ex parte matter authorized by law, the ALJ assigned to render a proposal for decision or to make findings of fact and conclusions of law in a contested case may not communicate directly or indirectly communicate with the agency or a person, party, or a representative of the agency in connection with an issue of fact or law, except on notice and opportunity for each party to participate.

(b) Unless required for the disposition of an ex parte matter authorized by law, Board Members assigned to render findings of fact and conclusions of law and proposals for decision in a contested case, and to issue a final order respecting the same, may not communicate directly or indirectly with a person, party, or representative of the agency who is not a Board Member in connection with an issue of fact or law, except on notice and opportunity for each party to participate.

(c) Agency members or employees who are not Board Members may communicate ex parte with another agency member or employee who is not a Board Member unless prohibited by law.

(d) A Board Member assigned to render a decision or to make findings of fact and conclusions of law in a contested case may communicate ex parte with an agency employee who has not participated in a hearing in the case for the purpose of using the special skills or knowledge of the agency and its staff in evaluating the evidence.

§281.51. Proposal for Decision.

(a) In a contested case, upon completion of the hearing before SOAH, the ALJ shall submit a proposal for decision to the agency and serve a copy of the proposal for decision upon each party. The board may request that the proposal for decision be presented to the board by the ALJ at the next Board meeting.

(b) A proposal for decision shall contain a statement by the ALJ of the reasons for the proposed decision and of each finding of fact and conclusion of law necessary to the proposed decision.

(c) Upon issuance of a proposal for decision by an ALJ in a contested case, any party may file written exceptions to the proposal for decision within ten days after its issuance. Within seven days after a party files written exceptions under this section, any other party may file a written reply.

(d) A proposal for decision may be amended in response to exceptions, replies and/or briefs submitted by the parties without again being served on the parties.

§281.52. Final Decision.

(a) Any final decision or order adverse to a party in a contested case shall be in writing. Such final decision shall include findings of fact and conclusions of law, separately stated. Parties shall be notified either personally or by mail of any decision or order. When the board issues a final decision or order ruling on a motion for rehearing, the agency shall send a copy of that final decision or order by first class mail to the attorney of record, then the agency shall send a copy of a final decision or order ruling on a motion for rehearing by first class mail to that party, and the agency shall keep an appropriate record of that mailing. A party or attorney of record notified by mail of a final decision or order as required by this subsection shall be presumed to have been notified on the date such notice is mailed.

(b) A decision of the board is final, in the absence of a timely motion for rehearing, or the expiration of the period for filing a motion for rehearing, and is final and appealable to a district court of Travis County on the date of rendition of the order overruling the motion for rehearing, or on the date the motion is overruled by operation of law. If the board finds that an imminent peril to the public health, safety, or welfare requires immediate effect of a final decision or order in a contested case, it shall recite the 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 to a district court of Travis county on the date rendered.

§281.53. Motion for Rehearing.

Other than the exception provided in §281.52 of this title (relating to Final Decision), a motion for rehearing is a prerequisite to appeal from a Board's final decision or order in a contested case. A motion for rehearing shall be filed by a party within 20 days after the date the party or his attorney of record is notified of the final decision or order as required by §281.52. Replies to a motion for rehearing shall be filed with the executive director/secretary within 30 days after the date the party or his attorney of record is notified of the final decision or order as required by §281.52, and Board action on the motion shall be taken within 45 days after the date the party or his attorney of record is notified of the final decision or order as required by §281.52. If Board action is not taken within the 45-day period, the motion for rehearing is overruled by operation of law 45 days after the date the party or his attorney of record is notified of the final decision or order as required by §281.52. The board, by written order, may extend the period of time for filing the motions and replies and taking Board action, except that an extension may not extend the

period for Board action beyond 90 days after the date the party or his attorney of record is notified of the final decision or order as required by §281.52. In the event of an extension, the motion for rehearing is overruled by operation of law on the date fixed by the order, or in the absence of a fixed date, 90 days after the date the party or his attorney of record is notified of the final decision or order as required by §281.52.

§281.54. Modification of Time Limits.

The parties to a contested case, with the agency's approval, may agree to modify the times prescribed by §281.52 of this title (relating to Final Decision) and §281.53 of this title (relating to Motion for Rehearing).

§281.55. Application or Reissuance or Removal of Restrictions of a License.

(a) A person whose pharmacy license or license to practice pharmacy has been canceled, revoked, or restricted, whether voluntary or by action of the board, may, after 12 months from the effective date of such cancellation, revocation, or restriction, apply to the board for reinstatement or removal of the restriction of the license.

(1) The application shall be given under oath and on the form prescribed by the board.

(2) On investigation and hearing, the board may in its discretion grant or deny the application or it may modify its original finding to reflect any circumstances that have changed sufficiently to warrant the modification.

(3) If such application is denied by the board, a subsequent application may not be considered by the board until 12 months from the date of denial of the previous application.

(b) The board may consider the following items in determining the reinstatement of an applicant's previously revoked or canceled pharmacist license:

(1) moral character in the community;

(2) employment history;

(3) financial support to his/her family;

(4) participation in continuing education programs or other methods of maintaining currency with the practice of pharmacy;

(5) criminal history record, including arrests, indictments, and convictions relating to felonies or misdemeanors involving moral turpitude;

(6) offers of employment as a pharmacist;

(7) involvement in public service activities in the community;

(8) failure to comply with the provisions of the board order revoking or canceling the applicant's license;

(9) action by other state or federal regulatory agencies;

(10) any physical, chemical, emotional, or mental impairment;

(11) the gravity of the offense for which the applicant's license was canceled, revoked, or restricted and the impact the offense had upon the public health, safety and welfare;

(12) the length of time since the applicant's license was canceled, revoked or restricted, as a factor in determining whether the time period has been sufficient for the applicant to have rehabilitated himself/herself to be able to practice pharmacy in a manner consistent with the public health, safety and welfare;

(13) competency to engage in the practice of pharmacy; or

(14) other rehabilitation actions taken by the applicant.

§281.56. Official Action To Be Taken.

The board may not take official action in a contested case unless it be formally pending for adjudication and unless it be a real case, controversy, or issue, except that an official ruling or opinion may be made in advance on any matter at the discretion of the board if it be shown that unreasonable hardship, loss, or delay would result if the matter were not determined in advance. This section shall not in any manner limit the right to an adjudicative hearing as provided by law and shall not be interpreted as limiting the right of the board on its own motion to cause matters to become formally pending and to perform any function or duty prescribed by law or rule or regulation of the board.

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

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

TRD-9815183
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Proposed date of adoption: November 9, 1998
For further information, please call: (512) 305–8028

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Subchapter C. Rulemaking

22 TAC §§281.71–281.76

The new sections are proposed under §4 and §16(a) of the Texas Pharmacy Act (Article 4542a-1, Texas Civil Statutes). The Board interprets §4 as authorizing the agency to adopt rules to protect the public health, safety, and welfare through the effective control and regulation of the practice of pharmacy. The Board interprets §16(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by the rules: Texas Civil Statutes, Article 4542a-1.

§281.71. Prerequisites to Adopting, Repealing, or Amending Rules.

(a) All rules shall be adopted, repealed, or amended in accordance with the Administrative Procedures Act.

(b) Prior to adopting, repealing, or amending any rule, the board or its designated representative shall give at least 30 days notice of its intended action. Notice of the proposed rule shall be filed with the secretary of state for publication in the Texas Register and a copy of the notice delivered to the lieutenant governor and speaker. The notice shall include the following:

(1) A brief explanation of the proposed rule.

(2) The text of the proposed rule, except any portion omitted as provided in §2002.014 of the APA, prepared in a manner to indicate the words to be added or deleted from the current text, if any.

(3) A statement of the statutory or other authority under which the rule is proposed to be promulgated, including a concise explanation of the particular statutory or other provisions under which

the rule is proposed, and a certification that the proposed rule has been reviewed by legal counsel and found to be within the agency's authority to adopt.

(4) A fiscal note showing the name and title of the officer or employee responsible for preparing or approving it and stating for each year for the first five years that the rule will be in effect:

(A) the additional estimated cost to the state and to local governments expected as a result of enforcing or administering the rule;

(B) estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rule;

(C) estimated loss or increase in revenue to the state or to local governments as a result of enforcing or administering the rule; and

(D) if applicable, that enforcing or administering the rule will have no foreseeable implication in any of the preceding respects.

(5) A public benefit-cost note showing the name and title of the officer or employee responsible for preparing or approving it and stating for each year for the first five years that the rule will be in effect:

(A) the public benefits to be expected as a result of adoption of the proposed rule; and

(B) the probable economic cost to persons who are required to comply with the rule.

(6) Request for comments on the proposed rule from any interested person.

(7) Any other statement required by law.

(c) Any notice becomes effective as notice when published in the Texas Register. The notice shall be mailed to all persons who have made timely written requests of the agency for advance notice of its rulemaking proceedings. However, failure to mail the notice does not invalidate any actions taken or rules adopted. Prior to the adoption, repeal, or amendment of any rule, the board shall afford all interested persons reasonable opportunity to submit data, views, or arguments. Such data, views, or arguments may, at the discretion of the board, be submitted either orally or in writing. A public hearing shall be held prior to the adoption of any rule if required by law or this chapter. The board shall consider fully all written and oral submissions concerning the proposed rule. On adoption of a rule, the board, if requested to do so by an interested person either prior to adoption or within 30 days after adoption, shall issue a concise statement of the principal reasons for and against its adoption, incorporating in the statement its reasons for overruling the considerations urged against its adoption.

(d) If the board finds that imminent peril to the public health, safety, or welfare requires adoption of a rule on fewer than 30 days notice and states in writing its reasons for that finding, the board may proceed without prior notice of hearing or on any abbreviated notice and hearing found practicable to adopt an emergency rule. The rule may be effective for a period of not longer than 120 days, renewable once for a period not exceeding 60 days, but the adoption of an identical rule is not precluded by this section. An emergency rule adopted under the provisions of this subsection, and the board's written reasons for the adoption, shall be filed in the Office of the Secretary of State for publication in the Texas Register.

(e) Except as prohibited by law, the agency may use informal conferences and consultations as means of obtaining the viewpoints and advice of interested persons concerning contemplated rulemaking. The board may also appoint committees of experts or interested persons or representatives of the general public to advise it with respect to any contemplated rulemaking. The powers of these committees are advisory only.

(f) Any interested person may petition the agency requesting the adoption of a rule as set out in §281.73 of this title (relating to Petition for Adoption of Rules).

§281.72. Effective Date of Rules.

Each rule adopted becomes effective 20 days after it is filed in the Office of the Secretary of State except that:

(1) if a later day is required by statute or specified in the rule, the later date is the effective date;

(2) if a federal statute or regulation requires that the agency implement a rule by a certain date, the rule is effective on the prescribed date; and

(3) subject to applicable constitutional or statutory provisions, an emergency rule (as that term is set out in §2001.034 of the APAP) becomes effective immediately on filing with the secretary of state, or on a stated date less than 20 days thereafter, if the board finds that this effective date is necessary because of imminent peril to the public health, safety, or welfare. The board shall take appropriate measures to make emergency rules known to persons who may be affected by them.

§281.73. Petition for Adoption of Rules.

Any interested person may petition the board requesting the adoption of a rule. Petitions shall be sent to the executive director/secretary. Within 60 days after the submission of a petition, the board shall either deny the petition in writing, stating the reasons for the denial, or shall initiate rulemaking proceedings. Petitions shall be deemed sufficient if they contain:

(1) the exact wording of the new, changed, or amended proposed rule;

(2) specific reference to the existing rule which is proposed to be changed or amended in the case of a changed or amended rule; and

(3) a justification for the proposed action set out in narrative form with sufficient particularity to inform the board and any other interested party of the reasons and arguments on which the petitioner is relying.

§281.74. President to Preside.

The president shall be the chairman and preside over all meetings of the board at which the president is present unless otherwise provided for under this chapter. In the absence of the president, the vice president shall preside. In the vice president's absence, one of the other Board members shall preside as acting chairman. The acting chairman shall be selected by mutual agreement of the board members present or, lacking mutual agreement, shall be the member senior in length of service on the board.

§281.75. Amendments and the Repeal of Conflicting Rules.

The provisions of this chapter shall govern in accordance with §281.1 of this title (relating to Objective and Scope) until amended. All rules of practice and procedure before the agency in conflict with the provisions of this chapter are repealed to the extent of the conflict. Special rules of the agency dealing with specific subjects or procedures are deemed to be compatible with these general rules of practice and procedure, and such special rules are not repealed.

§281.76. Effective Date.

The provisions of this chapter shall govern all proceedings filed after they take effect; and they shall also govern all proceedings then pending, except to the extent that the board shall determine that their application in a particular pending proceeding would not be feasible or would work injustice, in which event the former procedure applies.

This 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 September 28, 1998.

TRD-9815184
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Proposed date of adoption: November 9, 1998
For further information, please call: (512) 305–8075

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Part XXII. Texas State Board of Public Accountancy

Chapter 501. Professional Conduct

Subchapter B. Professional Practices

22 TAC §501.14

The Texas State Board of Public Accountancy (Board) proposes an amendment to §501.14, concerning Commissions and Receipt of Other Commissions.

The proposed amendment to §501.14 will allow for a clearer understanding of the effect on a CPA's independence of the receipt of commissions from a client.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment will be in effect:

A. the additional estimated cost to the state and to local governments expected as a result of enforcing or administering the amendment will be zero because the amendment does not require anyone to take any additional action; and,

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the amendment will be zero because the amendment does not require anyone to take any additional action; and

C. the estimated loss or increase in revenue to the state or to local governments as a result of enforcing or administering the amendment will be zero because the amendment does not require anyone to take any additional action.

Mr. Treacy has determined that for the first five-year period the amendment is in effect the public benefits expected as a result of adoption of the proposed rule will be a clearer understanding of the effect on a CPA's independence of the receipt of commissions from a client.

The probable economic cost to persons required to comply with the amendment will be zero because the amendment does not require anyone to take any additional action.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

The Board requests comments on the proposed amendment from any interested person. Comments must be received at the Board no later than noon on October 23, 1998. Comments should be addressed to Amanda Birrell, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower III, Suite 900, Austin, Texas 78701 or faxed to her attention at (512) 305-7854.

Mr. Treacy has determined that the proposed amendment will not have an adverse economic effect on small businesses because the amendment does not require anyone to take any additional action. The Board specifically invites the comments of the public on the issues of whether or not the proposed rule will have an adverse economic effect on small business; if the rule is believed to have such an effect, how the Board could legally and feasibly reduce that effect considering the purpose of the statute under which the rule is to be adopted; and if the amendment is believed to have such an effect, how the cost of compliance for a small business compares with the cost of compliance for the largest business affected by the rule under any of the following standards: (a) cost per employee; (b) cost for each hour of labor; or (c) cost for each $100 of sales. See Texas Government Code, §2006.002(c).

The amendment is proposed under The Public Accountancy Act, Texas Revised Civil Statutes Annotated, Article 41a-1, §6(a)(Vernon Supp. 1998), which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other statute, code or article is affected by this proposed amendment.

§501.14. Commissions and Receipt of Other Compensation.

(a) A licensee shall not for a commission recommend or refer to a client any product or service, or for a commission recommend or refer any product or service to be supplied by a client, or receive a commission, when the licensee or the licensee's practice unit also performs for that client:

(1) an audit or review of a financial statement;

(2) a compilation of a financial statement when the licensee expects, or reasonably might expect, that a third party will use the financial statement and the licensee's compilation report does not disclose a lack of independence;

(3) an examination of prospective financial information; or

(4) any other service requiring independence.

(b) This prohibition applies during the period in which the licensee engaged to perform any of the services listed above and the period covered by any of the historical financial statements involved in such listed services.

(c) [~~(a)~~] A certificate or registration holder who receives or agrees to receive other compensation with respect to services or products recommended, referred, or sold by him to another person shall, no later than the making of such recommendation, referral, or sale, make [~~making~~] the following disclosures in writing to such other persons:

(1) if the other person is a client, the nature, source, and amount of all such other compensation; or

(2) if the other person is not a client, the nature[,] and source only of any such other compensation received from a third party.

(d) [~~(b)~~] The disclosure required by this section shall be made regardless of the amount of other compensation involved.

(e) [~~(c)~~] This section does not apply to payments received from the sale of all, or a material part, of an accounting practice, or to retirement payments to persons formerly engaged in the practice of public accountancy.

This 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 September 22, 1998.

TRD-9814976
William Treacy
Executive Director
Texas State Board of Public Accountancy
Earliest possible date of adoption: November 8, 1998
For further information, please call: (512) 305-7848

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Part XXV. Structural Pest Control Board

Chapter 599. Treatment Standards

22 TAC §599.1

The Structural Pest Control Board proposes amendments to §599.1 concerning termite control; the amendment makes the provision of information regarding devices used for termite control mandatory.

Benny M. Mathis, Executive Director has determined that there will not be fiscal implications as a result of enforcing or administering the rule.

There will be no estimated additional cost, estimated reduction in cost or estimated loss or increase in revenue to state or local government for the first five-year period the rule will be in effect.

There will be no cost of compliance to small businesses.

Roger B. Borgelt, General Counsel has determined that for each year of the first five years the rule as proposed is in effect, the public benefits anticipated as a result of enforcing the rule as proposed will be consistent information about devices used for termite control by licensees of the Structural Pest Control Board.

There is no anticipated economic cost to individuals who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Roger B. Borgelt, General Counsel, Structural Pest Control Board, 1106 Clayton Lane #100LW, Austin, Texas 78723.

The amendment is proposed under Article 135b-6, which provides the Structural Pest Control Board with the authority to license and regulate the provision of structural pest control services.

The following is the (statutes, articles or code) that are affected by this rule.

Rule Number Statute, Article or Code

599.1 Article 135b-6

§599.1. Termite Control.

It will be illegal to use materials, products and/or methods for termite control that are not approved by the Board.

(1) (No change.)

(2) Products or devices not subject to the Environmental Protection Agency or Texas Department of Agriculture registration may be approved by the Board if the manufacturer submits a request for approval to the Board. The request must [~~should~~] contain the following information:

(A)-(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 September 22, 1998.

TRD-9814964
Benny M. Mathis, Jr.
Executive Director
Structural Pest Control Board
Earliest possible date of adoption: November 8, 1998
For further information, please call: (512) 451–7200

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TITLE 30. ENVIRONMENTAL QUALITY

Part I. Texas Natural Resource Conservation Commission

Chapter 50. Action on Applications

Subchapter C. Action by the Executive Director

30 TAC §50.31

The Texas Natural Resource Conservation Commission (TNRCC or commission) proposes amendments to §50.31, relating to the types of permits the executive director may issue pursuant to his authority arising under Chapter 50.

EXPLANATION OF PROPOSED RULE

The commission proposes the deletion of §50.31(c)(8) to ensure consistency for requirements of actions common to many programs such as motions for reconsideration (MFR). Since the municipal solid waste (MSW) specific MFR requirements are being removed from MSW rules and replaced with a reference to §50.39, the deletion of §30.31(c)(8) will clarify that MFRs are available for MSW and are to be done under Chapter 50. The commission proposes the renumbering of §§30.31(c)(9)-(11) to accommodate for the deletion of subparagraph (8).

The commission also proposes to delete §50.31(c)(12) in order to delete the redundant reference to emergency and temporary orders. See, §50.31(c)(6). For purposes of clarification, the commission notes that the executive director's authority to issue final approval of specific types of applications arises under statutes and rules. Chapter 50, subchapter C authorizes the executive director to issue final approval of certain applications and for such applications, the procedures in subchapter C apply. The executive director's authority to issue emergency

and temporary orders arises under other statutes and rules, not Chapter 50.

Additionally, this rulemaking is to address questions raised after the most recent rulemaking on §50.31 by confirming that an uncontested application for an interbasin transfer for which no evidentiary hearing is required may be granted by the executive director as authorized by Texas Water Code §5.122. Although the recent rulemaking appropriately deleted interbasin transfer from the list because related uncontested applications may be authorized by the executive director, the rules preamble was confusing as to the purpose for the deletion. No further rulemaking is necessary.

FISCAL NOTE

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

PUBLIC BENEFIT

Mr. Minick has also determined that, for the first five years these sections as proposed are in effect, the public benefit anticipated as a result of enforcement of and compliance with these sections will be to clarify the agency's interpretation and application of State law that allows the executive director to grant uncontested applications or certain emergency transfers and appropriations of water, thus avoiding unnecessary administrative costs and delays. There are no economic costs anticipated to any person, including small business, required to comply with the sections as proposed.

DRAFT REGULATORY ANALYSIS

The commission has reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code §2001.0225 and has determined that the rulemaking is not subject to §2001.0225 because it does not meet any of the four applicability requirements listed in §2001.0225(a) in that the rules implement state law, do not exceed any express requirements of state law, do not involve any delegation agreements between the state and federal government, and there is no applicable federal law or federal contract. The proposed rule changes section 50.31 to state what the rule said prior to an inadvertent repeal of a subsection, and deletes a redundancy in the exceptions from Chapter 50 Subchapter C.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for this rule pursuant to Texas Government Code, §2007.043. The following is a summary of that Assessment. The specific purpose of the rule is to place a subsection back into a rule which was inadvertently repealed in a prior rulemaking. Also, the rulemaking deletes a redundancy in Subchapter C. These changes do not adversely affect or burden real property, but simply allow the executive director to sign certain types of permits under certain situations.

COASTAL MANAGEMENT PROGRAM (CMP)

The commission 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, nor will it affect any action or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the proposed rule is not subject to the CMP.

PUBLIC HEARINGS

A public hearing on this proposal will be held at 10 a.m. on October 29, 1998, in Room 201S of the TNRCC central office, 12124 Park 35 Circle, Building E, Austin, Texas 78753. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion within the audience will not occur during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to each hearing and will answer questions before and after the hearing.

SUBMITTAL OF COMMENTS

Written comments on the proposal should reference Rule Log No. 97146-297-WT and may be submitted to Lutrecia Oshoko, Texas Natural Resource Conservation Commission, Office of Policy and Regulatory Development, MC-205, P.O. Box 13087, Austin, Texas 78711-3087, (512)239-4640, or faxed to (512) 239-5687. Written comments must be received by 5:00 p.m. November 2, 1998. For further information or questions concerning this proposal, please contact John Warden, Water Quantity Division at (512) 239-6967.

STATUTORY AUTHORITY This amendment is proposed under Texas Water Code section 5.115, which allows the commission to delegate issuance of permits to the executive director, and §11.139 and §5.501-5.516 of the Code.

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

§50.31. Purpose and Applicability.

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

(c) This subchapter does not apply to:

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

~~[(8) all municipal solid waste facilities authorized to operate by registration under Chapter 330 of this title (relating to Municipal Solid Waste);]~~

(8) [~~(9)~~] all compost facilities authorized to operate by registration under Chapter 332 of this title (relating to Composting);

(9) [~~(10)~~] concentrated animal feeding operations (CAFOs) under Chapter 321, Subchapter K of this title (relating to Concentrated Animal Feeding Operations);

(10) [~~(11)~~] an application for creation of a municipal management district under Local Government Code, Chapter 375; and

~~[(12) emergency or temporary orders or temporary authorizations]~~

(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 September 28, 1998.

TRD-9815153

Margaret Hoffman

Director, Environmental Law Division

Texas Natural Resource Conservation Commission
Earliest possible date of adoption: November 8, 1998
For further information, please call: (512) 239-4640

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Chapter 288. Water Conservation Plans, Guidelines and Requirements

The Texas Natural Resource Conservation Commission (TNRCC or commission) proposes amendments to §§288.1, 288.2, 288.4, 288.5, and a new §288.20, related to Drought Contingency Plans for Municipal Uses by Public Water Suppliers, a new §288.21, related to Drought Contingency Plans for Irrigation Use, a new §288.22, related to Drought Contingency Plans for Wholesale Water Suppliers, and a new §288.30, related to Required Plans.

EXPLANATION OF PROPOSED RULE

The purpose of the proposed amendments and new section are to establish criteria and minimum requirements for drought contingency plans for wholesale and retail public water suppliers and irrigation districts necessary to implement the Texas Water Code, §11.1272 as enacted by Senate Bill 1, 75th Legislature (1997). The new sections include both procedural and substantive requirements that must be addressed by drought contingency plans. The proposed new rules also establish deadlines for irrigation districts, and wholesale and retail public water suppliers to submit drought contingency plans. A staggered deadline is provided for public water supply systems to allow smaller systems with more limited resources additional time to submit their plans and allow for their participation in a technical assistance program jointly sponsored by the commission and the Texas Water Development Board. Staggering this requirement also allows the commission to review a manageable number of plans based upon the agency's available resources. Specifically, systems with 3300 connections or less must submit their plans by May 31, 2000. All other applicable systems including wholesale public water suppliers and irrigation districts must submit plans by May 31, 1999.

The proposed new rules also establish deadlines for existing water right holders, of 10,000 acre-feet a year or more for irrigation uses, and 1,000 acre-feet a year or more for other uses, to submit water conservation plans to the executive director as required by Texas Water Code, §11.1271, as amended by Senate Bill 1. Under the proposed new rule, all applicable water rights holders must submit water conservation plans by May 31, 1999.

Concurrently, the commission proposes the review of 30 TAC Chapter 288, in accordance with the General Appropriations Act, Article IX, §167, 75th Legislature, 1997, and is publishing the proposed notice of review in the Rules Review Section of the *Texas Register* .

The proposed new rules would amend the title to include drought contingency plans and establish three subchapters relating to water conservation plans, drought contingency plans, and submission requirements, respectively. Additionally, the proposed new §288.20(a)(3) provides minimum criteria for drought contingency plans for Public Water Suppliers. Section 288.20(a)(3)(C) provides that the drought contingency plan include an assessment of water management strategies to be used when flows are at 75 percent of normal and when flows are at 50 percent of normal. The commission intends that the terms "flows are at 75 percent of normal," and "flows are at 50 percent of normal," have the same definitions and usage as those terms have in the Texas Water Development Board's regional planning rules, 31 TAC §357 *et seq* in order to have consistency between the two sets of rules.

FISCAL NOTE

Stephen Minick, Strategic Planning and Appropriations Division, has determined that, for the first five years these sections as proposed are in effect, there will be fiscal implications as a result of enforcing and administering the sections. The effect on state government will be an increase in cost of approximately $140,000 annually related to review and coordination of water conservation and drought contingency plans. Some costs to local governments to comply with these regulations and develop water conservation and drought contingency plans are anticipated; however, these costs are not expected to be significant in most cases. Many local governments already have plans that will comply with these regulations currently, or can be brought into compliance with minor amendments. In addition, the commission, in conjunction with the Texas Water Development Board, is developing written examples and guidelines as well as developing a technical assistance program that will assist other local governments in developing their water conservation and drought plans at the lowest possible cost.

PUBLIC BENEFIT

Mr. Minick has also determined that, for the first five years these sections as proposed are in effect, the public benefit anticipated as a result of enforcement of and compliance with these sections will be an increase in water conservation and a reduction in water consumption during drought conditions, a reduction or avoidance of costs to public water suppliers associated with reduced demand and the cost to treat public drinking water, a delay in capital costs to water suppliers as existing water supplies and treatment and delivery systems are extended to satisfy reduced demands, and an increase in public water systems' ability to deal with drought and other short term water supply shortages. The proposed rules affect small businesses, specifically investor owned utilities that are public water supply systems, which must comply with the rules in the same form and manner as other public water suppliers. The costs to affected small businesses to develop water conservation and drought contingency plans are not anticipated to result in significant increases in the costs of operation and maintenance of these systems. These costs should be similar for most affected parties; however, the relative affects of these fixed costs could be more significant for a small business in relation to the gross income of a small utility, or its other fixed costs, such as labor. The affect of the costs on small business will also be kept minimal because the agency will provide technical assistance to small businesses with workshops, forms, etc., which should help with costs. There are no other anticipated costs to any person required to comply with this section as proposed.

DRAFT REGULATORY IMPACT ANALYSIS

The commission has reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code §2001.0225 and has determined that the rulemaking is not subject to §2001.0225 because it does not meet any of the four applicability requirements listed in §2001.0225(a). Specifically, it does not exceed a standard set by federal law since there are no corresponding federal requirements; it does

not exceed any express requirements of state law but, rather, the rule is specifically required by Texas Water Code, §11.1271, and §11.1272; does not involve any delegation agreements or contracts; and the rule is being proposed for adoption under specific authority provided in §§11.1271 and §11.1272 as well as the general powers of the commission provided under Chapter 5 of the Texas Water Code. The requirements for plans be added to the rules are necessary to implement Senate Bill 1 (1997).

TAKINGS IMPACT ASSESSMENT

The Commission has prepared a Takings Impact Assessment for these rules pursuant to Texas Government Code, §2007.043. The following is a summary of that Assessment. The specific purpose of the rule is to adopt criteria and deadlines for submission of water conservation and drought contingency plans necessary to implement existing statutory requirements for certain water right holders and wholesale and retail public water suppliers and irrigation districts to develop such plans. The rules will substantially advance this specific purpose by specifying the minimum requirements that must be addressed in water conservation and drought contingency plans, and specifying a date for submission of plans. Promulgation and enforcement of these rules will not burden private real property. Rather, they implement statutory requirements providing for the reasonable conservation and management of a state natural resource to which persons have been granted a usufructuary interest and over which the state retains supervisory oversight in trust for the public to ensure the protection of the public health, safety, and welfare.

COASTAL MANAGEMENT PROGRAM (CMP)

The commission 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, nor will it affect any action or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the proposed rule is not subject to the CMP.

PUBLIC HEARING

A public hearing on this proposal will be held at 10:00 a.m. on October 29, 1998, in Room 201S of the TNRCC central office, 12124 Park 35 Circle, Building E, Austin, Texas 78753. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion within the audience will not occur during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to each hearing and will answer questions before and after the hearing.

SUBMITTAL OF COMMENTS

Written comments on the proposal should reference Rule Log No. 97146-297-WT and may be submitted to Lutrecia Oshoko, Texas Natural Resource Conservation Commission, Office of Policy and Regulatory Development, MC-205, P.O. Box 13087, Austin, Texas 78711-3087, (512)239-4640, or faxed to (512) 239-5687. Written comments must be received by 5:00 p.m. November 9, 1998. For further information or questions concerning this proposal, please contact John Warden, Water Quantity Division at (512) 239-6967.

Subchapter A. Water Conservation Plans

30 TAC §§288.1, 288.2, 288.4, 288.5

STATUTORY AUTHORITY

The amended sections are proposed under Texas Water Code, §5.103, which provides the commission the authority to adopt and enforce rules necessary to carry out its powers and duties under the laws of this state; under Texas Water Code §11.1271 which requires the commission to adopt rules establishing criteria and deadlines for submission of water conservation plans; and under Texas Water Code §11.1272 which requires the commission by rule to require wholesale and retail public water suppliers and irrigation districts to develop drought contingency plans.

The rules also implement Texas Water Code §§11.1271, 11.1272.

§288.1. Definitions.

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

(1) Community water system - shall have the same definition in this chapter as it has in Chapter 290 of this title (relating to Water Hygiene).

(2) Conservation - Those practices, techniques, and technologies that reduce the consumption of water, reduce the loss or waste of water, improve the efficiency in the use of water or increase the recycling and reuse of water so that a water supply is made available for future or alternative uses.

(3) Drought contingency plan - A strategy or combination of strategies for temporary supply management and demand management responses to temporary and potentially recurring water supply shortages and other water supply emergencies. A drought contingency plan may be a separate document identified as such or may be contained within another water management document(s).

(4) Industrial use - The use of water in processes designed to convert materials of a lower order of value into forms having greater usability and commercial value, including commercial feedlot operations, commercial fish production, and the development of power by means other than hydroelectric.

(5) Irrigation use - The use of water for the irrigation of crops, trees, and pastureland, including, but not limited to, golf courses and parks which do not receive water through a municipal distribution system.

(6) Irrigation water use efficiency - The percentage of that amount of irrigation water which is beneficially used by agriculture crops or other vegetation relative to the amount of water diverted from the source(s) of supply. Beneficial uses of water for irrigation purposes include, but are not limited to, evapotranspiration needs for vegetative maintenance and growth and salinity management and leaching requirements associated with irrigation.

(7) Mining use - The use of water for mining processes including hydraulic use, drilling, washing sand and gravel, and oil field repressuring.

(8) Municipal per capita water use - The sum total of water diverted into a water supply system for residential, commercial, and public and institutional uses divided by actual population served.

(9) Municipal use - The use of potable water within or outside a municipality and its environs whether supplied by a person, privately owned utility, political subdivision, or other entity as well as the use of sewage effluent for certain purposes,

including the use of treated water for domestic purposes, fighting fires, sprinkling streets, flushing sewers and drains, watering parks and parkways, and recreational purposes, including public and private swimming pools, the use of potable water in industrial and commercial enterprises supplied by a municipal distribution system without special construction to meet its demands, and for the watering of lawns and family gardens.

(10) Pollution - The alteration of the physical, thermal, chemical, or biological quality of, or the contamination of, any water in the state that renders the water harmful, detrimental, or injurious to humans, animal life, vegetation, or property, or to the public health, safety, or welfare, or impairs the usefulness or the public enjoyment of the water for any lawful or reasonable purpose.

(11) Public Water Supplier - an individual or entity that supplies water to the public for human consumption. This term includes, but is not limited to, public water system, noncommunity water system, nontransient noncommunity water system, water and sewer utility, and retail public utility.

(12) Regional Water Planning Group - A group established by the Texas Water Development Board to prepare a regional water plan pursuant to Texas Water Code §16.053.

(13) Reuse - The authorized use for one or more beneficial purposes of use of water that remains unconsumed after the water is used for the original purpose of use and before that water is either disposed of or discharged or otherwise allowed to flow into a watercourse, lake, or other body of state-owned water.

(14) Water conservation plan - A strategy or combination of strategies for reducing the volume of water withdrawn from a water supply source, for reducing the loss or waste of water, for maintaining or improving the efficiency in the use of water, for increasing the recycling and reuse of water, and for preventing the pollution of water. A water conservation plan may be a separate document identified as such or may be contained within another water management document(s).

§288.2. Water Conservation Plans for Municipal Uses by Public Water Suppliers.

(a) A water conservation plan for municipal water use by public water suppliers shall provide information, where applicable, in response to the following.

(1) Minimum requirements. All water conservation plans for municipal uses by public drinking water suppliers shall include the following elements:

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

(F) a program of continuing public education and information regarding water conservation and the public water supplier's drought contingency plan targeted for its customers ;

(G) (No change.)

~~[(H) a drought management plan including:]~~

~~*[(i)* an education and information program concerning the plan;]~~

~~*[(ii)* notification procedures to identify the initiation and termination of the drought and the corresponding implementation and termination of the drought measures;]~~

~~*[(iii)* trigger conditions signaling the start of any identified drought period; and]~~

~~*[(iv)* drought water-use measures (e.g., curtailment of non-essential water uses and other water use restrictions, etc.) corresponding to each trigger condition;]~~

(H) [~~(I)~~] a reservoir systems operations plan, if applicable, providing for the coordinated operation of reservoirs owned by the applicant within a common watershed or river basin in order to optimize available water supplies; and

(I) [~~(J)~~] a means of implementation and enforcement which shall be evidenced by:

(i) a copy of the ordinance, resolution, or tariff, indicating official adoption of the water conservation plan by the water supplier; and

(ii) a description of the authority by which the water supplier will implement and enforce the conservation plan.

(J) documentation of coordination with the Regional Planning Groups for the service area of the public water supplier in order to insure consistency with the appropriate approved regional water plans.

(2) Additional content requirements. Water conservation plans for municipal uses by public drinking water suppliers serving a current population of 5,000 or more and/or a projected population of 5,000 or more within the next ten [~~10~~] years subsequent to the effective date of the plan shall include the following elements:

(A) (No change.)

(B) a record management system to record water pumped, water deliveries, water sales and water losses which allows for the desegregation of water sales and uses into the following user classes:

(i)-(iii)

(iv) industrial. [~~; and~~]

(C) (No change.)

(3) (No change.)

(b) (No change.)

§288.4. Water Conservation Plans for Irrigation Use.

(a) A water conservation plan for irrigation uses of water shall provide information, where applicable, in response to each of the following subsections.

(1) For an individual user:

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

(C) a description of the metering device(s) [~~and/or methods~~] within an accuracy of plus or minus 5%, to be used in order to measure and account for the amount of water diverted from the source of supply;

(D) (No change.)

(E) water-conserving irrigation equipment and application system or method[,] including, but not limited to, surge irrigation, low pressure sprinkler, drip irrigation, and nonleaking pipe;

(F)-(G) (No change.)

(H) land improvements for retaining or reducing runoff, and increasing the infiltration of rain and irrigation water[,] including, but not limited to, land leveling, furrow diking, terracing, and weed control;

(I)-(J) (No change.)

(2) For a system providing irrigation water to more than one user:

(A) a system inventory for the supplier's:

(i)-(ii) (No change.)

(iii) a user profile including square miles of the service area, the number of customers taking delivery of water by the system, the types of crops, the types of irrigation systems, the types of drainage systems, and total acreage under irrigation, both historical and projected. [~~;~~]

(B)-(H) (No change.)

[~~(I) a drought contingency plan providing:~~]

[~~(i)~~ ~~an education and information program concerning the plan;~~]

[~~(ii)~~ ~~notification procedures to identify the initiation and termination of the drought and the corresponding implementation and termination of the drought measures;~~]

[~~(iii)~~ ~~trigger conditions signaling the start of any identified drought period; and~~]

[~~(iv)~~ ~~drought water-use measures (e.g., curtailment of non-essential water uses and other water use restrictions, etc.) corresponding to each trigger condition; and~~]

(I) [~~(J)~~] any other water conservation practice, method or technique which the supplier shows to be appropriate for achieving conservation; and [~~.~~]

(J) documentation of coordination with the Regional Planning Groups in order to insure consistency with the appropriate approved regional water plans.

(b) (No change.)

§288.5. Water Conservation Plans for Wholesale Water Suppliers.

A water conservation plan for a wholesale water supplier shall provide information, where applicable, in response to each of the following paragraphs.

(1) Minimum requirements. All water conservation plans for wholesale water suppliers shall include the following elements:

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

[~~(F) a requirement in every wholesale water supply contract entered into or renewed after official adoption of the water conservation plan (by either ordinance, resolution, or tariff) and including any contract extension, that each successive wholesale customer develop and implement a water conservation plan or water conservation measures using the applicable elements of this chapter; if the customer intends to resell the water, then the contract between the initial supplier and customer must provide that the contract for the resale of the water must have water conservation requirements so that each successive customer in the resale of the water will be required to implement water conservation measures in accordance with applicable provisions of this chapter;~~]

[~~(G) a drought management plan including:~~]

[~~(i)~~ ~~an education and information program concerning the plan;~~]

[~~(ii)~~ ~~notification procedures to identify the initiation and termination of the drought and the corresponding implementation and termination of the drought measures;~~]

[~~(iii)~~ ~~trigger conditions signaling the start of any identified drought period; and~~]

[~~(iv)~~ ~~drought water-use measures corresponding to each trigger condition; and~~]

(F) [~~(H)~~] a reservoir systems operations plan, if applicable, providing for the coordinated operation of reservoirs owned by the applicant within a common watershed or river basin in order to optimize available water supplies; [~~and~~]

(G) [~~(I)~~] a means for implementation and enforcement which shall be evidenced by: a copy of the ordinance, rule, resolution, or tariff, indicating official adoption of the water conservation plan by the water supplier; and a description of the authority by which the water supplier will implement and enforce the conservation plan; and [~~.~~]

(H) documentation of coordination with the Regional Planning Groups for the service area of the wholesale water supplier in order to insure consistency with the appropriate approved regional water plans.

(2) (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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Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
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For further information, please call: (512) 239-4640

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Subchapter B. Drought Contingency Plans

30 TAC §§288.20-288.22

STATUTORY AUTHORITY The new sections are proposed under Texas Water Code, §5.103, which provides the commission the authority to adopt and enforce rules necessary to carry out its powers and duties under the laws of this state; under Texas Water Code §11.1271 which requires the commission to adopt rules establishing criteria and deadlines for submission of water conservation plans; and under Texas Water Code §11.1272 which requires the commission by rule to require wholesale and retail public water suppliers and irrigation districts to develop drought contingency plans.

The rules also implement Texas Water Code §§11.1271, 11.1272.

§288.20. Drought Contingency Plans for Municipal Uses by Public Water Suppliers.

(a) A drought contingency plan for a retail public water supplier, where applicable, shall provide information in response to each of the following:

(1) Public involvement. Provision shall be made to actively inform the public and affirmatively provide opportunity for public input into the preparation of the plan and for informing and educating the public about the plan. Such acts may include, but are not limited to, having a public meeting at a time and location

convenient to the public and providing written notice to the public concerning the proposed plan and meeting.

(2) Coordination with Regional Water Planning Groups. The drought contingency plan must document coordination with the Regional Planning Groups for the service area of the retail public water supplier in order to insure consistency with the appropriate approved regional water plans.

(3) Minimum requirements. Drought contingency plans shall include the following minimum elements:

(A) specific criteria for the initiation and termination of drought response stages, accompanied by an explanation of the rationale or basis for such triggering criteria;

(B) drought or emergency response stages providing for the implementation of measures in response to at least the following situations:

(i) reduction in available water supply up to a repeat of the drought of record;

(ii) water production or distribution system limitations;

(iii) supply source contamination; or

(iv) system outage due to the failure or damage of major water system components (e.g., pumps).

(C) an assessment of water management strategies to be used when flows are at 75 percent of normal and when flows are at 50 percent of normal;

(D) a description of the information to be monitored by the water supplier and the procedures to be followed for the initiation or termination of drought response stages;

(E) procedures for notification of the public of the initiation or termination of drought response stages;

(F) specific water supply or water demand management measures to be implemented during each stage of the plan including, but not limited to, the following:

(i) curtailment of non-essential water uses; and

(ii) utilization of alternative water sources and/or alternative delivery mechanisms with the prior approval of the executive director as appropriate (e.g., interconnection with another water system, temporary use of a non-municipal water supply, use of reclaimed water for non-potable purposes, etc.)

(G) procedures for granting variances to the plan; and

(H) procedures for the enforcement of any mandatory water use restrictions including specification of penalties (e.g., fines, water rate surcharges, discontinuation of service) for violations of such restrictions.

(4) Privately-owned water utilities. Privately-owned water utilities shall prepare a drought contingency plan in accordance with this section and shall incorporate such plan into their tariff.

(5) Wholesale water customers. Any water supplier that receives all or a portion of its water supply from another water supplier shall consult with that supplier and shall include in the drought contingency plan appropriate provisions for responding to reductions in that water supply.

(b) The water supplier shall notify the executive director within five business days of the implementation of any mandatory provisions of the drought contingency plan.

(c) The retail public water supplier shall review and update, as appropriate, the drought contingency plan, at least every five years, based on new or updated information, such as the adoption or revision of the regional water plan.

§288.21. Drought Contingency Plans for Irrigation Use.

(a) A drought contingency plan for an irrigation use, where applicable, shall provide information in response to each of the following:

(1) User involvement. Provision shall be made to actively inform and to affirmatively provide opportunity for users of water from the irrigation system to provide input into the preparation of the plan and to remain informed of the plan. Such acts may include, but are not limited to, having a public meeting at a time and location convenient to the water users and providing written notice to the water users concerning the proposed plan and meeting.

(2) Coordination with Regional Water Planning Groups. The drought contingency plan must document coordination with the Regional Planning Groups in order to insure consistency with the appropriate approved regional water plans.

(3) Minimum requirements. Drought contingency plans for irrigation water suppliers shall include policies and procedures for the equitable and efficient allocation of water on a pro rata basis during times of shortage in accordance with Texas Water Code §11.039. Such plans shall include the following elements as a minimum:

(A) water supply criteria and other considerations for determining when to initiate or terminate water allocation procedures, accompanied by an explanation of the rationale or basis for such triggering criteria;

(B) methods for determining the allocation of irrigation supplies to individual users;

(C) a description of the information to be monitored by the water supplier and the procedures to be followed for the initiation or termination of water allocation policies;

(D) procedures for use accounting during the implementation of water allocation policies;

(E) policies and procedures, if any, for the transfer of water allocations among individual users within the water supply system or to users outside the water supply system; and

(F) procedures for the enforcement of water allocation policies including specification of penalties for violations of such policies and for wasteful or excessive use of water.

(4) Wholesale water customers. Any irrigation water supplier that receives all or a portion of its water supply from another water supplier shall consult with that supplier and shall include in the drought contingency plan appropriate provisions for responding to reductions in that water supply.

(5) Protection of public water supplies. Any irrigation water supplier that also provides or delivers water to a public water supplier(s) shall consult with that public water supplier(s) and shall include in the plan mutually agreeable and appropriate provisions to ensure an uninterrupted supply of water necessary for essential uses relating to public health and safety. Nothing in this provision shall be construed as requiring the irrigation water supplier to transfer

irrigation water supplies to non-irrigation use on a compulsory basis or without just compensation.

(b) Irrigation water users shall review and update, as appropriate, the drought contingency plan, at least every five years, based on new or updated information, such as adoption or revision of the regional water plan.

§288.22. Drought Contingency Plans for Wholesale Water Suppliers.

(a) A drought contingency plan for a wholesale water supplier, where applicable, shall provide information in response to each of the following:

(1) Public involvement. Provision shall be made to actively inform the public and to affirmatively provide opportunity for user input in the preparation of the plan and for informing wholesale customers about the plan. Such acts may include, but are not limited to, having a public meeting at a time and location convenient to the public and providing written notice to the public concerning the proposed plan and meeting.

(2) Coordination with Regional Water Planning Groups. The drought contingency plan must document coordination with the Regional Planning Groups for the service area of the wholesale public water supplier in order to insure consistency with the appropriate approved regional water plans.

(3) Minimum requirements. Drought contingency plans for wholesale water suppliers shall include the following elements as a minimum:

(A) specific criteria for the initiation and termination of drought response stages, accompanied by an explanation of the rationale or basis for such triggering criteria;

(B) a minimum of three drought or emergency response stages providing for the implementation of measures in response to water supply conditions during a repeat of the drought-of-record;

(C) a description of the information to be monitored by the water supplier and the procedures to be followed for the initiation or termination of drought response stages;

(D) procedures for notification of wholesale customers regarding the initiation or termination of drought response stages;

(E) the specific water supply or water demand management measures to be implemented during each stage of the plan including, but not limited to, the following:

(i) pro rata curtailment of water deliveries to or diversions by wholesale water customers as provided in Texas Water Code §11.039; and

(ii) utilization of alternative water sources with the prior approval of the executive director as appropriate (e.g., interconnection with another water system, temporary use of a non-municipal water supply, use of reclaimed water for non-potable purposes, etc.);

(F) a provision in every wholesale water contract entered into or renewed after adoption of the plan, including contract extensions, that in case of a shortage of water resulting from drought, the water to be distributed shall be divided among all customers pro rata, according to the amount each may be entitled to, so that preference is given to no one and everyone suffers alike;

(G) procedures for granting variances to the plan; and

(H) procedures for the enforcement of any mandatory water use restrictions including specification of penalties (e.g., liquidated damages, water rate surcharges, discontinuation of service) for violations of such restrictions.

(b) The wholesale public water supplier shall notify the executive director within five business days of the implementation of any mandatory provisions of the drought contingency plan.

(c) The wholesale public water supplier shall review and update, as appropriate, the drought contingency plan, at least every five years, based on new or updated information, such as adoption or revision of the regional water plan.

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

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Subchapter C. Required Submittals

30 TAC §288.30

STATUTORY AUTHORITY The section is proposed under Texas Water Code, §5.103, which provides the commission the authority to adopt and enforce rules necessary to carry out its powers and duties under the laws of this state; under Texas Water Code §11.1271 which requires the commission to adopt rules establishing criteria and deadlines for submission of water conservation plans; and under Texas Water Code §11.1272 which requires the commission by rule to require wholesale and retail public water suppliers and irrigation districts to develop drought contingency plans.

The rules also implement Texas Water Code §§11.1271, 11.1272.

§288.30. Required Plans.

In addition to the water conservation and drought contingency plans required to be submitted with an application under §295.9 of this title (relating to Water Conservation and Drought Contingency Plans) water conservation and drought contingency plans are required as follows:

(1) The holder of an existing permit, certified filing, or certificate of adjudication for the appropriation of surface water in the amount of 1,000 acre-feet a year or more for municipal, industrial and other non-irrigation uses shall develop, submit and implement a water conservation plan meeting the requirements of Subchapter A of this chapter (relating to Water Conservation Plans). The water conservation plan shall be submitted to the executive director not later than May 31, 1999. The requirement for a water conservation plan under this rule shall not result in the need for an amendment to an existing permit, certified filing, or certificate of adjudication.

(2) The holder of an existing permit, certified filing, or certificate of adjudication for the appropriation of surface water in the amount of 10,000 acre-feet a year or more for irrigation uses shall develop, submit and implement a water conservation plan meeting the

requirements of Subchapter A of this chapter. The water conservation plan shall be submitted to the executive director not later than May 31, 1999. The requirement for a water conservation plan under this rule shall not result in the need for an amendment to an existing permit, certified filing, or certificate of adjudication.

(3) Retail public water suppliers shall submit a drought contingency plan meeting the requirements of Subchapter B of this chapter (relating to Drought Contingency Plans) to the executive director after adoption by its governing body. The retail public water system shall provide a copy of the plan to the Regional Water Planning Group for each region within which the water system operates. These drought contingency plans shall be submitted as follows:

(A) For community water systems providing water service to 3,300 or more connections, the drought contingency plan shall be submitted to the executive director not later than May 31, 1999. Thereafter, any new or revised plans shall be submitted to the executive director within 90 days of adoption by the community water system; and

(B) For all other retail public water systems, the drought contingency plan shall be prepared and adopted not later than May 31, 2000 and shall be available for inspection by the executive director upon request.

(4) Wholesale public water suppliers shall submit a drought contingency plan meeting the requirements of Subchapter B of this chapter to the executive director not later than May 31, 1999, after adoption of the drought contingency plan by the governing body of the water supplier. Thereafter, any new or revised plans shall be submitted to the executive director within 90 days of adoption by the governing body of the wholesale public water supplier. Wholesale public water suppliers shall also provide a copy of the drought contingency plan to the Regional Water Planning Group for each region within which the wholesale water supplier operates.

(5) Irrigation districts shall submit a drought contingency plan meeting the requirements of Subchapter B of this Chapter to the executive director not later than May 31, 1999, after adoption by the governing body of the irrigation district. Thereafter, any new or revised plans shall be submitted to the executive director within 90 days of adoption by the governing body of the irrigation district. Irrigation districts shall also provide a copy of the plan to the Regional Water Planning Group for each region within which the irrigation district operates.

(6) A water conservation plan or drought contingency plan required to be submitted with an application in accordance with §295.9 of this title shall also be subject to review and approval by the commission.

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

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Margaret Hoffman

Director, Environmental Law Division

Texas Natural Resource Conservation Commission

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

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Chapter 293. Water Districts

The Texas Natural Resource Conservation Commission (TNRCC or commission) proposes new §293.16 and §293.21 and the repeal of §§293.21-293.25, Subchapter C; new §293.36 and §293.37, Subchapter D; amendments to §§293.131, 293.132, and 293.134; and new §293.137, relating to Procedure for Creation and Dissolution of a Groundwater Conservation District and the Appointment of its Director.

EXPLANATION OF PROPOSED RULE

The commission proposes the repeals, in order to repropose these sections in Chapter 294, which is the section which is currently titled "Underground Water Management Areas," and covers two designated Management Areas and four Critical Areas. The commission believes that these sections are more appropriate in Chapter 294.

The purpose of the new sections is to implement the requirements in Senate Bill 1 (1997), amending Texas Water Code Chapter 36, relating to the creation of groundwater conservation districts in areas which have been designated as Priority Groundwater Management Areas (PGMA). These rules provide procedures for district creation, for appointment of temporary directors, and for commission action if a groundwater conservation district does not submit or implement a management plan. Also, these rules provide procedures for a groundwater conservation district to expand its management authority within its territory.

Section 293.16(a) provides that if a district created by the commission wants to expand its authority to manage water-bearing formations which are within its territorial boundaries, it may file a petition to amend the commission order which meets the criteria of §293.16(b). Pursuant to proposed §293.16(c), no further confirmation election need be held.

New §293.21 relates to commission creation of groundwater conservation districts in priority groundwater management areas. Section 293.21(a) would provide that the executive director prepare a report meeting specified requirements and file it with the chief clerk, and the chief clerk shall set the petition for hearing. Pursuant to proposed §293.21(b), the hearing procedures are those set out in Texas Water Code, §36.014. Proposed §293.21(c) provides that the order is mailed to each city having extraterritorial jurisdiction and/or each county in the district, and proposed §293.21(d) provides that the governing board provide certain information to the executive director.

New §293.36 provides procedures for appointment of temporary directors for these districts. Under proposed §293.36(a), the commission shall order the commissioners' court of the counties in the area to appoint temporary directors and hold an election within 90 days. If this is not done, the commission shall appoint the directors. Under proposed §293.36(b), the commission also appoints temporary directors if it grants a petition to create a district under Texas Water Code §36.015 or if it dissolves the board of the district. Under §293.36(c), if the temporary directors fail to qualify, or a vacancy occurs, the commission or the county commissioners' court shall appoint someone to fill the vacancy. Section 293.36(d) would provide that temporary directors serve until the initial directors are elected or voters fail to approve creation of the district. Section 293.36(e) would provide that appointment of temporary directors also be pursuant to §§293.31-293.35 of this chapter.

Proposed new §293.36(f) provides that if a commission-created district contains more than one county, the commission shall apportion the number of temporary directors to each county based on each county's proportionate amount of total estimated groundwater use within the proposed district.

Proposed new §293.37(a) provides that the Texas Water Development Board will provide the commission an estimate of total groundwater use in each county comprising the area studied as a proposed PGMA.

Section 293.131 would be amended to provide that subsection (a) applies only to Texas Water Code, Chapter 36 districts. That section provides that a groundwater conservation district can be dissolved if it is found not to be operational under Texas Water Code §36.302 and has no outstanding indebtedness. If the procedures set out in §293.137 are followed, Texas Water Code §36.302 allows dissolution for failure to file or implement a management plan. All assets will be sold and the proceeds given to the county or counties in proportion to the surface land area in each county served by the district. Section 293.131(b), setting out procedures for dissolution, would be amended to apply only to Chapter 49 districts. The rest of §293.131(b) and §§293.132-293.136 are not proposed to be changed.

New §293.137 sets out procedures for commission action for failure of a groundwater conservation district to submit or implement a management plan. Section 293.137(a) provides that the commission may require certain actions of the district or order the district to refrain from taking certain actions, dissolve the board, remove the district's taxing authority, dissolve the district, or recommend action to the legislature to address operational problems. Section 293.137(b) would provide that the executive director will investigate any violations and write a report to the commission including actions the executive director would recommend taking. Proposed subsection (c) would provide that the executive director will attempt to resolve noncompliances with the board of the district, and if unsuccessful, shall follow Chapter 70, Subchapter C of this title. New §293.137(d) would set out notice requirements for any hearing on the violations, and proposed §293.137(e) provides that the commission will appoint temporary directors if it dissolves the board. Proposed subsection (f) provides that the commission shall file a certified copy of the order with the county, and if the district was legislatively created, with the secretary of state. Proposed subsection (f) provides that appeals for any commission order shall be in the district court in any of the counties in which the district is located.

The commission also proposes the repeal of §§293.21-293.25 to repropose these sections in Chapter 294, which is the section which is currently titled Underground Water Management Areas, and covers two designated Management Areas and four Critical Areas. The commission believes that these sections are more appropriate in Chapter 294.

FISCAL NOTE

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five-year period the sections as proposed are in effect, there will be fiscal implications as a result of administration or enforcement of the sections. The effect on state government will be an increase in costs of $145,000 per year in order to complete the pending priority groundwater management studies, conduct evidentiary hearings, as necessary, prepare the biennial report to the legislature, and to enforce groundwater district requirements, if necessary, as required by Senate Bill 1 (1997). There are no significant costs anticipated for units of local government.

PUBLIC BENEFIT

Mr. Minick has also determined that, for 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 improvement in the process of delineation, creation and operation of groundwater management areas and enhanced protection and conservation of groundwater resources. There are no significant economic costs anticipated to any person required to comply with the sections as proposed. While these rules amend various procedural requirements that may have implications for groundwater districts, the costs associated with creation and operation of these jurisdictions under the proposed rules is not anticipated to be materially changed. In any event, if there were increased costs, these costs would be due to the statutory requirements; these rules do not result in any additional costs. These rules affect priority groundwater districts and do not have any direct implications for businesses, including small businesses. No adverse impact to small businesses is anticipated.

DRAFT REGULATORY IMPACT ANALYSIS

The commission has reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code §2001.0225 and has determined that the rulemaking is not subject to §2001.0225 because it does not meet any of the four applicability requirements listed in §2001.0225(a) in that the rules are specifically required by state law, Chapter 36 of the Texas Water Code, do not exceed any express requirements of state law, and do not involve any delegation agreements between the state and the federal government, there is no applicable federal law or contracts. While some of the rules interpret statutory procedural requirements, these procedural requirements are not outside the scope of this statute. The additional procedural requirements under these rules are necessary to implement S.B. 1. The rules relating to adding aquifers to groundwater districts do not exceed state law requirements, but implement a method for amending commission orders delineating districts, following existing statutory procedures for these orders.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these rules pursuant to Texas Government Code, §2007.043. The following is a summary of that Assessment. The specific purpose of the rule is to adopt new requirements, pursuant to state law, for creating groundwater conservation districts in Priority Groundwater Management Areas ("PGMAs") and for taking certain actions if the district does not prepare or implement a management plan. Also, the new rules contain a process for adding aquifer areas to the district's authority within the district's territory. The PGMA process and groundwater conservation district creation is for the purpose of protecting groundwater which is threatened.

These new rules will not burden private real property because these rules only add procedural requirements to a process which was already in existence in the statutes. Additionally, these rules do not create districts on their own. The locality will decide whether a district should be created. The PGMA process and district creation do not create a burden on real property because the process is for the protection of real property,

groundwater. Additionally, even if the rules could be construed as creating a burden on private real property, the rules are being proposed in response to a real and substantial threat to public health and safety, the rules significantly advance the health and safety purpose, and impose no greater burden than is necessary to achieve that purpose. These rules help preserve and protect groundwater supplies, which are necessary to public health and safety. The district creation process is an efficient method of ensuring that there supplies remain and are uncontaminated.

COASTAL MANAGEMENT PROGRAM (CMP)

The commission has reviewed this proposed rulemaking and found that the rule is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Action as and Rules Subject to the Coastal Management Program, nor will it affect any action or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the proposed rule is not subject to the CMP.

PUBLIC HEARINGS

A public comment hearing on this proposal and rules review will be held in Austin on October 29, 1998, beginning at 10:00 a.m. in the Texas Natural Resource Conservation Commission Office Complex, Building E, Room 201S, located at 12100 Park 35 Circle. The hearing is structured to receive oral or written comments by interested persons. Individuals may present oral statements when called upon in the order of registration. Open discussion will not occur during the hearing; however, a commission staff member will be available to discuss the proposed rules one half hour prior to each hearing and will answer questions before and after the hearings.

SUBMITTAL OF WRITTEN COMMENTS

Written comments on the proposed rules should reference Rule Log No. 97146-297-WT and may be submitted to Lutrecia Oshoko, Texas Natural Resource Conservation Commission, Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 (512) 239-4640; or faxed to (512) 239-5687. All comments sent by fax must be followed by an original, signed hard copy for the agency's records. Written comments must be received by 5:00 p.m., November 9, 1998. For further information or questions concerning this proposal, contact Steve Musick, Water Quality Division at (512) 239-4514.

Subchapter B. Creation of Water Districts

30 TAC §293.16

STATUTORY AUTHORITY

These new section is being proposed under Texas Water Code, §5.103, which provides the commission the authority to adopt and enforce rules necessary to carry out its powers and duties under the laws of this state; and under Texas Water Code Chapter 36 Subchapters B and I, which provides the commission the authority to create groundwater conservation districts in PGMAs, and take actions if a groundwater conservation district does not submit or implement a management plan.

The rule implements Texas Water Code Chapter 36 Subchapters B and I.

§293.16. Expansion of an Existing Groundwater Conservation District's Management Authority.

(a) Any district, created by the commission pursuant to statute to manage groundwater supplies, may expand its authority to manage water-bearing formations which are within its territorial boundaries by filing with the commission a motion to amend the commission order creating the district.

(b) The petition to amend the order creating the district shall describe which water formations are being proposed for management, specifically addressing the criteria listed in Texas Water Code §36.015(a) and the following criteria:

(1) identify the aquifer and its areal extent within the district, including a map if different from the boundaries of the district;

(2) describe the physical, stratigraphic and hydrologic relationships of the aquifer to those of the aquifer(s) identified for management in the original order including the relationships to surficial geologic units and the base of usable quality groundwater in the district;

(3) describe the characteristics of the aquifer including general quality, availability and use within the district and its storage and transmissive properties; and

(4) identify the nature of projects and management issues to be undertaken to address concerns of the aquifer, including necessity and feasibility of the work.

(c) If a confirmation election has been held in the territorial boundaries of the district, no further confirmation election need be held to add these water-bearing formations to the district.

(d) The notice and hearing provisions of Texas Water Code §36.014 shall be followed to add aquifers to an existing district.

This 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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Margaret Hoffman
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Texas Natural Resource Conservation Commission
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For further information, please call: (512) 239-4640

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Subchapter C. Designation of Underground Water Management Areas

30 TAC §§293.21-293.25

(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.)

STATUTORY AUTHORITY These repeals are proposed under Texas Water Code, §5.103, which provides the commission the authority to adopt and enforce rules necessary to carry out its powers and duties under the laws of this state; and under Texas Water Code Chapter 36 Subchapters B and I, which provides the commission the authority to create groundwater conservation districts in PGMAs, and take actions if a groundwater conservation district does not submit or implement a management plan.

These rules implement Texas Water Code Chapter 36 Subchapters B and I.

§293.21. Designation of Groundwater Management Area Through Rulemaking.
§293.22. Petition for Adoption of Rules Designating a Groundwater Management Area.
§293.23. Commission Consideration of Petition for Adoption of Rules Designating a Groundwater Management Area.
§293.24. Notice of Commission Consideration of Final Adoption Rules Designating a Groundwater Management Area.
§293.25. Alteration of Groundwater Management Area.

This 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 C. Creation of Groundwater Conservation Districts In Priority Groundwater Management Areas [~~Designation of Underground Water Management Areas~~]

30 TAC §293.21

STATUTORY AUTHORITY The new section is proposed under Texas Water Code, § 5.103, which provides the commission the authority to adopt and enforce rules necessary to carry out its powers and duties under the laws of this state; and under Texas Water Code Chapter 36 Subchapters B and I, which provides the commission the authority to create groundwater conservation districts in PGMAs, and take actions if a groundwater conservation district does not submit or implement a management plan.

The rule implements Texas Water Code Chapter 36 Subchapters B and I.

§293.21. Commission Creation of Groundwater Conservation Districts in Priority Groundwater Management Areas on its own Motion.

(a) Following commission issuance of an order under §294.42(i) of this title (relating to Commission Action Concerning PGMA Designation) and filing of the executive director's report under §294.43(b)(2) of this title (relating to Landowners Actions in a PGMA), the commission after notice and hearing may create a groundwater conservation district and appoint temporary directors to call and hold a confirmation election. Contents of executive directors report, to be filed with the chief clerk, shall include:

(1) the name of the proposed district;

(2) the area and boundaries of the proposed district, including a map generally outlining the boundaries of the proposed district;

(3) the purpose or purposes of the proposed district;

(4) a statement of the general nature of any projects needed and recommended to be undertaken by the district, including the necessity and feasibility of the work;

(5) a map showing the proposed district's boundaries, metes and bounds, area, physical culture, and computation sheet for survey closure;

(6) a geologic/hydrologic report including as appropriate:

(A) the purpose or purposes of the proposed district and its management planning objectives/goals;

(B) a description of the existing area, conditions, topography, economic endeavors which rely heavily upon groundwater, and any proposed improvements;

(C) a description of the groundwater resources, including the characteristics (i.e., recharge/discharge features, depth of usable groundwater, etc.) of individual aquifers within the proposed district;

(D) complete justification for the creation of the proposed district supported by evidence that the district is feasible, practicable, necessary, and will benefit all of the land to be included in the district;

(E) the existing and projected land use in the proposed district;

(F) the existing and projected groundwater quality, quantity, availability, and usage within the proposed district, including any foreseeable quality, quantity, availability, and usage issues as identified in the executive director's Priority Groundwater Management Area report;

(G) the existing and projected population;

(H) an evaluation of the effect the proposed district and its programs will have within the district; and

(I) financial information including the following:

(i) the projected maintenance tax rate, under Texas Water Code, §36.020, which should not exceed 50 cents on each $100 of assessed valuation;

(ii) the proposed budget of revenues and expenses for the district; and

(iii) an evaluation of the effect the district and its programs will have on the total tax assessments on all land within the district, including a discussion of current and projected tax rates.

(7) affidavits by those persons nominated by the county commissioners court(s) as temporary directors, showing compliance with applicable statutory requirements of qualifications and eligibility for temporary directors, and in accordance with Texas Water Code, §§36.051(b) , 36.058, and 36.059(b) for appointment of directors.

(b) The chief clerk shall set the petition for hearing by the commission and issue notice thereof. The notice and hearing provisions of Texas Water Code §36.014 shall be followed for creation of a district.

(c) A copy of the order of the commission creating a district shall be mailed by first-class mail by the chief clerk to each city having extraterritorial jurisdiction and/or to each county.

(d) The governing board of the district shall provide information to the executive director in accordance with §293.14 of this title (relating to District Reporting Actions Following Creation).

This 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 September 28, 1998.

TRD-9815159
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: November 8, 1998
For further information, please call: (512) 239-4640

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Subchapter D. Appointment of Directors

30 TAC §293.36, §293.37

STATUTORY AUTHORITY These new sections are proposed under Texas Water Code, § 5.103, which provides the commission the authority to adopt and enforce rules necessary to carry out its powers and duties under the laws of this state; and under Texas Water Code Chapter 36 Subchapters B and I, which provides the commission the authority to create groundwater conservation districts in PGMAs, and take actions if a groundwater conservation district does not submit or implement a management plan.

These rules implement Texas Water Code Chapter 36 Subchapters B and I.

§293.36. Appointment of Temporary Directors by Commission for a Groundwater Conservation District.

(a) If the commission creates a district in a priority groundwater management area (PGMA) under this chapter:

(1) the commission shall provide in its order creating the district that the commissioners' court of the county or counties that contain the area of the district appoint temporary directors and that an election be called by the temporary directors to confirm the creation of the district and to elect permanent directors.

(2) the commissioners' court of the county or counties that contain the area of the district shall, within 90 days after receiving notification by the commission under paragraph (1) of this subsection, appoint temporary directors, for the district's board. The commissioners court shall not make any appointments after the expiration of the 90-day period. If fewer temporary directors have been appointed at the expiration of the period than required under paragraph (3) of this subsection, the commission shall appoint the additional directors.

(3) the commissioners' court of the county or counties that contain the area of the district shall appoint the temporary directors using the method set out in Texas Water Code, §36.0161. For districts containing two or more counties, the district shall apportion the appointments of the temporary directors in the manner provided by the commission under §293.37(b) of this title (relating to Estimation of Groundwater Use).

(b) If the commission grants a petition to create a district under Texas Water Code §36.015 or if the commission dissolves a district's board under Texas Water Code §36.303, it shall appoint the temporary directors.

(c) If a temporary director appointed by the commission or a county commissioners' court fails to qualify, or if a vacancy occurs in the office of temporary director, the commission or the county commissioners' court, as appropriate, shall appoint an individual to fill the vacancy.

(d) Temporary directors appointed under this subsection shall serve until the initial directors are elected and have qualified for office or until the voters fail to approve the creation of the district.

(e) Appointment of temporary directors by the commission shall be pursuant to §§293.31-293.35 of this title (relating to Appointment of Directors).

(f) If a district created by the commission in a PGMA contains two or more counties, the commission shall apportion the number of temporary directors to each county based on each county's proportionate amount, to the nearest whole number, of the total estimated groundwater use within the proposed district. The commission shall provide this information in its order proposing a district under §294.42(i) of this title (relating to Commission Action Concerning Priority Groundwater Management Area Designation).

§293.37. Estimation of Groundwater Use.

At the time the executive director requests a study from the Texas Water Development Board pursuant to §294.41(c) of this title (relating to Executive Director's Report Concerning Priority Groundwater Management Area Designation), the executive director will request the board to provide the commission an estimate of total groundwater use in each county comprising the area studied as a proposed PGMA.

This 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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Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: November 8, 1998
For further information, please call: (512) 239-4640

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Subchapter L. Dissolution of Districts

30 TAC §§293.131, 293.132, 293.134, 293.137

STATUTORY AUTHORITY These sections are proposed under Texas Water Code, § 5.103, which provides the commission the authority to adopt and enforce rules necessary to carry out its powers and duties under the laws of this state; and under Texas Water Code Chapter 36 Subchapters B and I, which provides the commission the authority to create groundwater conservation districts in PGMAs, and take actions if a groundwater conservation district does not submit or implement a management plan.

These rules implement Texas Water Code Chapter 36 Subchapters B and I.

§293.131. Authorization for Dissolution of Water District by the Commission.

(a) Chapter [~~Chapters~~] 36 [~~and 49, Subchapters I and K, being the~~] of the Texas Water Code §§306.301-306.310 [~~§§36.301-36.307 and 49.321-49.327~~] authorizes [~~authorize~~] the commission to dissolve any district as defined in Water Code §36.001(1), a groundwater conservation district, which is not operational as determined under Texas Water Code §36.302 [~~§49.001(1) which is~~

~~inactive for a period of three consecutive years for a groundwater conservation district or five consecutive years for other water districts~~] and has no outstanding bonded indebtedness. [~~A groundwater conservation district that is composed of territory entirely within one county may be dissolved even if it has outstanding indebtedness that matures after the year in which the district is dissolved.~~]

(1) A groundwater conservation district that is composed of territory entirely within one county may be dissolved even if it has outstanding indebtedness that matures after the year in which the district is dissolved.

(2) The procedures set out in §293.137 of this title (relating to Commission Action for Failure of a Groundwater Conservation District to Submit a Management Plan or to Implement a Certified Plan through its Operations) shall apply to these actions.

(3) Upon the dissolution of a groundwater conservation district by the commission, all assets of the district shall be sold at public auction and the proceeds given to the county if it is a single county district. If it is a multi-county district, the proceeds shall be divided with the counties in proportion to the surface land area in each county served by the district.

(b) Texas Water Code, Chapter 49, Subchapters I and K, §§49.321-49.327 authorize the commission to dissolve any district as defined in Water Code §49.001(1) which is inactive for a period of five consecutive years and has no outstanding bonded indebtedness.

(1) [~~(b)~~] Proceedings for the dissolution of a district may be initiated by the executive director upon his own initiative or upon the receipt of an application filed with the executive director by the owners of land or interests in land within the district which is sought to be dissolved, a member or members of the board of directors of the district, or any other party who can demonstrate an interest in having the district dissolved.

(2) [~~(c)~~] The application must include a petition on the part of the party requesting dissolution including a statement of the reasons that a dissolution is desirable or necessary, and contain a statement that the district has been financially dormant for [~~the preceding three-year period for a groundwater conservation district or~~] the preceding five-year period for [~~other~~] water districts and has performed no functions for the five previous preceding years and has no outstanding bonded indebtedness. [~~A groundwater conservation district that is composed of territory entirely within one county may be dissolved even if it has outstanding indebtedness that matures after the year in which the district is dissolved.~~]

(3) [~~(d)~~] If the petition is submitted by a landowner, a director of the district, or other interested party, the application must contain certified copies of dormancy affidavits submitted pursuant to Water Code §49.197, for [~~three years for a groundwater conservation district or~~] five years for [~~other~~] water districts preceding the year in which the application is submitted.

(4) [~~(e)~~] Evidence that the district has no outstanding bonded indebtedness may be filed as prepared testimony with the application and may consist of statements or testimony from the district's attorney, engineer, or officer and shall include an affidavit of the state comptroller of public accounts certifying that the district has never registered any bonds with the comptroller.

(5) [~~(f)~~] Applications shall include a list of assets and liabilities of the district.

(6) [~~(g)~~] The executive director may initiate procedures to dissolve a district without financial dormancy affidavits on file if:

(A) [~~(1)~~] The district has failed to comply with the reporting requirements of this chapter for the previous five year period;

(B) [~~(2)~~] attempts to contact directors, interested parties or anyone with knowledge of district's financial activity have failed; and,

(C) [~~(3)~~] the state comptroller of public accounts has submitted a certificate certifying that the district has never registered any bonds with the comptroller.

§293.132. Notice of Hearing.

A notice of the hearing upon the proposed dissolution of a district will be given by the chief clerk and will describe the reasons for the proceeding, as required by Water Code, §36.305 [~~§36.302~~] for groundwater conservation districts and §49.322 for other water districts. The notice will be published once each week for two consecutive weeks before the day of hearing in a newspaper having general circulation in the county or counties in which the district is located. The first publication will be 30 days before the day of the hearing. Notice of the hearing will be given by the chief clerk by first class mail addressed to the directors of the district according to the last record on file with the executive director.

§293.134. Order of Dissolution.

For districts created under Texas Water Code, Chapter 49, following [~~Following~~] the hearing, the commission will enter an appropriate order that the district be dissolved or that the district not be dissolved if it finds that the district has performed none of the functions for which it was created for a period of five consecutive years before the day of the proceeding and the district has no outstanding bonded indebtedness. If the district is ordered dissolved, the order shall contain a provision that the assets of the district shall escheat to the State of Texas and shall be administered by the state treasurer and disposed of in the manner provided by Property Code, Chapter 74.

§293.137. Commission Action for Failure of a Groundwater Conservation District to Submit a Management Plan or to Implement a Certified Plan through its Operations.

(a) If a board of a groundwater conservation district fails to submit a management plan or receive certification of its management plan as required under Texas Water Code §36.1072, or fails to submit or receive certification of an amendment to the management plan as required under Texas Water Code §36.1073, or the state auditors office determines that a district is not actively engaged in achieving the objectives of its certified management plan and therefore not operational in accordance with Texas Water Code §36.302(c) and (f), the commission shall after notice and hearing take action the commission considers appropriate, including:

(1) issuing an order requiring the district to take certain actions or to refrain from taking certain actions;

(2) dissolving the board in accordance with Texas Water Code §36.305 and §36.307;

(3) removing the district's taxing authority;

(4) dissolving the district in accordance with Texas Water Code §§36.304, 36.305, and 36.308; or

(5) recommending to the legislature in the commission's report concerning the designation of Priority Groundwater Management Areas required by Texas Water Code §35.018, actions the commission deems necessary to address operational problems identified in the state auditors report under Texas Water Code §36.302(c) and accomplish comprehensive management in the district.

(b) The executive director shall investigate the facts and circumstances of any violations of any rule or order of the commission or any provisions of Texas Water Code Chapter 36 identified under Texas Water Code §36.302(c), §36.1072 and §36.1073 and shall prepare and file a written report with the commission and district and include any actions the executive director believes the commission should take under subsection (a) of this section.

(c) The executive director shall attempt to resolve any non-compliance set out in subsection (b) of this section with the board. If unable to resolve the violation, the executive director shall follow the procedures for commission enforcement actions set out in Chapter 70, Subchapter C of this title (relating to Enforcement).

(d) Before taking any action listed in subsection (a)(1)-(4) of this section, the commission shall:

(1) give notice of the hearing which briefly describes the reasons for the proceeding.

(2) publish notice once each week for two consecutive weeks before the day of the hearing in a newspaper of general circulation in the county or counties in which the district is located. The first publication shall be 30 days before the day of hearing.

(3) give notice of the hearing by first-class mail addressed to the directors of the district according to the last record on file with the executive director.

(e) If the commission enters an order to dissolve the board, the commission shall notify the county commissioners court of each county which contains territory in the district and the commission shall appoint temporary directors under Texas Water Code §36.016 to serve until an election for a new board can be held under Texas Water Code §36.017; provided, however, that district confirmation shall not be required for continued existence of the district and shall not be an issue in the election.

(f) The commission shall file a certified copy of the order of dissolution of the district in the deed records of the county or counties in which the district is located. If the district was created by a special Act of the legislature, the commission shall file a certified copy of the order of dissolution with the secretary of state.

(g) Appeals from any commission order issued under this subsection shall be filed and heard in the district court of any of the counties in which the district land is located.

This 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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Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
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For further information, please call: (512) 239-4640

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Chapter 294. Underground Water Management Areas

The Texas Natural Resource Conservation Commission (TNRCC or commission) proposes the repeal of §§294.20-294.22, 294.24, and 294.25, new §§294.21-294.25, 294.30-294.32 and 294.34 and 294.35 , Subchapter D, and new §§294.40-294.44 Subchapter E relating to procedures for designation of underground management areas by rulemaking.

These rules were in Chapter 293 Subchapter C. The repealed rules simply change the Subchapter to Subchapter D, and change "critical area" to "priority groundwater management area" in the title of the Subchapter and in the text of the rules. The repeal and adoption of these rules does not constitute any new designation of priority groundwater management areas. But, rather, simply rename existing critical areas in accordance with Senate Bill 1 (1997) and renumber existing related rules. The commission additionally proposes new Chapter 294 Subchapter E, related to designation of priority groundwater management areas ("PGMAs").

EXPLANATION OF PROPOSED RULE

The rules related to underground management areas are being added to Chapter 294 and moved from Chapter 293 because Chapter 294 relates to underground management areas and similar designations. The rules related to changing "critical area' to "priority groundwater management area" make this change because recent legislation, Senate Bill 1, 75th Legislature (1997), changed the name of these areas. The new rules related to procedures for designation of PGMAs implement changes made to Texas Water Code Chapter 35 in Senate Bill 1. Concurrently, the commission proposes the review of 30 TAC Chapter 294, in accordance with the General Appropriations Act, Article IX, §167, 75th Legislature, 1997, and is publishing the proposed notice of review in the Rules Review Section of the *Texas Register* .

New Subchapter C relates to the designation of groundwater management areas. These rules are presently in §§293.21-293.25 of this title. Section 294.20 provides a definition for "groundwater management area." Proposed §294.21 provides the procedure for designating these areas through rulemaking. Proposed §294.22 sets out requirements for adoption of rules designating these areas by a petition. Section 294.23 would provide that the commission consider this petition within 60 days and initiate a rulemaking or deny the petition. Proposed §294.24 provides for notice of commission consideration of designation, and proposed §294.25 would provide procedures for alteration of groundwater management areas by the commission or on petition for a rulemaking proceeding.

Amended Subchapter C changes the Subchapter designation to Subchapter D of Chapter 294. Subchapter D designates four areas as a Priority Groundwater Management Area. These sections simply change "critical area" to "priority groundwater management area." The commission is making this change because recent legislation, Senate Bill 1, 75th Legislature, (1997), changed the name of these areas.

New Subchapter E relates to procedures for designation of PGMAs and implements changes made to Texas Water Code Chapter 35 in Senate Bill 1. Proposed §294.40 defines executive administrator and Priority Groundwater Management Area (PGMA).

Proposed §294.41 relates to the executive director's report concerning proposed PGMAs. Section 294.41(a) provides that the executive director and executive administrator shall meet at least once a year to identify areas experiencing groundwater problems, and §294.41(b) provides that a report shall be prepared if the executive director concludes that an area should

be considered for PGMA designation. Proposed §294.41(c) provides that the executive director will begin the PGMA study by requesting a study from the Texas Water Development Board which addresses certain criteria. Proposed §294.41(d) provides that notice must be given to several different groups of the proposed PGMA designation and that those persons may provide information to the executive director which will be considered. Proposed subsection (e) states that the executive director will also request a study from the Texas Department of Parks and Wildlife which addresses certain criteria. Under proposed §294.41(f), the executive director must complete the report on or before the 240th day following the date of the request for the study. The executive director will also provide notice by filing the report with the commission, making the report available for public inspection in each county in which the proposed PGMA is located, publishing notice in the Texas Register, and mailing notice to the persons who received notice of the initiation of the study. Proposed §294.41(h) provides the executive director may hold public meetings and solicit information for the study, and proposed §294.41(i) provides that if the executive director recommends that no PGMA be designated, no further action by the commission or executive director is necessary. However, any person who received mailed notice can file a motion for reconsideration under §50.39 of this title.

Proposed §294.42 relates to commission action concerning a PGMA designation recommendation. Proposed §294.42(a) provides that the commission shall consider the recommendation using the procedures set out in the subchapter. Proposed §294.42(b) provides that the commission shall call an evidentiary hearing to consider the proposed designation, whether a district should be created over all or part of the PGMA, or whether the land in the PGMA should be added to an existing district. Under proposed §294.42(c), the hearing must be held in one of the counties in which the PGMA is proposed, or the nearest convenient location. Under proposed §294.42(d), hearing procedures are set out. Proposed §294.42(e) provides that the commission ruling on designation may not be appealed. Section 294.42(f) would provide that notice must be given by newspaper 30 days prior to the hearing, and the requirements of that notice are set out in proposed §294.42(g). Under proposed §294.42(h), the commission shall also give written notice to the persons who received notice of the PGMA study 30 days prior to the hearing. Proposed §294.42(i) sets out what should be in any commission order, and requires that the commission address whether a district would be beneficial, there is a public need for a district, and whether a district would further the public welfare. Proposed new §294.42(j) provides that the Administrative Procedures Act does not apply to evidentiary hearings for PGMA designation.

Proposed §294.43 relates to landowner actions regarding district creation in a designated PGMA. Under proposed §294.43(a), if the commission finds that a district or districts should be created, landowners may create districts under Texas Water Code, Chapter 36, have the area annexed to an adjoining district, or create districts through the legislative process. Under proposed §294.43(b), the executive director must identify those areas which the commission has decided need a district but which have not formed a district and report this to the commission with recommendations for action. Notice provisions for this report are set out.

Proposed §294.44 relates to adding a PGMA to an existing district. Under proposed §294.44(a), the commission will submit to the affected district a copy of an order recommending that a PGMA be added to an existing district, and the affected district's board to conduct a vote and advise the commission. Proposed §294.44(b) provides that if the board votes to accept the PGMA into their district, the board may request state agencies to administer an education program concerning water resources, management and annexation, and shall call an election on the issue. Proposed §294.44(c) provides that the board shall give notice of the election and proposition. Proposed §294.44(d) sets out how the ballot shall read for the election. Proposed §294.44(e) provides what occurs after the election, including a requirement that the board file a copy of the election results with the commission. Proposed §294.44(f) provides that if the voters approve adding the PGMA to the district, the board shall provide reasonable representation on the board. Under proposed §294.44(g), if the proposition is defeated, another election may not be called within a year. Proposed §294.44(h) provides for payment of costs of the election, and §294.44(i) provides that if the election is defeated, the commission may make recommendations to the legislature in its biennial report concerning possible legislative action.

FISCAL NOTE

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

PUBLIC BENEFIT

Mr. Minick has also determined that, for 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 improvements in the process and procedures for designation of priority groundwater management areas. These rules generally reorganize existing rules without significant amendment or replace existing definitions and other terms and procedural requirements with more current provisions consistent with the statutory amendments in Senate Bill 1. There are no economic costs anticipated to any person, including small business, required to comply with the sections as proposed. These rules do not even apply to small businesses.

DRAFT REGULATORY IMPACT ANALYSIS

The commission has reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code §2001.0225 and has determined that the rulemaking is not subject to §2001.0225 because it does not meet any of the four applicability requirements listed in §2001.0225(a) in that the rules are specifically required by state law, there is no applicable federal law, do not exceed any express requirements of state law, and do not involve any delegation agreements or contracts. Additionally, some of these rules already exist and are simply being moved to a new chapter, or are being amended to change the term "critical area" to "priority groundwater management area." While some of the rules interpret on the statute's procedural requirements, they are not outside the scope of the statute.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these rules pursuant to Texas Government Code §2007.043.

The following is a summary of that Assessment. The specific purpose of part of this rulemaking is to move rules which provide procedures for designation of underground management areas by rulemaking, These regulations were in Chapter 293 and are being moved verbatim to Chapter 294, which is a more appropriate Chapter for these rules. These new rules will not burden private real property because these rules already exist and are simply being moved to place these rules in a more appropriate Chapter.

The amendments to rules which simply change the words "critical area" to "priority groundwater management area" are to implement the change in term in amendments to Chapter 35 of the Texas Water Code and do not burden private real property because they have no affect on real property.

The new rules concerning procedures for designating PGMAs, which are to implement recent amendments to Chapter 35 of the Texas Water Code, do not burden private real property because a similar procedure was already in place in the critical area process, and, the designation of a PGMA is for the protection and preservation of groundwater. Additionally, PGMAs have no regulatory authority which could constitute a burden.

COASTAL MANAGEMENT PROGRAM (CMP)

The commission has reviewed this proposed rulemaking and found that the rule is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Action as and Rules Subject to the Coastal Management Program, nor will it affect any action or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the proposed rule is not subject to the CMP.

PUBLIC HEARINGS

A public comment hearing on this proposal and rules review will be held in Austin on October 29, 1998, beginning at 10:00 a.m. in the Texas Natural Resource Conservation Commission Office Complex, Building E, Room 201S, located at 12100 Park 35 Circle. The hearing is structured to receive oral or written comments by interested persons. Individuals may present oral statements when called upon in the order of registration. Open discussion will not occur during the hearing; however, a commission staff member will be available to discuss the proposed rules one half hour prior to the hearing and will answer questions before and after the hearing.

SUBMITTAL OF WRITTEN COMMENTS

Written comments on the proposed rules should reference Rule Log No. 97146-297-WT and may be submitted to Lutrecia Oshoko, Texas Natural Resource Conservation Commission, Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 (512) 239-4640; or faxed to (512) 239-5687. All comments sent by fax must be followed by an original, signed hard copy for the agency's records. Written comments must be received by 5:00 p.m., November 9, 1998. For further information or questions concerning this proposal, contact Steve Musick, Water Quality Division at (512) 239-4514.

Subchapter C. Critical Areas

30 TAC §§294.20-294.22, 294.24, 294.25

(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.)

STATUTORY AUTHORITY

These repeals are being proposed under Texas Water Code, § 5.103, which provides the commission the authority to adopt and enforce rules necessary to carry out its powers and duties under the laws of this state; and under Texas Water Code Chapter 35, which relates to the creation of PGMAs.

These rules will implement Texas Water Code Chapter 35, §§35.007-35.013.

§294.20. Definitions.

§294.21. Designation of Briscoe, Hale and Swisher County Critical Area.

§294.22. Designation of Dallam County Critical Area.

§294.24. Designation of Hill Country Critical Area.

§294.25. Designation of Reagan, Upton, and Midland County Critical Area.

This 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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Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: November 8, 1998
For further information, please call: (512) 239-4640

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Subchapter C. Designation of Groundwater Management [~~Critical~~] Areas

30 TAC §§294.21-294.25

STATUTORY AUTHORITY

These new sections are being proposed under Texas Water Code, § 5.103, which provides the commission the authority to adopt and enforce rules necessary to carry out its powers and duties under the laws of this state; and under Texas Water Code Chapter 35, which relates to the creation of PGMAs.

These rules will implement Texas Water Code Chapter 35, §§35.007-35.013.

§294.21. Designation of Groundwater Management Area Through Rulemaking.

(a) These sections only apply to the designation of groundwater management areas as authorized by Texas Water Code, §35.004.

(b) Designation of a groundwater management area is a separate proceeding from that for creation of a groundwater conservation district.

(c) In accordance with Texas Water Code, §35.004, on its own motion or on receiving a petition, the commission may initiate a rulemaking to designate a groundwater management area. Through the rulemaking process, the commission will determine the boundaries of such a management area with the objective of providing the most suitable area for the management of the groundwater resources of

the part of the state where a groundwater conservation district is or may be located. To the extent feasible, the management area will coincide with the boundaries of a groundwater reservoir or a subdivision thereof. The commission may also consider other factors in determining the boundaries of the management area, such as the boundaries of other political subdivisions and the appropriateness of the size and configuration of the management area to a groundwater conservation district's performance of its duties under Texas Water Code, §§36.101-36.122.

(d) Upon the request of the commission or any person interested in a petition to designate a groundwater management area, the executive director will prepare available evidence relating to the configuration of a groundwater management area. The evidence prepared by the executive director shall include information concerning the existence, configuration, and characteristics of a groundwater reservoir or subdivision thereof. The evidence prepared by the executive director shall be made part of the rulemaking record.

(e) The commission shall designate groundwater management areas using the procedures applicable to rulemaking under the Administrative Procedure Act (Subchapter B, Chapter 2001, Government Code) except where such procedures conflict with those set forth in the Texas Water Code, Chapter 35.

(f) A petition for designation of an underground water management area must be submitted to the executive director and be accompanied by a $100 application fee and petition recording fee of $1.00 per page.

§294.22. Petition for Adoption of Rules Designating a Groundwater Management Area.

(a) A petition may be submitted to the executive director for the sole purpose of requesting that the commission designate a management area for all or part of one or more counties.

(b) A petition submitted pursuant to this section must be signed by:

(1) a majority of the landowners in the proposed management area; or

(2) if there are more than 50 landowners in the proposed management area, the petition must be signed by at least 50 of those landowners.

(c) A petition submitted pursuant to this section must contain the following statement: "Petitioners request that the Texas Natural Resource Conservation Commission designate a groundwater management area to include all or part of _____ County (Counties). The management area shall be designated with the objective of providing the most suitable area for the management of groundwater resources of the part of the state in which a district is to be located. Petitioners understand that this petition requests only the designation of a management area, but that all or part of the land in the management area designated may later be added to an existing groundwater conservation district or become a new groundwater conservation district as provided by Texas Water Code, Chapter 36."

(d) A petition shall include a map that shows the location of the proposed management area and may include any other information desired by the petitioners concerning the proposed management area.

(e) The petitioners shall submit the petition to the executive director.

(f) The petitioners shall supply any additional information requested by the commission or the executive director.

§294.23. Commission Consideration of Petition for Adoption of Rules Designating a Groundwater Management Area.

Within 60 days of the receipt of a Petition To Designate a Groundwater Management Area the commission shall initiate a rulemaking proceeding or deny the petition. If the commission denies the petition, it shall issue an order which sets forth the reasons for denying the petition.

§294.24. Notice of Commission Consideration of Final Adoption of Rules Designating a Groundwater Management Area.

(a) In addition to the notice prescribed by the Administrative Procedure Act (Subchapter B, Chapter 2001, Government Code), the petitioners shall have notice published in at least one newspaper with general circulation in the county or counties in which the proposed management area is to be located. Notice must be published not later than the 30th day before the date set for the commission to consider the final adoption of the rules designating the management area.

(b) The notice must include:

(1) a statement of the general purpose and effect of designating the proposed management area;

(2) a map generally outlining the boundaries of the proposed management area or notice of the location at which a copy of the map may be examined or obtained; and

(3) the time and place at which the commission will consider the final adoption of rules designating the management area.

(c) If the commission initiates the rulemaking proceeding on its own motion, the chief clerk shall give the same notice as required to be given by the petitioner under this section.

§294.25. Alteration of Groundwater Management Area.

(a) In accordance with Texas Water Code, §35.004, on its own motion or on receiving a petition, the commission, after notice and hearing, may initiate a rulemaking proceeding to alter the boundaries of a designated management area as required by changed or future conditions and as justified by factual data. A petition for alteration of management area boundaries must allege in detail the facts and circumstances making alteration necessary and be accompanied by a $100 application fee and petition recording fee of $1.00 per page.

(b) A petition or request under subsection (a) of this section shall be subject to the provisions and procedures of this subchapter.

(c) A petition submitted pursuant to this section must be signed by:

(1) if there are less than 50 landowners in the proposed management area, a majority of the landowners in the proposed area for addition to the management area; or

(2) if there are more than 50 landowners in the proposed management area, the petition must be signed by at least 50 landowners in the proposed management area.

This 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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Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission

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

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Subchapter D. Priority Groundwater Management Areas

30 TAC §§294.30, 294.31, 294.32, 294.34, 294.35

STATUTORY AUTHORITY These new sections are proposed under the Texas Water Code, §35.012, which provides the Texas Natural Resource Conservation Commission with the authority to designate Priority Groundwater Management Areas to protect groundwater resources.

These rules will implement Texas Water Code Chapter 35, §§35.007-35.013.

§294.30. Definitions.

The following words and terms when used in this subchapter shall have the following meaning unless the context indicates otherwise:

(1) Bolson - Waterbearing formations consisting of unconsolidated sands and gravels.

(2) Priority Groundwater Management Area - An area of the state that is experiencing or that is expected to experience, based on information available to the commission and the water development board, within the immediately following 25-year period, critical groundwater problems including shortage of surface or underground water, land subsidence, resulting from underground water withdrawal, and contamination of underground water supplies.

§294.31. Designation of Briscoe, Hale and Swisher County Priority Groundwater Management Area.

(a) Areas of Briscoe, Hale and Swisher County, as described in this section, are designated as a Priority Groundwater Management Area.

(b) The Briscoe, Hale and Swisher County Priority Groundwater Management Area is composed of portions of Briscoe and Hale Counties and all of Swisher County. The portion of Briscoe County below the Caprock Escarpment and the portion of Hale County within the High Plains Underground Water Conservation District Number 1 are excluded from the Priority Groundwater Management Area. All remaining areas in Hale and Briscoe counties are included within the Priority Groundwater Management Area.

(c) A General Description of Boundaries of the Briscoe, Hale and Swisher County Priority Groundwater Management Area is as follows:

(1) beginning at northwest corner of Swisher County, the northern boundary extends to the east and is coterminous with the Swisher-Randall and Swisher-Armstrong County line; and

(2) the boundary continues eastward along the Briscoe-Armstrong County line to the junction with the eastern boundary of Subdivision Number 1 of the Underground Water Reservoir, High Plains Area, Ogallala Formation, South of the Canadian River, in Briscoe County, as delineated by the Texas Board of Water Engineers in 1950; and

(3) the boundary continues southerly along this boundary in Briscoe County to the southern Briscoe County line; then

(4) west along Briscoe-Floyd and Swisher-Floyd County lines; then

(5) south along the Hale-Floyd County line to the intersection with the boundary of the High Plains Underground Water Conservation District Number 1; then

(6) generally west for approximately twelve miles; then

(7) south along the High Plains Underground Water Conservation District boundary in Hale County line; then

(8) west along the Hale-Lubbock County line to the intersection of the Hale and Lamb County lines; then

(9) north along the Hale-Lamb County line to the intersection of the Hale and Castro County lines; then

(10) east for approximately six miles along the Hale-Castro County line; then

(11) north along the eastern boundary between Hale and Castro Counties to the northwest corner of Swisher County.

(d) The boundaries of the Briscoe, Hale and Swisher County Priority Groundwater Management Area are outlined in the map attached as Exhibit A to this section.
Figure: 30 TAC §294.31(d)

§294.32. Designation of Dallam County Priority Groundwater Management Area.

(a) An area of Dallam County, as described in this section, is designated as a Priority Groundwater Management Area.

(b) The Dallam County Priority Groundwater Management Area is composed of Dallam County except for the area within the Dallam County Underground Water Conservation District Number 1, which is excluded from the Priority Groundwater Management Area.

(c) A General Description of Boundaries of Dallam County Priority Groundwater Management Area is as follows:

(1) starting at the northeastern corner of Dallam County, the eastern boundary is coterminous with the Dallam County - Sherman County Line; then

(2) the boundary continues west along the Dallam-Hartley County Line to the border between Texas and New Mexico; then

(3) north along the western Dallam County - New Mexico state line to the northwest corner of Dallam County; then

(4) the boundary turns eastward along the Dallam County-Oklahoma state line to the junction with the boundary of the Dallam County Underground Water Conservation District Number 1; then

(5) the boundary follows the district boundary until it again intersects with the Dallam County-Oklahoma State line; then

(6) the boundary continues east to the northeast corner of Dallam County.

(d) The boundaries of the Dallam County Priority Groundwater Management Area and outlined in the map attached as Exhibit A to this section.
Figure: 30 TAC §294.32(d)

§294.34. Designation of Hill Country Priority Groundwater Management Area.

(a) All of the areas of Bandera, Blanco, Gillespie, Kendall and Kerr Counties, and portions of Comal, Hays and Travis County, are designated as a Priority Groundwater Management Area.

(b) A General Description of Boundaries of the Hill Country Priority Groundwater Management Area is as follows:

(1) starting at the northwest corner of Kerr County, the northern boundary is coterminous with the Kerr-Kimble County line and continues eastward to Gillespie County; then

(2) northward along the Gillespie-Kimble County Line to Mason County;

(3) the northern boundary is conterminous with the Gillespie-Mason, Gillespie-Llano, Blanco-Llano, and Blanco-Burnet County Lines; then

(4) the boundary then continues eastward to the Travis County Line; then

(5) continues north to the Colorado River; then

(6) continues southeast along the Colorado River to the western boundary of the Barton Spring-Edward Aquifer Conservation District; then

(7) continues southerly along this boundary and continues along the northern-western boundary of the Edwards Underground Water District to the Medina County Line; then

(8) is coterminous with the Bandera-Medina and Bandera-Uvalde County Lines; then

(9) continues westward along the Bandera-Uvalde County Line to Real County; then

(10) continues northward and is coterminous with the Bandera-Real, Kerr-Real, and Kerr-Edwards County Lines to the starting point, the northwest corner of Kerr county.

(c) The boundaries of the Hill Country Priority Groundwater Management Area are delineated on the map attached as Exhibit A to this section.
Figure: 30 TAC §294.34(c)

§294.35. Designation of Reagan, Upton, and Midland County Priority Groundwater Management Area.

(a) Portions of southeastern Midland County, northeastern Upton County and northern Reagan County are designated as a Priority Groundwater Management Area.

(b) A General Description of Boundaries of the Reagan, Upton and Midland County l Priority Groundwater Management Area is as follows:

(1) beginning at the northwest corner of Reagan County, which is also the point where Glasscock, Reagan, Upton and Midland Counties meet; then

(2) east along the county line to the Sterling County line; then

(3) south along the line Reagan-Sterling County line to the Section 1, S-46675, Block A, T.&P RR Survey; then

(4) west along Section 41, S-37369 of said Blocks; then

(5) to Section 3, S-46677 of said Block and Survey; then

(6) west to the eastern line of Block F, Longview & Sabine Valley Ry County; then

(7) south southeast along said Block to the lower line of Section 21, S-46695, Black A, T&P RRC Surveys; then

(8) west southwest to the northwest corner of Section 11, S-37120, G.C.&S.F. Ry County Survey; then

(9) south along the eastern line of Sections 12 and 13 of said Survey continuing to the northern line of Block 58 of University Land; then

(10) west and south along the eastern line of Section 29 of said Block and Survey continuing along Section 3, Block 10 of said Survey; then

(11) to the Reagan-Upton County line; then

(12) west to the western line of Block 58 of said Survey; then

(13) west along the northern line of Sections 1 and 2, Block G, G.C. & S.F. Ry County Survey continuing along Sections 8, 12, and 13, Block A to Section 1, Block 3 1/2, M.K. & T. RR County; then

(14) north along the eastern edge of Section 6, Block 1, J.E. Hamilton Survey to the south line of Block Y G.C. & S.F. Ry County Survey; then

(15) north northwest along the eastern side of Sections 81, 76, and 65, Block Y; then

(16) west southwest to the corner of the Section; then

(17) north northwest between Blocks E and D and Blocks 42 and 41 continuing to the Upton-Midland County line; then

(18) continuing north northwest to the northwest corner of Section 6, #88353, Block 41, Texas and Pac RY County; then

(19) east northeast to the Midland-Glassrock County line; then south along the county line to the starting point.

(c) The boundaries of the Reagan, Upton, and Midland County Priority Groundwater Management Area are delineated on the maps attached as Exhibit A to this section.
Figure: 30 TAC §294.35(c)

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

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Subchapter E. Designation of Priority Groundwater Management Areas

30 TAC §§294.40-294.44

STATUTORY AUTHORITY These new sections are proposed under the Texas Water Code, §35.012, which provides the Texas Natural Resource Conservation Commission with the authority to designate Priority Groundwater Management Areas to protect groundwater resources.

These rules will implement Texas Water Code Chapter 35, §§35.007-35.013.

§294.40. Definitions.

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

(1) Executive Administrator - the Executive Administrator of the Texas Water Development Board.

(2) Priority groundwater management area (PGMA) - an area designated and delineated by the commission as an area that is experiencing or is expected to experience, within the immediately following 25 year period, critical groundwater problems, including shortages of surface water or groundwater, land subsidence resulting form groundwater withdrawal, and contamination of groundwater supplies.

§294.41. Executive Director's Report Concerning Priority Groundwater Management Area Designation.

(a) The executive director, the executive administrator and the executive director of the Texas Parks and Wildlife Department or their designees shall meet at least once a year to identify, based on information gathered by the commission and the Texas Water Development Board, those areas of the state that may be experiencing or expected to experience critical groundwater problems within the immediately following 25-year period.

(b) If the executive director concludes that an area of the state should be considered for designation as a (PGMA), the executive director shall prepare a report to the commission.

(c) The executive director shall begin preparation of a PGMA report by requesting a study from the executive administrator. The study must:

(1) include an appraisal of the hydrogeology of the area and matters within the Texas Water Development Board's planning expertise relevant to the area;

(2) assess the area's immediate, short-term, and long-term water supply and needs; and

(3) be completed and delivered to the executive director on or before the 180th day following the date of the request. If the study is not delivered within this 180-day period, the executive director may proceed with the preparation of the report under subsection (b) of this section.

(d) Before the executive director requests a study from the executive administrator under subsection (c) of this section, the executive director shall provide written notice of consideration of the area for designation as a PGMA, and the opportunity to comment or provide studies or information, to the governing body of each county, regional water planning group, adjacent groundwater district, municipality, river authority, water district, or other entity which supplies public drinking water, including each holder of a certificate of convenience and necessity issued by the commission, and of each irrigation district, located either in whole or in part in the proposed PGMA. Not later than the 45th day after the date of the notice, a person required to receive notice under this subsection may submit to the executive director any existing information or studies that address the potential effect on an area of being identified as experiencing or expected to experience critical groundwater problems. The executive director shall consider this information in making its recommendation.

(e) The executive director shall also request a study from the executive director of Parks and Wildlife Department for the purpose of preparing the report required by this Subchapter. The study must:

(1) evaluate the potential effects of the designation of a PGMA on an area's natural resources; and

(2) be completed and delivered to the executive director on or before the 180th day following the date of the request. If the study is not delivered within this 180-day period, the executive director may proceed with the preparation of the report under subsection (b) of this section.

(f) The executive director's report shall include:

(1) the recommended delineation of the boundaries of any proposed PGMA in the form of a proposed order to be considered for adoption by the commission;

(2) the reasons and supporting information for or against designating the area as a PGMA;

(3) if the designation of a PGMA is recommended, a recommendation regarding whether a district should be created in the PGMA or whether the PGMA should be added to an existing district;

(4) a recommendation as to actions that should be considered to conserve natural resources;

(5) an evaluation of information or studies submitted to the executive director under subsections (c)-(e) of this section; and

(6) any other information that the executive director considers helpful to the commission.

(g) The executive director must complete the report and file it with the commission on or before the 240th day following the date on which the executive administrator was requested to produce a study. In addition, the executive director shall provide the following notice:

(1) At the same time the executive director files the report with the commission, the executive director shall make the report available for public inspection by providing a copy of the report to at least one public library and the county clerk's office in each county in which the proposed PGMA is located and to all groundwater conservation districts adjacent to the area of the proposed PGMA.

(2) The executive director shall also publish notice in the *Texas Register* that this report has been prepared, explaining the executive director's recommended action, and stating where the report may be obtained.

(3) This notice shall be published in the *Texas Register* , and mailed to the same persons who received notice of the initiation of the PGMA study under §294.41(d) of this title (relating to Executive Director's Report Concerning Priority Groundwater Management Area Designation), within 30 days that the report is filed with the commission.

(h) To prepare this report, the executive director may make necessary studies, hold public meetings, solicit and collect information, or use information already prepared by the executive director or the executive administrator for other purposes.

(i) If the executive director recommends that no PGMA designation be made in the area studied, no further action by the executive director or the commission is necessary. However, a person who receives mailed notice under §294.31(g)(3) of this title may file a motion for reconsideration under §50.39 of this title (relating to Motion for Reconsideration).

§294.42. Commission Action Concerning PGMA Designation.

(a) The commission shall consider the executive director's proposed designation of PGMAs using the procedures set out in this subchapter.

(b) The commission shall call an evidentiary hearing to consider:

(1) the proposed designation of a PGMA;

(2) whether a district should be created over all or part of a PGMA; or

(3) whether all or part of the land in the PGMA should be added to an existing district.

(c) Evidentiary hearings shall be held in one of the counties in which the PGMA is proposed to be located, or in the nearest convenient location, if adequate facilities are not available in those counties.

(d) At the hearing, the commission, or a judge, if the hearing is remanded to SOAH, shall hear testimony and receive evidence from affected persons. The executive director may request that the hearing be remanded to SOAH. The commission or the judge shall consider the executive director's report and supporting information and the testimony and evidence received at the hearing. If the commission or judge considers further information necessary, the commission or judge may request such information from any source.

(e) The designation or non-designation of a PGMA may not be appealed nor may it be challenged under Texas Government Code §2001.038.

(f) The commission shall have notice of the hearing published in at least one newspaper with general circulation in the county or counties in which the area proposed for designation as a PGMA or the area within a PGMA being considered for district creation or for addition to an existing district is located. Notice must be published not later than the 30th day before the date set for the commission to consider the designation of the PGMA, and the need for the creation of a district in a PGMA, or the addition of land in a PGMA to an existing district.

(g) Notice of the hearing must include:

(1) if applicable, a statement of the general purpose and effect of designating the proposed PGMA;

(2) if applicable, a statement of the general purpose and effect of creating a district in the PGMA;

(3) if applicable, a statement of the general purpose and effect of adding all or part of the land in the PGMA to an existing district;

(4) a map generally outlining the boundaries of the area being considered for PGMA designation or if different the area within the proposed PGMA being recommended for district creation or for addition to an existing district, or notice of the location at which a copy of the map may be examined or obtained;

(5) a statement that the executive director's report concerning the PGMA or proposed PGMA is available at the commission's main office in Austin, Texas, and at regional offices of the commission for regions which include territory within the PGMA or proposed PGMA and that the report is available for inspection during regular business hours;

(6) a description of the name of the locations in the affected area at which the commission has provided copies of the executive director's report to be made available for public inspection;

(7) the name and address of each public library, each county clerk's office, and each district to which the commission has provided copies of the executive director's report; and

(8) the date, time, and place of the hearing.

(h) The commission shall also give written notice of the date, time, place, and purpose of the hearing to the governing body of each county, regional water planning group, adjacent groundwater district, municipality, river authority, water district, or other entity which supplies public drinking water, including each holder of a certificate of convenience and necessity issued by the commission, and of each irrigation district, located either in whole or in part in the PGMA or proposed PGMA. This notice shall be given before the 30th day preceding the date set for the hearing.

(i) At the conclusion of its hearing and considerations, the commission shall issue an order stating its findings and conclusions:

(1) If the commission decides that a PGMA should be designated, the commission shall designate and delineate the boundaries of the PGMA.

(2) If the commission designates the area as a PGMA, and it finds that the land and other property in the PGMA would benefit from the creation of one or more districts, that there is a public need for one or more districts, and that the creation of one or more districts would further the public welfare, the commission shall include in its order the finding that creation of one or more district is needed.

(3) If the commission designates the area as a PGMA, and if land in a PGMA is located adjacent to one or more existing districts, the commission may include in its order a finding that the PGMA be added to an existing district designated by the commission. In its order, the commission must find that the land and other property in the PGMA and the land in the existing district will benefit from the addition of the area, that there is a public need to add the PGMA to the existing district, and that the addition of the land to the existing district would further the public welfare.

(4) If the commission fails to find that a district would be a benefit to the land and other property within the PGMA, that there is a public need for the district, or that creation of the district or annexation to an existing district will further the public welfare, the commission's order shall state that a district should not be created within the boundaries of the PGMA.

(j) The Administrative Procedure Act, Texas Government Code, Chapter 2001, does not apply to evidentiary hearings held under this subsection.

§294.43. Landowner Actions in a PGMA.

(a) Following the issuance of a commission order under §294.42 (i)(2) of this title (relating to Commission Action Concerning PGMA Designation) designating a PGMA and finding that one or more districts should be created in the PGMA and prior to the close of next regular session of the legislature, landowners in the PGMA may:

(1) create one or more districts under Chapter 293 of this title (relating to Water Districts);

(2) have the area annexed to a district that adjoins the area; or

(3) create one or more districts through the legislative process.

(b) The executive director shall identify the areas subject to any order of the commission under subsection (a) of this section

that have not been incorporated into a district and shall delineate proposed boundaries of a district, or area to be annexed to include those areas, and initiate a report including recommendations to the commission for the annexation of the identified areas to an adjacent existing district under §294.44 of this title (relating to Adding a PGMA for an Existing District) or for the creation of one or more districts under provisions of §293.21 of this title (relating to Commission Creation of Groundwater Conservation Districts in Priority Groundwater Management Area on its Own Motion). This report shall be completed and filed with the commission within 120 days after notice of initiation of the report is given under paragraph (1) of this subsection.

(1) The executive director shall provide written notice of the delineation of the boundaries and the initiation of the report to the governing body of each county, regional water planning group, adjacent groundwater district, municipality, river authority, water district, or other entity which supplies public drinking water, including each holder of a certificate of convenience and necessity issued by the commission, and of each irrigation district, located either in whole or in part within the proposed district boundaries.

(2) At the same time notice is given under paragraph (1) of this subsection, the executive director shall notify the Texas Agricultural Extension Service of the proposed district boundaries and initiation of the executive director's report to begin an educational program within the identified areas with the assistance and cooperation of the Texas Water Development Board, the commission, other state agencies, and existing districts to inform the residents of the status of the area's water resources and management options including possible formation of a district.

§294.44. Adding a PGMA to an Existing District.

(a) If the commission orders, pursuant to §294.42(i)(3) of this title (relating to Commission Action Concerning PGMA Designation), that the PGMA or a portion of the PGMA be added to an existing district it shall give notice to the board of the existing district.

(1) The commission shall submit a copy of the order to the board of the district to which it is recommending the PGMA be added and to any other existing districts adjacent to the PGMA.

(2) The board shall vote on the addition of the PGMA to the district and shall advise the commission of the outcome.

(b) If the board votes to accept the addition of the PGMA to their district, the board:

(1) may request the Texas Agricultural Extension Service, the commission, the Texas Water Development Board, and other state agencies to administer an educational program to inform the residents of the status of the area's water resources and management options including possible annexation into a district;

(2) shall call an election within the PGMA as delineated by the commission to determine if the PGMA will be added to their district; and

(3) shall designate election precincts and polling places for the elections in the board's order calling for an election under this subsection.

(c) The board shall give notice of the election and the proposition to be voted on. The board shall publish notice of the election at least one time in one or more newspapers with general circulation within the boundaries of the PGMA. The notice must be published before the 30th day preceding the date set for the election.

(d) The ballots for the election shall be printed to provide for voting for or against the proposition: "The inclusion of _____ (briefly describe the PGMA) in the _____ District." If the district has outstanding debts or taxes, the proposition shall include the following language:"and assumption by the described area of a proportional share of the debts or taxes of the district."

(e) Immediately after the election, the presiding judge of each polling place shall deliver the returns of the election to the board, and the board shall canvass the returns for the election within the PGMA and declare the results. If a majority of the voters in the PGMA voting on the proposition vote against adding the PGMA to the district, the board shall declare that the PGMA is not added to the district. The board shall file a copy of the election results with the commission.

(f) If the voters approve adding the PGMA to the district, the board of the district to which the PGMA is added shall provide reasonable representation on that board compatible with the district's existing scheme of representation.

(g) If the proposition is defeated, another election to add the PGMA to an existing district may not be called before the first anniversary of the date on which the election on the proposition was held.

(h) The costs of an election to add a PGMA to an existing district at which the voters approve adding the PGMA to the district shall be paid by the existing district. The costs of an election to create a district or add a PGMA area to an existing district at which the proposition fails shall be paid by the commission.

(i) If the proposition is defeated, the commission may recommend to the legislature under Texas Water Code §35.018(c) in its biennial report whether legislative action should be taken to address the need for groundwater management in the PGMA.

This 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 295. Water Rights, Procedural

Subchapter A. Requirements of Water Right [~~Use Permit~~] Applications

The Texas Natural Resource Conservation Commission (commission) proposes amendments to §§295.5, 295.9, 295.13, 295.21, 295.22, 295.91, 295.111, 295.133, 295.134, 295.155 and 295.156 and proposes new §§295.16, 295.112, 295.113, and 295.161 relating to Water Rights, Procedural.

The amendments to §§295.5, 295.9, 295.13, 295.21, 295.22, 295.91, and 295.111 and new §§295.16, 295.112, 295.113, are contained in Subchapter A, Requirements for Water Right Applications. The purpose of the proposed rules is to implement changes made to the Texas Water Code by Senate Bill 1 (Acts 1997, Texas Legislature, Regular Session, Chapter 1010), and

to put into rule, where necessary, agency regulatory guidance contained in "A Regulatory Guidance Document for Application to Divert, Store or Use State Water" (RG-141 June 1995).

The amendments to §295.133 and §295.134 are contained in Subchapter B, Water Use Permit Fees. The purpose of the proposed rules is to implement changes made to the Texas Water Code by Senate Bill 1 (Acts 1997, Texas Legislature, Regular Session, Chapter 1010).

Additionally, the amendments of §295.155 and §295.156 and the adoption of new §295.161 are contained in Subchapter C, Notice Requirements for Water Use Permit Applications. The purpose of the proposed rules is to implement changes made to the Texas Water Code by Senate Bill 1 (Acts 1997, Texas Legislature, Regular Session, Chapter 1010).

EXPLANATION OF PROPOSED RULE

The title of Subchapter A is proposed to be changed to clarify that the subchapter includes all classes of water rights administered by the commission, including certificates of adjudication, claims, and certified filings as well as permits. Concurrently, the commission proposes the review of 30 TAC Chapter 295, in accordance with the General Appropriations Act, Article IX, §167, 75th Legislature, 1997, and is publishing the proposed notice of review in the Rules Review Section of the *Texas Register* .

Proposed changes to §295.5, Amount and Purpose of Diversion and Use, would implement changes made to Texas Water Code §11.134 by Senate Bill 1 (1997) authorizing multiple purposes of use for the same appropriative amount by requiring this information to be provided in the application, if appropriate.

Proposed changes to §295.9, Conservation Plan, would not institute new substantive requirements for water right applications. Rather, they reflect proposed changes to related rules contained in Chapter 288 of this title. Specifically the drought contingency components currently required in water conservation plans under Chapter 288 to be submitted with a water right application are being separated into a new subchapter specific to drought contingency plans in order to implement new Texas Water Code §11.1272 enacted by Senate Bill 1 (1997). This separation and reorganization of Chapter 288 requires adding "drought contingency plans" to the title and relevant portions of §295.9 to continue the requirement that drought contingency measures also be submitted with the application.

Proposed changes to §295.13, Interbasin Transfers, would implement changes made to Texas Water Code §11.085 by Senate Bill 1 by adding corresponding additional application content requirements for an application for an interbasin transfer, unless exempted by Texas Water Code §11.085(v).

Proposed new §295.16, Consistency With State and Regional Water Plans, would implement changes made to Texas Water Code, §11.134 and §11.1501 by Senate Bill 1 by providing that the application shall contain information describing how the application addresses a water supply need consistent with the state water plan and the applicable approved regional water plan or, in the alternative, whether present conditions exist that warrant a waiver of this requirement.

Proposed changes to §295.21, Aquifer Storage and Retrieval Projects, would implement changes made to Texas Water Code §11.153 by Senate Bill 1 by deleting the list of specific aquifers where such projects may be authorized and providing that such projects may be authorized for aquifers where completed pilot projects or historically demonstrated projects have been shown to be feasible.

Proposed changes to §295.22, Additional Requirements for the Underground Storage of Surface Water for Subsequent Retrieval and Beneficial Use, would implement changes made to Texas Water Code §§11.154 and 11.155 by Senate Bill 1 by changing the terms "critical area" and "underground water" to "priority groundwater management area" and "groundwater," respectively.

Proposed changes to §295.91, Application for Emergency Water Use Authorization, would implement changes made to Texas Water Code §11.139 by Senate Bill 1 by providing additional, statutory application content requirements for the emergency appropriation or transfer of water.

Proposed changes to §295.111, Application, would amend the title as well as the section to clarify that this provision relates to a bed and banks authorization under Texas Water Code §11.042(a) providing for the release of water from a storage reservoir and its conveyance downstream to meet a water supply contract. The proposed rule would also add that a person seeking such bed and banks authorization must also submit information on how the conveyance of the water will be measured in order to assure that no more water will be diverted at the delivery point than water being released, less carriage losses.

Proposed new §295.112, Application to Convey Groundwater-Based Effluent in Bed and Banks, would implement changes made to Texas Water Code §11.042(b) and (d) by Senate Bill 1 by providing the application content requirements for the use of bed and banks for the discharge of groundwater-based effluent into a stream and its subsequent diversion and use. This information is needed to determine what special conditions, if any, may be necessary to protect affected water rights and environmental flow needs as provided by Texas Water Code, §11.042(b). Nothing in this proposed rule shall be construed to affect an existing project for which water rights and reuse authorizations have been granted by the commission prior to September 1, 1997.

Proposed new §295.113, Application to Convey Water in Bed and Banks, would implement changes made to Texas Water Code §11.042(c) and (d) by providing the application content requirements for a bed and banks authorization for the conveyance of water in a state watercourse other than provided by Texas Water Code §11.042(a) and (b). This information is needed to determine what special conditions, if any, may be necessary to protect affected water rights and environmental flow needs as provided by Texas Water Code, §11.042(c). Nothing in this proposed rule shall be construed to affect an existing project for which water rights and reuse authorizations have been granted by the commission prior to September 1, 1997.

Proposed changes to §295.133, One-Time Use Fees, and §295.134, Maximum Fees, would implement changes made to Texas Water Code §5.235 by Senate Bill 1 providing that the one-time use fee to be submitted with an application to use saline tidal water for industrial processes shall be one dollar per acre-foot, not to exceed a total fee of five thousand dollars ($5,000). Additionally, the proposed rule would provide that for an application requesting multiple purposes for the same amount of water, the fee would be based on the use with the highest fee.

The title of Subchapter C is proposed to be changed to clarify that the subchapter includes all classes of water rights administered by the commission, including certificates of adjudication, claims, and certified filings as well as permits.

Proposed changes to §295.155, Notice for Interbasin Transfers, would implement changes to Texas Water Code §11.085 made by Senate Bill 1 (1997) by providing additional statutory notice requirements for an application for an interbasin transfer.

Proposed changes to §295.156, Notice for Emergency Water Use, would implement changes to Texas Water Code §11.139 made by Senate Bill 1 (1997) by providing additional statutory notice requirements for an application for the emergency use of water.

Proposed new §295.161, Notice of Applications to Convey Water in Bed and Banks, would implement changes made to Texas Water Code §11.042(b) and (c) by Senate Bill 1 (1997) by providing notice requirements for applications to convey water, including groundwater, discharged into a stream or watercourse for subsequent diversion and use. Specifically, notice would be provided to existing water right holders downstream of the discharge point as well as the Public Interest Counsel and the Texas Parks and Wildlife Department. Such proposed notice to downstream water right holders would need to be provided since §11.042(b) and (c) provide that existing water rights that were based upon the availability or use of historical return flows may potentially be affected by the diversion of these return flows under a bed and banks authorization. Additionally, in the case of a new discharge, the diversion of this water may potentially affect existing water rights or instream uses if more water is diverted that actually discharged, less carriage losses. Notice would also be provided to the Texas Parks and Wildlife Department pursuant to Texas Water Code, §11.147(f). The Public Interest Counsel would also receive notice in accordance with Texas Water Code, §5.273.

FISCAL NOTE

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five-year period the sections as proposed are in effect, there will be fiscal implications as a result of administration or enforcement of the sections. The effect on state government will be an increase in cost of $200,000 per year associated with the amended procedural requirements for water rights applications and the Commission's consideration and action. There are no additional significant costs to units of local government anticipated.

PUBLIC BENEFIT

Mr. Minick has also determined that, for 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 enhanced protection and more effective utilization of surface water resources, increased beneficial use of surface water resources and improvements in the process of application for and allocation of surface water rights. The requirement that a drought contingency plan and water conservation plan be provided as part of an application for water rights is not new, but exists in pre-Senate Bill 1 law and the existing rules. Therefore, there should be no additional costs to applicants. Other procedural requirements, including public notice requirements may result in additional costs, however, these costs are not anticipated to be significantly greater under the proposed rules when compared to existing procedural requirements. Additionally, these rules are prospective and apply to applications made after the effective date of Senate Bill 1 and do not impose any additional costs on existing water right holders who are not electing to amend or expand the scope of an existing right. The provisions related to one-time and maximum use fees are anticipated to affect a limited number of applications and would limit the one-time fee imposed for the use of saline tidal water for industrial processes to $1 per acre-foot of water diverted for the industrial process, not to exceed a total fee of $5,000. The effects of these rules on small businesses are limited to a small business making application for surface water rights and will be similar to the effects on any applicant. Any costs imposed by these rules on a small business are not anticipated to be significantly greater than under existing requirements and will not affect any existing water right. Although any costs imposed under these rules may be relatively minor, generally, any fixed economic cost may be anticipated to have a proportionally greater effect on a small business than on a larger business, either in terms of operating costs, such as labor costs, or per dollar of revenue. There are no other economic costs anticipated to any person required to comply with the sections as proposed.

DRAFT REGULATORY IMPACT ANALYSIS

The commission has reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code §2001.0225 and has determined that the proposed rulemaking is not subject to this provision because it does not meet any of the four applicability requirements list in the provision because the rule is specifically required by changes made to the Water Code by SB 1 (1997), there is no applicable federal law, and it does not otherwise exceed any express requirements of state law, and does not involve any delegation agreements or contracts. These rules are within the scope of SB1, implement that statute, and are necessary for evaluating applications under S.B. 1.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Statement for these rules pursuant to Texas Government Code §2007.043. The following is a summary of that Assessment. The specific purpose of the rule is to adopt criteria and guidelines for the submission of certain water right applications. Promulgation and enforcement of these rules will not burden private real property. Rather, they implement statutory requirements providing procedural requirements for the beneficial use of state water to which persons have been granted a usufructuary interest and over which the state retains supervisory oversight in trust for the public for the protection of the public health, safety, and welfare.

COASTAL MANAGEMENT PROGRAM

The commission has reviewed the proposed rulemaking and found that the rule is neither identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Actions and Rules Subject to the Coastal Management Program, nor will it affect any action or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the proposed rule is not subject to the CMP.

PUBLIC HEARINGS

A public comment hearing on this proposal and rules review will be held in Austin on October 29, 1998, beginning at 10:00 a.m. in the Texas Natural Resource Conservation Commission

Office Complex, Building E, Room 201S, located at 12100 Park 35 Circle. The hearing is structured to receive oral or written comments by interested persons. Individuals may present oral statements when called upon in the order of registration. Open discussion will not occur during the hearing; however, a commission staff member will be available to discuss the proposed rules one half hour prior to the hearing and will answer questions before and after the hearing.

SUBMITTAL OF WRITTEN COMMENTS

Written comments on the proposed rules should reference Rule Log No. 97146-297-WT and may be submitted to Lutrecia Oshoko, Texas Natural Resource Conservation Commission, Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 (512) 239-4640; or faxed to (512) 239-5687. All comments sent by fax must be followed by an original, signed hard copy for the agency's records. Written comments must be received by 5:00 p.m., November 9, 1998.

Division 1. General Provisions [~~Requirements~~]

30 TAC §§295.5, 295.9, 295.13, 295.16

STATUTORY AUTHORITY

The new and amended sections are proposed under Texas Water Code (TWC), Chapter 5, Subchapter D, §§5.103 and 5.105 which establishes the commission's authority to promulgate rules necessary for the exercise of its jurisdiction and to establish and approve all agency policy by rule. Other relevant sections of the TWC under which the commission takes this action include: §5.235, which establishes the commissions authority regarding fees; §11.042, which establishes the commission's jurisdiction over delivering water down the bed and banks of streams; §11.085, which establishes the commission's authority concerning the interbasin transfer of state water; §11.1271, which establishes the commission's authority regarding requirements for water conservation plans; §11.1272, which establishes the commission's authority regarding additional requirements for drought contingency plans for certain applicants and water right holders; §11.134, which establishes the commission's jurisdiction regarding actions on applications to use state water; §11.139, which establishes the commission's authority to issue emergency permits; §11.1501, which establishes the commission's authority regarding permitting and consideration and revision of state and approved regional water plans; §11.153, which establishes the commission's jurisdiction over pilot projects for storage of appropriated water in aquifers; §11.154, which establishes the commission's authority regarding permits to store appropriated water in aquifers; and §11.155, which establishes the commission's authority aquifer storage pilot project reports.

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

§295.5. Amount and Purpose of Diversion and Use.

The total amount of water to be used shall be stated in definite terms, i.e., a definite number of acre-feet annually or, in the case of a seasonal, emergency, or temporary water right [~~permit~~] application, over the period for which application is made. The purpose or purposes of each use shall be stated in definite terms. If the water is to be used for more than one purpose, the specific amount to be used annually for each purpose shall be clearly set forth or the application shall expressly state an annual amount of water to be used for the multiple purposes. If the amount to be consumptively used is less than the amount to be diverted, both the amount to be diverted and the amount to be consumptively used shall be specified.

§295.9. Water Conservation and Drought Contingency Plans [~~Plan~~].

An application relating to the appropriation or use of state water must include [~~a~~] water conservation and drought contingency plans [~~plan~~] meeting applicable requirements contained in this section. An application not accompanied by such plans [~~plan~~] is not administratively complete and shall not be considered by the commission, unless expressly exempted by this section. The water conservation plan must demonstrate that reasonable diligence will be used to avoid waste and achieve water conservation in order that appropriated waters will be beneficially used for the authorized purposes. Conservation means those practices, techniques, and technologies that will reduce the consumption of water, prevent or reduce the loss or waste of water, maintain or improve the efficiency in the use of water, increase the recycling and reuse of water, or prevent the pollution of water so that a water supply is made available for future or alternative uses for the benefit of the public health, safety and welfare, and of the environment.

(1) Applications to appropriate or to use water for municipal use, industrial or mining use, or irrigation use. The [~~A~~] water conservation and drought contingency plans [~~plan~~] submitted with an application to appropriate or to use state water for municipal use, industrial or mining use, or irrigation use must be submitted in accordance with the guidelines set forth in Chapter 288 of this title (relating to Water Conservation and Drought Contingency Plans, Guidelines and Requirements).

(2) Applications to appropriate or to use water by wholesale water suppliers. A water conservation plan submitted with an application to appropriate or to use state water by a wholesale water supplier must be submitted in accordance with the guidelines set forth in Chapter 288 of this title [~~(relating to Water Conservation Plans, Guidelines, and Requirements)~~].

(3) Applications [~~Application~~] to appropriate or to use water for any other purpose or use. A water conservation plan submitted with an application to appropriate or to use state water for any other purpose or use shall include a water conservation plan providing information where applicable about those practices, techniques, and technologies that will be used to reduce the consumption of water, prevent or reduce the loss or waste of water, maintain or improve the efficiency in the use of water, increase the recycling and reuse of water, or prevent the pollution of water.

(4) Applications to amend existing water rights. An application to amend an existing water right for any of the following reasons must be accompanied by [~~a~~] water conservation and drought contingency plans [~~plan~~] in accordance with the applicable provisions of this section:

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

(5) (No change.)

§295.13. Interbasin [~~Interwatershed~~] Transfers.

(a) An applicant seeking to transfer state water from one basin [~~watershed~~] to another basin [~~watershed~~] shall so state in the application. [~~Hearing shall be held in the same manner as required for water use applications.~~] For purposes of this section, a river basin is defined and designated by the Texas Water Development Board by rule pursuant to Texas Water Code §16.051 [~~a watershed refers to a named river basin or coastal basin~~]. The application content requirements contained in this chapter for a new or amended water

right, as applicable, shall apply to all applications for an interbasin transfer unless otherwise provided.

(b) In addition to the application requirements for a new or amended water right contained in this chapter, the application must also include the following unless exempted by subsection (c) of this section:

(1) the contract price of the water to be transferred;

(2) a statement of each general category of proposed use of the water to be transferred and a detailed description of the proposed uses and users under each category;

(3) the cost of diverting, conveying, distributing, and supplying the water to, and treating the water for, the proposed users;

(4) the projected effect on user rates and fees for each class of ratepayers;

(5) an analysis of whether and to what extent there is the need for the water in the basin of origin and in the proposed receiving basin based upon the period for which the transfer is requested, but not to exceed 50 years;

(6) factors identified in the applicable approved regional water plans which address the following:

(A) an analysis of the availability of feasible and practicable alternative supplies in the receiving basin for which the water is needed;

(B) the amount and purposes of use in the receiving basin for which the water is needed;

(C) the proposed methods and efforts by the receiving basin to avoid waste and implement water conservation and drought contingency measures;

(D) the proposed methods and efforts by the receiving basin to put the water proposed for transfer to beneficial use;

(E) the projected economic impact that is reasonably expected to occur in each basin as a result of the transfer; and

(F) the projected impacts of the proposed transfer that are reasonably expected to occur on existing water rights, instream uses, water quality, aquatic and riparian habitat, and bays and estuaries that must be assessed under Texas Water Code, §§11.147, 11.150, and 11.152 and related commission rules contained in §§297.49-297.52 of this title (relating to Return and Surplus Waters, Consideration of Water Conservation Plans, Time Limitations for Commencement or Completion of Construction, Suppliers of Water for Irrigation) in each basin. If the water sought to be transferred is currently authorized to be used under an existing water right, such impacts shall only be considered in relation to that portion of the water right proposed for transfer and shall be based on historical uses of the water right for which amendment is sought.

(7) proposed mitigation or compensation, if any, to the basin or origin by the applicant;

(8) the continued need to use the water for the purposes authorized under the existing water right if an amendment to an existing water right is being sought; and

(9) any other related information the executive director or commission may require to review the application to make recommendation or determine, as applicable, whether it meets all applicable requirements of the Texas Water Code or other applicable law.

(c) Subsection (b) of this section shall not apply to:

(1) a proposed transfer which in combination with any existing transfers totals less than 3,000 acre-feet of water per annum from the same water right;

(2) a request for an emergency transfer of water under §297.17 of this title (relating to Emergency Authorizations (Texas Water Code, §11.139));

(3) a proposed transfer from a basin to its adjoining coastal basin; or

(4) a proposed transfer from a basin to a county or municipality or the municipality's retail service area that is partially within the basin for use in that part of the county or municipality and the municipality's retail service area not within the basin. For purposes of this paragraph, a county, municipality, or municipality's service area refers to a geographic area.

§295.16. Consistency With State And Regional Water Plans.

An application shall contain information describing how it addresses a water supply need in a manner that is consistent with the state water plan or the applicable approved regional water plan for any area in which the proposed appropriation is located or, in the alternative, describe conditions that warrant a waiver of this requirement.

This 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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Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
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For further information, please call: (512) 239-4640

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Division 2. Additional Requirements for the Storage of Appropriated Surface Water in Aquifers

30 TAC §295.21, §295.22

STATUTORY AUTHORITY These sections are proposed under Texas Water Code §§5.103 and 5.105 which provides the commission with the authority to promulgate rules necessary for the exercise of its jurisdiction and to establish and approve all agency policy by rule.

There are no other codes or statutes that will be affected by this proposed rule.

§295.21. Aquifer Storage and Retrieval Projects.

~~[(a) For the purposes of this chapter, aquifer storage and retrieval projects that propose the underground storage of appropriated surface water for subsequent retrieval and beneficial use shall be limited to the following areas:]~~

~~[(1) the Anacacho, Austin Chalk, and Glen Rose Limestone aquifers in Bexar County and Medina County;]~~

~~[(2) the Carrizo-Wilcox aquifer in Bexar, Webb, Smith, Wood, Rains, and Van Zandt Counties;]~~

~~[(3) the Hickory and Ellenberger aquifers in Gillespie County;]~~

[(4) the Gulf Coast aquifer in Cameron and Hidalgo counties;]

[(5) areas designated by the commission as "critical areas" under §35.008 of the Texas Water Code; and]

[(6) other areas of the state designated by the Texas Water Development Board in accordance with §11.155 (b)(3) of the Texas Water Code.]

(a) [(b)] Except as provided by subsection (b) [(c)] of this section, an applicant shall file the appropriate application and obtain the issuance of the following:

(1) a temporary or term permit under Chapter 297 of this title (relating to Water Rights, Substantive) and the necessary authorization under Chapter 331 of this title (relating to Underground Injection Control) prior to commencement of construction of Phase I of an aquifer storage and retrieval project, as defined in §297.1 of this title (relating to Definitions); or

(2) a permit under §297.11 of this title (relating to General Authorization to Divert, Store, or Use State Water, [Permit Under] Texas Water Code, §11.121) and the necessary authorization under Chapter 331 of this title (relating to Underground Injection Control) prior to actual storage of state water for underground storage and retrieval for purposes other than a Phase I project.

(A) An application for permit under paragraph (2) of this subsection will not be accepted for processing by the executive director until such time as the applicant has obtained the necessary authorizations and successfully completed a Phase I project.

(B) The commission will only issue a final order granting a water right under §297.11 of this title (relating to General Authorization to Divert, Store, or Use State Water, Texas Water Code §11.121) or an amendment to an existing water right authorizing that storage of state water in an aquifer for subsequent retrieval and beneficial use where completed pilot projects or historically demonstrated projects have been shown to be feasible. [A final order granting a permit or amendment to a permit authorizing the storage of appropriated water in aquifers for subsequent beneficial use, for purposes other than a Phase I project, will not be issued before June 1, 1999.]

(b) [(c)] A water right permit is not required for Phase I of an aquifer storage and retrieval project that proposes the temporary storage of appropriated surface water in an aquifer for testing and subsequent retrieval and beneficial use if the diversion and purpose of use (e.g., municipal, industrial, etc.) of the surface water is covered by an existing water right. The water right holder or person holding a valid contract with a water right holder shall notify the executive director, in writing, of the proposed temporary storage and shall submit the information required by §295.22 of this title (relating to Additional Requirements for Storage of Surface Water for Subsequent Retrieval and Beneficial Use) with the written notification not later than 60 days prior to the proposed temporary storage of water in an applicable aquifer. Upon completion of Phase I of the project, an amendment to the existing water right is required for permanent authorization to store appropriated surface water in an aquifer for subsequent retrieval and beneficial use.

(c) [(d)] This section does not apply to any existing permit or permit amendment issued by the commission or to any administratively complete application for a permit or permit amendment filed with the commission prior to June 5, 1995.

§295.22. Additional Requirements for the Underground Storage of Surface Water for Subsequent Retrieval and Beneficial Use.

(a) Phase I projects. In addition to the applicable information required by Subchapter A of this chapter (relating to Requirements of Water Right [Use Permit] Application), the appropriate [permit] application must include:

(1) (No change.)

(2) a map or plat showing the proposed depth and location of all injection facilities, retrieval wells, and the aquifer in which the water will be stored; and

[(3) if applicable, a letter from the Texas Water Development Board indicating an area has been designated in accordance with §11.155 (b)(3) of the Texas Water Code; and]

(3) [(4)] if applicable, the application for storage of surface water in a groundwater [an underground water] reservoir or a subdivision of a groundwater [an underground water] reservoir, as defined by Chapter 35 of the Texas Water Code, that is under the jurisdiction of a groundwater [an underground water] conservation district, must include:

(A) evidence of service, by certified mail, of a copy of the application or notification submitted in accordance with §295.21 of this title (relating to Aquifer Storage and Retrieval Projects) to the groundwater [underground] water conservation district having jurisdiction over the aquifer; and

(B) a copy of an agreement, if any, reached by the applicant with the groundwater [underground] water conservation district reflecting the applicant's consent to cooperate in the development of, and abidance with, the rules governing the injection, storage, or retrieval of appropriated surface water in the underground water reservoir or a subdivision thereof.

(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.

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Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
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Division 9. Requirements for Application for Emergency Water Use [Permit]

30 TAC §295.91

STATUTORY AUTHORITY This section is proposed under Texas Water Code §§5.103 and 5.105 which provides the commission with the authority to promulgate rules necessary for the exercise of its jurisdiction and to establish and approve all agency policy by rule.

There are no other codes or statutes that will be affected by this proposed rule.

§295.91. Application for Emergency Water Use.

A person requesting an emergency authorization under Texas Water Code, §11.139 and commission rules contained in §297.17 of this title (relating to Emergency Authorization (Texas Water Code, §11.139))

shall submit to the commission a sworn application containing the following information: [~~An applicant for an emergency water use permit shall submit a written request setting forth the location of the diversion point, the diversion rate, the amount of state water to be diverted, the purpose of use, and a statement of the emergency condition which has prompted submission of the application.~~]

(1) a description of the condition of emergency justifying the granting of an emergency authorization, including a statement of the facts which support the finding that such conditions present an imminent threat to the public health and safety which override the necessity to comply with established statutory procedures and there are no feasible practicable alternatives to the emergency authorization;

(2) the proposed location of the diversion point, diversion rate, the amount of water to be diverted, the purpose or purposes of use, and an estimate of the dates on which the proposed authorization should begin and end;

(3) steps made by the applicant to purchase or otherwise acquire the needed water other than through an emergency authorization;

(4) for a proposed transfer, a statement of consistency with the applicable approved regional water plan, if available; and

(5) any other statements or information required by the commission or executive director necessary to review and take action on the application.

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

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Division 11. Requirements for Application for Authorization to Use Bed and Banks [~~Convey Stored Water~~]

30 TAC §§295.111-295.113

STATUTORY AUTHORITY These sections are proposed under Texas Water Code §§5.103 and 5.105 which provides the commission with the authority to promulgate rules necessary for the exercise of its jurisdiction and to establish and approve all agency policy by rule.

There are no other codes or statutes that will be affected by this proposed rule.

§295.111. Authorization to Convey Stored Water In Bed and Banks [~~Application~~].

(a) Any seller or purchaser of water stored in a reservoir [~~stored water~~] desiring to use the bed and banks of any natural watercourse to release the water from storage and convey it downstream for subsequent use under a water supply contract pursuant to Texas Water Code, §11.042(a) [~~convey stored water~~] shall file a copy of the purchase contract with the executive director and a written statement of the intended transit of the water setting forth the following:

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

(8) The number of the permit, certified filing, or certificate of adjudication which authorizes the storage and/or the use of water proposed to be transported; and

(9) The manner in which the water being conveyed will be measured to ensure that only the water being released is being diverted at the point of delivery, less the amount of water that will be lost to transportation, evaporation, seepage, channel or other associated carriage losses from the point of release to the point of delivery. [~~the number of the permit, certified filing or certificate of adjudication which authorizes the use of water proposed to be transported~~].

(b) An exception to the requirements of [~~this~~] subsection (a) of this section may be granted by the commission if an emergency exists and time does not permit following the procedures herein outlined. Further, the requirements of this subsection are not applicable if water is being released from upstream storage under the order of the commission.

(c) Nothing in this section shall be construed to affect an existing project for which water rights and reuse authorizations have been granted by the commission prior to September 1, 1997.

§295.112. Application to Convey Groundwater-Based Effluent in Bed and Banks.

(a) The purpose of this section is to provide the application content requirements for a bed and banks authorization under Texas Water Code §11.042(b).

(b) A person who has discharged or intends to discharge groundwater-based effluent into a stream or watercourse and wishes to divert and use the discharged water shall submit an application with the commission containing the following information:

(1) the name, mailing address, and telephone number of the applicant;

(2) the name of the stream and the locations of the point of the existing or proposed discharge and diversion as identified on a USGS 7.5 minute topographical map(s);

(3) the source, amount, and rates of the existing or proposed discharge and diversion;

(4) a description of the water quality of the water discharged or proposed to be discharged and the permit number and name of any related discharge permit;

(5) the date of initial discharge of the groundwater into the watercourse or stream, if applicable, and any related records of discharge periods, points, amounts and rates; and

(6) the estimated amount of water that will be lost to transportation, evaporation, seepage, channel or other associated carriage losses from the point of discharge to the point of diversion.

(c) Nothing in this section shall be construed to affect an existing project for which water rights and reuse authorizations have been granted by the commission prior to September 1, 1997.

§295.113. Application to Convey Water In Bed and Banks.

(a) The purpose of this section is to provide the application content requirements for a bed and banks authorization under Texas Water Code §11.042(c).

(b) A person wishing to place water into a stream or watercourse, convey the water in the watercourse or stream, and subsequently divert such water shall file an application with the commission containing the following information:

(1) the name, mailing address, and telephone number of the applicant;

(2) the name of the stream and the locations of the point of discharge and diversion as identified on a USGS 7.5 minute topographical map(s);

(3) the source, amount, and rates of discharge and diversion;

(4) a description of the water quality of the water discharged and, if applicable, the permit number and name of any related discharge permit;

(5) if the water to be placed into the stream is from an existing, authorized interwatershed or interbasin transfer, a certified copy of the related water right;

(6) if the water placed into the stream is from a proposed interwatershed or interbasin transfer, the information required by this subsection shall be provided in the application for the interwatershed or interbasin transfer and the bed and banks authorization shall be combined with the authorization for the interbasin transfer; and

(7) the estimated amount of water that will be lost to transportation, evaporation, seepage, channel or other associated carriage losses from the point of discharge to the point of diversion.

(c) An application under this section may be combined with an application for a wastewater discharge for purposes of a consolidated permit proceeding.

(d) Nothing in this section shall be construed to affect an existing project for which water rights and reuse authorizations have been granted by the commission prior to September 1, 1997.

This 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 B. Water Use Permit Fees

30 TAC §295.133, §295.134

STATUTORY AUTHORITY These sections are proposed under Texas Water Code §§5.103 and 5.105 which provides the commission with the authority to promulgate rules necessary for the exercise of its jurisdiction and to establish and approve all agency policy by rule.

There are no other codes or statutes that will be affected by this proposed rule.

§295.133. One-Time Use Fees.

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

(c) A fee imposed under subsection (a)(4) of this section for the use of saline tidal water for industrial processes shall be one dollar ($1) per acre-foot of water diverted for the industrial process, not to exceed a total fee of five thousand dollars ($5,000).

(d) For an application requesting multiple uses of the same amount of water, the fee shall be based on the use with the highest fee.

§295.134. Maximum Fees.

A fee under §295.133 of this title (relating to One-Time Use Fees) for one use of state water under a permit from the commission shall not exceed $50,000. The fee for each additional use of water under a permit for which the maximum fee is paid shall not exceed $10,000. Temporary water permit use fees under §295.133 of this title [~~(relating to One-Time Use Fees)~~] shall not exceed $500. The fee for any application for extension of time to commence or complete construction under §295.133 of this title [~~(relating to One-Time Use Fees)~~] shall not exceed $1,000. The fee under §295.133 of this title for the use of saline tidal water for industrial processes shall not exceed five thousand dollars ($5,000).

This 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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Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: November 8, 1998
For further information, please call: (512) 239-4640

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Subchapter C. Notice Requirements for Water Right [~~Use Permit~~] Applications

30 TAC §§295.155, 295.156, 295.161

STATUTORY AUTHORITY These sections are proposed under Texas Water Code §§5.103 and 5.105 which provides the commission with the authority to promulgate rules necessary for the exercise of its jurisdiction and to establish and approve all agency policy by rule.

There are no other codes or statutes that will be affected by this proposed rule.

§295.155. Notice for Interbasin [~~Interwatershed~~] Transfers.

(a) The notice requirements of this subchapter for an application for a new or amended water right, as applicable, shall apply to an application for an interbasin transfer except as otherwise provided by this section. [~~Notice of an application seeking to transfer water from one watershed to another shall be given in the manner provided for a water use permit application to the watershed which is the source of supply.~~] In addition, notice shall be given to users of record in the receiving basin [~~watershed~~] who are located below the point of introduction except for interbasin transfers described under subsection (d)(2), (3) and (4) of this section. For purposes of this section, a river basin is defined and designated by the Texas Water Development Board by rule pursuant to Texas Water Code §16.051 [~~watershed refers to a named river basin or coastal basin~~]. An increase in the amount of water being transferred to the receiving basin under an existing water right constitutes a new interbasin basin transfer for purposes of this section.

(b) In addition to the notice requirements provided by subsection (a) of this section, notice of an application for an interbasin

transfer shall also include the following unless exempted by subsection (d) of this section:

(1) notice of the application shall be mailed to:

(A) all holders of water rights located in whole or in part in the basin of origin if not already provided under subsection (a) of this section;

(B) each county judge of a county located in whole or in part in the basin of origin;

(C) each mayor of a city with a population of 1,000 or more based upon the most recent estimate of the U.S. Census Bureau located in whole or in part in the basin or origin; and

(D) all groundwater conservation districts located in whole or in part in the basin of origin; and

(E) each state legislator in both basins.

(2) the applicant shall cause notice of the application to be published once a week for two consecutive weeks in one or more newspapers having general circulation in each county located in whole or in part in the basin of origin and the receiving basin. The published notice may not be smaller than 96.8 square centimeters or 15 square inches with the shortest dimension at least 7.6 centimeters or three inches. The notice of application and public meetings shall be combined in the mailed and published notices; and

(3) the notice of the application must state how a person may obtain from the applicant, without cost, information relating to the contract price of the water to be transferred; a statement of each general category of proposed use of the water to be transferred, and a detailed description of the proposed uses and users under each category; the cost of diverting, conveying, distributing, and supplying the water to, and treating the water for, the proposed users; and the projected effect on user rates and fees for each class of ratepayers.

(c) The applicant shall pay the cost of notice required to be provided under this section.

(d) Subsection (b) of this section shall not apply to:

(1) a proposed transfer which in combination with any existing transfers totals less than 3,000 acre-feet of water per annum from the same water right;

(2) a request for an emergency transfer of water under §297.17 of this title (relating to Emergency Authorizations (Texas Water Code, §11.139));

(3) a proposed transfer from a basin to its adjoining coastal basin; or

(4) a proposed transfer from a basin to a county or municipality or the municipality's retail service area that is partially within the basin for use in that part of the county or municipality and the municipality's retail service area not within the basin. The further transfer and use of this water outside of such county or municipal retail service area other than back to the basin of origin shall not be exempt under this paragraph.

§295.156. Notice for Emergency Water Use [~~Permits~~].

(a) An initial emergency authorization [~~permit~~] for the diversion and use of state water for a period of not more than 120 [~~30~~] days under the Texas Water Code, §11.139, may be granted after notice to the governor and without the necessity of issuing the notice required for other water rights [~~permits~~] issued by the commission.

(b) Notice of the hearing at which the commission determines whether to affirm, modify or set aside the emergency authorization is not subject to the requirements of Texas Water Code §11.132, but such general notice of the hearing shall be given as the commission deems practicable and meets the requirements of Texas Government Code, Chapter 2001. In the case of an emergency transfer, such notice shall be provided, at a minimum, to the water right holders whose right to use water is being temporarily transferred and to the governor.

§295.161. Notice of Application to Convey Water in Bed and Banks. Notice of an application to convey groundwater-based effluent or other water in the bed and banks of a stream or watercourse pursuant to Texas Water Code §11.042(b) and (c) shall be provided by first class mail, postage prepaid, by the commission to every water right holder of record downstream of the discharge point at least 30 days prior to commission consideration of the application. Such notice shall also be provided to the Texas Parks and Wildlife Department and the Public Interest Counsel. No published notice shall be required for the application. The applicant shall be responsible for the costs of providing notice under this section (For notice requirements relating to the conveyance of stored water under Texas Water Code, §11.042(a), see §295.160 of this title (relating to Notice of Applications to Convey Stored Water.).

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

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Texas Natural Resource Conservation Commission
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Chapter 297. Water Rights, Substantive

The Texas Natural Resource Conservation Commission (commission) proposes amendments to §297.1, 297.11, 297.13-297.15, and 297.17-297.19, the repeal of §§297.16, 297.20, 297.21-297.29, 297.41-297.56, 297.71-297.74 and new §§297.16, 297.21-297.27, 297.41-297.56, 297.58-297.59, 297.71-297.75.

The amendments to §297.1, Definitions, which would add definitions for the terms "beneficial inflows," "conserved water," "drought of record," "firm yield," "mitigation," "unappropriated water," and "wetlands;" amend the existing definitions for the terms "appropriative right," "beneficial use," "dam," "domestic use," "industrial use," "permit," "priority," "state water," "streamflow," "surplus water," and "water right;" and repeal the definitions for "commission," "director or executive director," and "person."

The purpose of these proposed changes is to clarify the meaning and use of these terms as they are used in applicable commission rules and the commission's interpretation and application of provisions contained in the Water Code and other state law, including Senate Bill 1 (Acts 1997, Texas Legislature, Regular Session, Chapter 1010). The proposed changes would also number the definitions contained in §297.1 in accordance with *Texas Register* style and format guidelines. Concurrently, the commission proposes the review of 30 TAC Chapter 297, in accordance with the General Appropriations Act, Article IX,

§167, 75th Legislature, 1997, and is publishing the proposed notice of review in the Rules Review Section of the *Texas Register* .

The commission also proposes amendments to §§297.11, 297.13-297.15, and 297.17-297.18, the repeal of §§297.16 and 297.20, and the adoption of new §297.16 to clarify the meaning and use of these provisions as they are used by the commission in the review and action on water right applications and to implement changes made to the Texas Water Code by Senate Bill 1 (Acts 1997, Texas Legislature, Regular Session, Chapter 1010).

In addition, the commission proposes the repeal of §§297.21-297.24, the adoption of new §297.21, and the amendment and renumbering of §297.25-297.30. The purpose of the changes is to consolidate and clarify provisions related to water uses exempt from permitting and special conditions for storage in another's reservoir.

Additionally, the commission proposes the repeal of §§297.41-297.57 and the adoption of new §§297.41-297.58. The purpose of these proposed changes is to clarify existing commission criteria used for the issuance and the placing of conditions on new and amended water rights and to implement related provisions of Senate Bill 1 (Acts 1997, Texas Legislature, Regular Session, Chapter 1010).

In addition, the commission proposes the repeal of §§297.71 -297.74 and proposes the adoption of new §§297.71 -297. The purpose of these changes is to clarify the meaning and use of these provisions as they are used by the commission in the cancellation and revocation of water rights and to implement changes made to the Texas Water Code by Senate Bill 1 (Acts 1997, Texas Legislature, Regular Session, Chapter 1010).

EXPLANATION OF PROPOSED RULE.

The definitions contained in §297.1 are proposed to be made applicable to Chapter 288, Water Conservation and Drought Contingency Plans, as well as to Chapter 295 as currently provided.

A proposed new definition for "conserved water" is in response to changes made to Texas Water Code §11.002 by Senate Bill 1 (1997). A related proposed amendment to "beneficial use" would add the conservation of water in accordance with changes made to §11.002 of the Texas Water Code by Senate Bill 1 (1997).

Additionally, a definition for "unappropriated water" is proposed for purposes of Texas Water Code §11.134(b)(2). This statute provides that the commission may grant an application for an appropriation of state water only if "unappropriated water is available in the source of supply." Unappropriated water available for this purpose would be the water remaining in a watercourse or other source of supply after taking into account complete satisfaction of all existing uncancelled certificates of adjudication, permits, and certified filings valued at their fully recorded amounts and conditions. This definition is based upon the Texas Supreme Court's interpretation of this provision in *Lower Colorado River Authority v. Texas Dept. of Water Resources (Stacy Dam)* , 689 S.W.2d 873 (Tex. 1984). The proposed definition includes unappropriated water available for all beneficial purposes. Water available for new appropriation, however, may be limited for the maintenance and protection of flows necessary for existing instream uses, water quality, aquatic and wildlife habitat, and bays and estuaries pursuant to §§11.147, 11.150, and 11.152 of the Texas Water Code.

A related definition is being proposed for the term "firm yield" in determining the availability of unappropriated water for storage in a reservoir to supply water for domestic and municipal use. The proposed definitions for "unappropriated water" and "firm yield" also correspond to proposed amendments to §297.41 of this title (relating to Subject to Prior and Superior Water Rights) clarifying the existing criteria used by the commission in determining whether there is sufficient, available unappropriated water for a new or increased appropriation.

A definition for "beneficial inflows" is also proposed for purposes of Texas Water Code §11.147 and §297.51 of this title (relating to Estuarine Considerations). These laws provide that the commission shall consider the impacts of an application for a new or amended water right on bays and estuaries and the commission may place conditions on the water right to provide beneficial inflows to the affected bay and estuary. The proposed definition is based upon provisions contained in §11.147(a) of the Code.

A definition for "drought of record" is proposed for purposes of determining the firm yield of a project and whether there is sufficient water to grant certain appropriations such as municipal use that are dependent upon a firm water supply in accordance with Texas Water Code §11.134(b)(2).

The definition for "mitigation" is proposed for purposes of Texas Water Code, §§11.147, 11.1491, 11.150, and 11.152, and commission rules contained in proposed §§297.53, 297.54, 297.55, and 297.56 of this title. These laws provide that the commission must consider the effects of the issuance of a new or amended permit on water quality, existing instream uses, fish and wildlife habitat, and bays and estuaries, with the goal of implementing reasonable actions to avoid, minimize and/or compensate for unavoidable adverse impacts. This definition is consistent with related commission rules contained in Chapter 279, Water Quality Certification.

Additionally, a definition of "wetland" as provided by Texas Water Code §11.502 is proposed to be added to §297.1 for purposes of §§11.147 and 11.152 Texas Water Code and §297.53 of this title relating to Habitat Mitigation. These provisions require the commission to assess the impacts of a proposed project on aquatic and wildlife habitat, including wetlands, and to require the mitigation of unavoidable impacts.

The proposed amendment to the definition of "dam" would clarify that such structures may also store as well as impound water.

The commission proposes a revised definition of "domestic use." While the revision is intended primarily to make it easier to understand the definition, the revised definition also contains further clarification concerning the commission's policy and past actions relative to whether or not a water right permit would be required. The revised definition would clarify that such use is limited to the use by the person or household. Additionally, the definition would specify that "domestic use" may include a recreational use (including aquatic and wildlife enjoyment) so long as the use also meets the other requirements for a "domestic use." For example, if a person specified a recreational use other than for his personal or household use, such as a hunting and fishing club and charges a fee for its use, the exempt status under "domestic use" would not apply and

the person would need to obtain a water right permit for "recreational use." The commission is also considering, and may make part of the rule on adoption of the changes proposed herein, a limit to the definition of "domestic use" so that such use may not exceed the amount of water needed to support a certain acreage. The commission seeks public comment on whether it should limit domestic use to the support of a certain acreage, and if so, what amount of acreage would be considered reasonable.

The proposed amendment to the term "livestock use" would clarify the types of animals and watering activity which could be considered for permit exemption under Section 11.142 of the Texas Water Code. For example, the incidental and open-range watering of game and fur-bearing animals would be considered as part of the "livestock use" and, therefore, exempt from permitting under Section 11.142. Also, a landowner who constructed a reservoir primarily for domestic and livestock purposes and leases his ranch or farm for the hunting of wildlife would be exempt from the permitting requirements under Section 11.142.

The proposed amendment to the definition of "permit" would clarify that such term also includes new or amended certificates of adjudication, certified filings, or unadjudicated claims.

The proposed amendment to the term "priority" would delete the reference to the Wagstaff Act, Texas Water Code §11.028, which was repealed by Senate Bill 1 (1997), and indicate that exceptions to the priority in time rule are provided by court decisions and state law relating to water rights in the Lower Rio Grande Valley, vested riparian rights, and certain uses exempt from permitting.

The proposed amendment to the term "recreational use" would clarify that the use of water for aquatic and wildlife resource purposes which exceed the personal and household needs of an individual and for which the individual will receive consideration or compensation, does not qualify for exemption under Section 11.142 of the Texas Water Code. For example, if a person proposes to construct and maintain a reservoir for the purpose of fishing or in-place recreational activities and charges for that activity, a permit must be obtained under Section 11.121 of the code.

Proposed changes to the definition of "reservoir systems operations" would clarify that the coordinated operation of such reservoirs to optimize water supplies may be done across river basins and with reservoirs owned or operated by different entities through cooperative agreements.

The definition for "streamflow" is proposed to be amended to clarify that it may include any flow in the stream.

The definition for "state water" is also proposed to be amended to clarify that percolating groundwater and diffuse surface runoff before it reaches a state watercourse is not state water. This includes springwater before it reaches a watercourse, as determined by the court in *A.H. Denis, III et al. v. Kickapoo Land Co., et al.* , 771 S.W.2d 235 (Tex. App. -Austin 1989, writ denied). Additionally, state water injected into the ground for an aquifer storage and recovery project remains state water in accordance with the court ruling in *Texas Rivers Protection Assoc. V. TNRCC* , 910 S.W.2d 147 (Tex. App. -Austin 1995).

In addition, a change to the definition of "surplus water" is being proposed to correspond to the change in the definition of this term in §§11.002 and 11.046(d) of the Texas Water Code made by Senate Bill 1 (1997).

Proposed amendments to the definition of "water right" seek to clarify that such rights include amendments made to water rights and that they may also provide for the taking and storing of water.

Finally, the definitions for "commission," "director or executive director," and "person" are proposed for repeal because they are redundant of the definitions for these terms contained in Chapter 3 of this title that apply to all commission rules.

The title of subchapter B is proposed to be changed to clarify that the subchapter includes all classes of water rights administered by the commission, including certificates of adjudication, unadjudicated claims, and filings as well as permits.

Proposed changes to §297.11, Permit Under Texas Water Code §11.121, would amend the title and rule to clarify that Texas Water Code §11.121 provides the general authority to the commission for the issuance of a water right, and that these rights may have special terms and conditions as provided by more specific statutory and regulatory provisions addressed in subsequent rules in the subchapter.

Proposed amendments to §297.13, Temporary Permit Under Texas Water Code §§11.138 and 11.153-11.155, would incorporate the specific conditions provided by Texas Water Code §11.138 under which a person may be granted the authority to temporarily use water. The proposed changes would also allow the TNRCC regional director or watermaster, as applicable, to issue by registration temporary permits of ten acre-feet or less for no more than one year and for which no notice or hearing is required. This change would also implement recommendations made in the agency's Business Plan Review.

Proposed amendments to §297.14, Contractual Permit, would clarify that such permits may be issued by the commission as well as authorized through the administrative review and approval of contracts by the executive director under subchapter J, Chapter 297, (relating to Water Supply Contracts and Amendments) to ensure consistency with the underlying water right.

Proposed amendments to §297.15, Permit Under Texas Water Code, §11.143, would change the title of the rule to more specifically describe that the nature of this permit by indicating in the title that a permit is required to make additional uses of a domestic and livestock reservoir that would otherwise be exempt from permitting.

Section 297.16, Permit for Storage (Texas Water Code, §11.140), is proposed for repeal because it is redundant of other existing rules relating to the review and approval of an application for a new or amended water right, including that for a storage reservoir.

The proposed adoption of new §297.16 would implement changes made to Texas Water Code §11.042 by Senate Bill 1 (1997) by providing the statutory criteria and conditions to be used in the commission's authorization for the conveyance of water in the bed and banks of a stream or watercourse.

Proposed amendments to §297.17, Emergency Permit (Texas Water Code §11.139), would implement changes made to Texas Water Code §11.139 by Senate Bill 1 (1997). Specifically, these changes would provide for the emergency transfer of water appropriated to another if the commission finds emergency conditions to exist which present an imminent threat to the public

health and safety and which override the necessity to comply with established procedures and there are no practicable alternatives to the emergency authorization.

Proposed amendments to §297.18, Interwatershed Transfers, would implement changes made to Texas Water Code §11.085 by providing a balancing test to be performed by the commission between the detriments to the basin of origin and the benefits to the receiving basin. If the benefits outweigh the detriments, the commission may approve the application. Specific factors to be examined in performing this balancing test as provided under §11.085 are also included in the proposed rule as well as corresponding statutory conditions and criteria relating to water right amendments. Additionally, statutory exemptions to the special requirements under §11.085 are also provided. Also, the title of the rule would be amended to reference "inter-basin," rather than "inter-watershed," as provided by the changes made to §11.085 by Senate Bill 1.

Proposed amendments to §297.19, Term Permit, would clarify the criteria and conditions the commission must use in its authorization for someone to use unused appropriated water in accordance with Texas Water Code, §§11.1381, and 11.153-11.155.

Section 297.20, Permit for Diversion from Unsponsored or Storage-Limited Reservoir, is proposed for repeal as redundant of provisions under §§297.31-297.32 of this title (relating to Diversion from Unsponsored or Storage Limited Reservoirs).

Sections 297.21-297.24 are proposed for repeal so that redundant provisions can be deleted and remaining provisions relating to domestic and livestock use may be consolidated in a proposed new §297.21, Domestic and Livestock Use. Additionally, the statutory and common law extent of the exempt domestic and livestock use is clarified by including the distinction from other vested riparian rights, the rights and duties as between exempt uses, the definition for "normal" storage for purposes of determining the size of an exempt domestic and livestock reservoir, and the prohibition of such reservoirs on navigable streams. These provisions are based upon the Texas Supreme Court's decision in *Motl v. Boyd* , 116 Tex. 82, 104-108, 111, 121-122 and 124 (1926) and the exemption provided to vested riparian rights for domestic and livestock use from having to file a claim under the Texas Water Right Adjudication Act, Texas Water Code, §11.303(a)(1) and (l), as well as Texas Water Code, §11.142 (see also, Hutchins, *The Texas Law of Water Rights,* pp. 293 *et seq* . - 1961).

Proposed new §297.22, Storage in Another's Reservoir, would clarify that the consent from the reservoir owner for the storage of water must be in writing and submitted to the executive director. The proposed amendments would also reflect the change in name of the Soil Conservation Service to the Natural Resources Conservation Service.

Proposed amendments to §297.26, Spreader Dams, Contouring, Terracing, would renumber this section as new §297.23.

Proposed amendments to §297.27, Permit Exemption for Mariculture Activities, would renumber this section as new §297.24 and clarify that an order requiring the interruption or reduction of the use of water under the section may apply to all water rights for this purpose, not just to appropriations.

Proposed amendments to §297.28, Permit Exemption for Drilling and Producing Petroleum, would renumber this section as new §297.25.

Proposed amendments to §297.29, Permit Exemptions to Use State Water for Emergency Use, would renumber this section as new §297.26 and clarify that such exemption is for purposes of firefighting emergencies.

Proposed amendments to §297.30, Permit Exemptions for Use of State Water for Irrigation of Certain Historic Cemeteries and for Sedimentation Control Structures Within Surface Coal Mining Operations, would be renumbered as new §297.27.

Subchapter E, Chapter 297, is proposed for repeal so that it may be reorganized to follow generally the corresponding statutory order of the criteria and factors used in the review and approval of a water right application as set forth in the Texas Water Code as well as to make certain clarifications and to implement changes made to the Texas Water Code by Senate Bill 1 (1997).

The proposed repeal of §297.41, Subject to Prior and Superior Rights, and the adoption of new §297.41, General Approval Criteria, is to provide the general statutory criteria the commission must use in its review and action on a water right application pursuant to Texas Water Code §11.134. The provisions of existing §297.41 would be clarified and transferred to new §297.44 as provided below.

The proposed repeal of §297.42, Additional Limitations, and the proposed adoption of new §297.42, Water Availability, is to set forth the criteria the commission uses to determine whether there is sufficient unappropriated water available to grant a new appropriation pursuant to Texas Water Code §11.134(b)(2). Generally, one hundred percent of the water does not need to be available one hundred percent of the time for the requested appropriation to be granted. Rather, sufficient water will be found available if there is a sufficient amount available a sufficient amount of time to make the proposed project viable and ensure the beneficial use of water without waste. Alternative, supplemental water supplies available to the applicant and return flow requirements may be considered in making this determination. The existing provisions of §297.42 would be consolidated with other special conditions under a new §297.58 as described below.

The proposed repeal of §297.43, Requiring Storage Facilities, and the proposed adoption of new 297.43, Beneficial Uses, is to set forth the statutorily authorized purposes for which water may be put to use as provided under Texas Water Code §11.023. The proposed new rule would also provide that such preferences of use as provided under Texas Water Code §11.024 shall be used in the commission's consideration of competing applications for the use of the same water. The provisions of existing §297.43 would be transferred and consolidated with other special conditions under new §297.58 described below.

The proposed repeal of §297.44, Acceptance of Permit or Certificate of Adjudication, and the adoption of new §297.44, Subject to Prior and Superior Rights, are to reflect that Texas has generally adopted the prior appropriation doctrine as a basis of allocating state water resources as provided by Texas Water Code §11.027. The proposed amendment further provides that the priority of a water right is determined by the date the application is filed with the commission as provided by Texas Water Code §11.141. The proposed amendment clarifies that an application is deemed to have been filed with the commission for purposes of time priority when it has been declared administratively complete by the executive director and filed with the chief clerk. The provisions of existing §297.44 would be trans-

ferred and consolidated with other special conditions under new §297.58 described below.

Additionally, proposed new §297.44 provides that there are some exceptions to the first in time, first in right principle. One such exception relates to water rights granted on the main stem of the Rio Grande below the Amistad Reservoir in the Lower Rio Grande Valley (see, generally, Chapter 303 of this title). In the court's adjudication of those rights in *State v. Hidalgo County WCID No. 18* , 443 S.W.2d 728 (Tex. Civ. App. -Corpus Christi 1969, writ ref'd n.r.e.), priority was assigned based upon the classification of use, rather than the date the filing, claim, or application was filed, in order to address rights granted under Spanish and Mexican law and recognized by Texas under treaty. *State v. Valmont Plantations* , 355 S.W. 2d 502 (1962). Under the court's ruling, rights for domestic, municipal, and industrial use have a higher priority and may be curtailed during times of low flow only after rights for irrigation, mining, and other uses have been limited. The other exceptions to the prior appropriation principle relate to certain limited uses exempt from permitting under Texas Water Code §§11.142, 11.1421, 11.1422, and 11.303(l).

The proposed repeal of §297.45, Return and Surplus Water, and the proposed adoption of new §297.45, "No Injury" Rule, would set forth the "no injury" rule pursuant to Texas Water Code §11.134(b)(3)(B) providing that an application may not be approved if it would impair an existing water right or vested riparian right such as domestic and livestock use exempt from permitting. Additionally, the proposed amendment provides that the scope of review under the "no injury" rule when considering an application for a water right amendment is limited by the "four corners" analysis provided under Texas Water Code §11.122, as amended by Senate Bill 1 (1997). Under this provision, the commission is to compare the effect of the proposed amendment on other existing water rights with such effects from the full, lawful exercise of the water right prior to its amendment to determine whether the proposed change would impair another existing water right. If the existing water right can be fully exercised in accordance with all terms and conditions within the "four corners" of the existing water right so as to have the same impacts on stream flows as the proposed amended water right, then the proposed change could not, as a matter of law, impair other water rights. If the proposed change would create such impacts, however, the commission will consider what types of restrictions to place on the amendment to prevent such impacts. The provisions of existing §297.45 have been clarified and transferred to new §297.49 as described below.

The proposed repeal of §297.46, Suppliers of Water for Irrigation, and the proposed adoption of new §297.46, Consideration of Public Welfare, seeks to implement Texas Water Code §11.134(b)(3)(C) providing that the commission may not grant an application for a new or amended water right if it would be detrimental to the public welfare. The proposed rule sets out the factors and criteria to be used by the commission in making this determination. The provisions of existing §297.46 have been transferred to new §297.52.

The proposed repeal of §297.47, Time Limitations for Commencement or Completion of Construction, and the proposed adoption of new §297.47, Impacts on Groundwater, seek to implement changes made by Senate Bill 1 (1997) to Texas Water Code §11.134(b)(3)(D) and new Texas Water Code §11.151 requiring the commission to assess the impacts to groundwater in its review and action on an application for a new or amended water right. The provisions of existing §297.47 have been transferred to new §297.51 as described below.

The proposed repeal of §297.48, Low-Flow Outlets for Dams, and the adoption of new §297.48, Waste Prevention, would provide for the transfer of provisions in existing §297.54 to new §297.48. The provisions of existing §298.48 would be consolidated with other special conditions and transferred to new §297.58.

The proposed repeal of §297.49, Habitat Mitigation, and the proposed adoption of new §297.49, Return and Surplus Water, seeks to implement changes made by Senate Bill 1 (1997) to Texas Water Code §11.046. Such changes clarified that, unless provided otherwise in the water right, the water right holder may use and reuse the water as authorized under the water right prior to its return to the stream. However, once the water is returned to the stream, it is generally considered to be surplus water, subject to appropriation by others and meeting environmental water needs. The proposed amendments would also make clear that return flows must also meet applicable water quality standards for the stream contained in Chapter 307 of this title. The provisions of existing §297.49 would be clarified and transferred to new §297.53 as described below.

The proposed repeal of §297.50, Water Quality Effects, and the proposed adoption of new §297.50, Consideration of Water Conservation Plans, would provide for the clarification and transfer of the provisions of §297.50 to new §297.54 and the transfer of the provisions of §297.55 to proposed new §297.50.

The proposed repeal of §297.51, Estuarine Considerations, and the proposed adoption of new §297.51, Time Limitations for Commencement or Completion of Construction, would provide for the clarification and transfer of the existing provisions of §297.51 to proposed new §297.55 as described below and the transfer of existing provisions of §297.47 to new §297.51.

The proposed repeal of §297.52, Instream Uses, and the proposed adoption of new §297.52, Suppliers of Water for Irrigation, would allow for the transfer of the existing provisions of §297.46 to proposed new §297.52 and the clarification and transfer of the existing provisions of §297.52 to proposed new §297.56 as described below.

The proposed repeal of §297.53, Conservation and Beneficial Use, and the proposed adoption of new §297.53, Habitat Mitigation, would allow for the clarification and transfer of the existing provisions of §297.53 to new §297.50 and for the clarification and transfer of existing provisions of §297.49 to proposed new §297.53. Proposed new §297.53, Habitat Mitigation, would reorganize the existing provisions under §297.49 to make it more readable. Additionally, the proposed change would clarify existing criteria used to determine the manner and extent of mitigation required for aquatic and wildlife habitat lost as a result of the approval of the application pursuant to Texas Water Code §11.152. Specifically, the commission is to consider any environmental net benefit to the habitat produced by the project in determining overall mitigation requirements.

The proposed repeal of §297.54, Waste, and the proposed adoption of new §297.54, Water Quality Effects, would provide for the transfer of the existing provisions of §297.54 to proposed new §297.48 and the clarification and transfer of the provisions of existing §297.50 to proposed new §297.54. Proposed new §297.54, Water Quality Effects, would clarify that the commission is also to assess the impacts to water quality

resulting from a proposed new or amended water right pursuant to Texas Water Code §11.147 and 11.150. The commission may also impose conditions on new or amended water rights to protect water quality standards established by commission rules contained in Chapter 307 of this title.

The proposed repeal of §297.55, Consideration of Water Conservation Plans, and the proposed adoption of new §297.55, Estuarine Considerations, would allow for the transfer of the provisions of existing §297.55 to proposed new §297.50 and the clarification and transfer of the provisions of existing §297.51 to proposed new §297.55. Proposed new §297.55, Estuarine Considerations, would specifically include all factors and information provided under Texas Water Code §11.147 relevant to determine water right conditions for the maintenance of beneficial inflows to bays and estuaries. Proposed amendments to this section also include the appropriation to Texas Parks and Wildlife Department for bay and estuary purposes of at least five percent of the storage of a reservoir built after September 1, 1985, with state financial aid as well as the emergency release of unappropriated or unallocated water in certain state-owned and controlled reservoirs for the protection of environmental water needs as provided by Texas Water Code §16.1331 and 16.195, respectively.

The proposed repeal of §297.56, Conserved Water, and the proposed adoption of new §297.56, Instream Uses, seeks to implement the changes to Texas Water Code §11.002 enacted by Senate Bill 1 (1997) which provides that conserved water constitutes a beneficial use of water and to allow the clarification and transfer of the provisions under existing §297.52 to proposed new §297.56. Proposed new §297.56, Instream Uses, would also clarify that the commission also assesses the impacts to existing instream uses resulting from proposed water right amendments as well as new water rights. The commission shall impose limitations in a new or amended water right necessary to maintain applicable water quality standards for the affected stream or as necessary to protect federally listed species or species of "high interest" as defined under the section or recreational uses.

The proposed adoption of new §297.58, Accounting; Multiple Uses of the Same Amount, would prevent the redundancy with proposed new §35.101 of this title (relating to Emergency Suspension of Permit Conditions) and seeks to implement new Texas Water Code §11.135(b)(5) enacted by SB 1 (1997) providing that if the use of the appropriated water is authorized for multiple purposes, the permit shall contain a special condition limiting the total amount of water that may actually be diverted for all the purposes to the amount of water appropriated. The proposed rule would also provide that if a water right has appropriations with different priority dates, the oldest priority water shall be credited against the water right first unless the water right expressly provides otherwise. The proposed adoption of new §297.59, Additional Limitations, would incorporate special permit conditions currently provided under §§297.43, 297.44 and 297.48. These latter rules are proposed for repeal so that they may be consolidated under the one general, miscellaneous provision.

FISCAL NOTE

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five-year period the sections as proposed are in effect, there will be fiscal implications as a result of administration or enforcement of the sections. The effect on state government will be an increase in cost of $135,000 per year associated with the amended procedural requirements for water rights permit applications and the Commission's requirements for review, consideration and evaluation of applications. The costs to units of local government would be the same costs as those for any applicant for a water right as that right and the application process are subject to and affected by these rules and the provisions of Senate Bill 1.

PUBLIC BENEFIT

Mr. Minick has also determined that, for 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 enhanced protection and more effective utilization of surface water resources, increased beneficial use of surface water resources and improvements in the process of application for and allocation of surface water rights. The rules as proposed may have some cost implications for those persons making application for surface water rights related to additional procedural requirements, however, these costs are not anticipated to be significantly greater under the proposed rules when compared to existing procedural requirements. In addition, these rules are prospective and apply to applications made after the effective date of Senate Bill 1 and do not impose any additional costs on existing water right holders who are not electing to amend or expand the scope of an existing right. The effects of these rules on small businesses are limited to a small business making application for surface water rights and will be similar to the effects on any applicant. Any costs imposed by these rules on a small business are not anticipated to be significantly greater than under existing requirements and will not affect any existing water right. Although any costs imposed under these rules may be relatively minor, generally, any fixed economic cost may be anticipated to have a proportionally greater effect on a small business than on a larger business, either in terms of operating costs, such as labor costs, or per dollar of revenue. There are no other economic costs anticipated to any person required to comply with the sections as proposed.

DRAFT REGULATORY IMPACT ANALYSIS

The commission has reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code §2001.0225 and has determined that the proposed rulemaking is not subject to this provision because it does not meet any of the four applicability requirements listed in the provision because the rule is specifically required by changes made to the Water Code by Senate Bill 1 (1997), and it does not otherwise exceed any express requirements of state law, and does not involve any delegation agreements or contracts. Some of these rules implement S.B. 1, and other rules implement existing commission policy which has been necessary to implement existing law.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Statement for these rules pursuant to Texas Government Code §2007.043. The following is a summary of that Assessment. The specific purpose of the rule is to implement the substantive requirements of Senate Bill 1 from the 1997 legislative session. Promulgation and enforcement of these rules will not burden private real property. Rather, they implement statutory requirements providing for the beneficial use of state water to which persons have been granted a usufructuary interest and over which the

state retains supervisory oversight in trust for the public for the protection of the public health, safety, and welfare. And, since these requirements are in the legislation of S.B. 1, any takings argument would be that the statute violates Chapter 2007 of the Government Code.

Any burden to real property, if it exists, would be exempt from takings claims because the rules are proposed pursuant to a real and substantial threat to human health and safety, significantly advance that human health and safety purpose and go no further than is necessary to achieve that purpose. Specifically, these requirements protect property right holders, other water right holders, and protect environmental uses of state water.

COASTAL MANAGEMENT PROGRAM (CMP)

The commission has reviewed the proposed rulemaking and found that the rule is neither identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Actions and Rules Subject to the Coastal Management Program, not will it affect any action or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the proposed rule is not subject to the CMP.

PUBLIC HEARINGS

A public comment hearing on this proposal and rules review will be held in Austin on October 29, 1998, beginning at 10:00 a.m. in the Texas Natural Resource Conservation Commission Office Complex, Building E, Room 201S, located at 12100 Park 35 Circle. The hearing is structured to receive oral or written comments by interested persons. Individuals may present oral statements when called upon in the order of registration. Open discussion will not occur during the hearing; however, a commission staff member will be available to discuss the proposed rules one half hour prior to the hearing and will answer questions before and after the hearing.

SUBMITTAL OF WRITTEN COMMENTS

Written comments on the proposed rules should reference Rule Log No. 97146-297-WT and may be submitted to Lutrecia Oshoko, Texas Natural Resource Conservation Commission, Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 (512) 239-4640; or faxed to (512) 239-5687. All comments sent by fax must be followed by an original, signed hard copy for the agency's records. Written comments must be received by 5:00 p.m., November 9, 1998.

Subchapter A. Definitions

30 TAC §297.1

STATUTORY AUTHORITY

The amended section is proposed under Texas Water Code (TWC), Chapter 5, Subchapter D, §§5.103, 5.105 and 5.120 which establishes the commission's authority to promulgate rules necessary for the exercise of its jurisdiction and to establish and approve all agency policy by rule. Other relevant sections of the TWC under which the commission takes this action include: §11.002, which contains definitions necessary for the commission's water rights permitting program; §11.023, which establishes the purposes for which state water may be appropriated; §11.024, which establishes the commission's public policy regarding the preference among recognized beneficial uses of state water; §11.027, which establishes the commission's policy regarding rights between appropriators; §11.042, which established the commission's jurisdiction over delivering water down stream bed and banks; §11.046, which establishes the commission's authority concerning the return of unused water; §11.085, which establishes the commission's authority concerning the interbasin transfer of state water; §11.121, which establishes the commission's jurisdiction regarding the permitting of state water; §11.122, which establishes the commission's authority over the amendment of water rights; §11.1271, which establishes the commission's authority regarding additional requirements for water conservation plans; §11.1272, which establishes the commission's authority regarding additional requirements for drought contingency plans for certain applicants and water right holders; §11.134, which establishes the commission's jurisdiction regarding actions on applications to use state water; §11.135, which establishes the commission's authority to issue permits for the use of state water; §11.138, which establishes the commission's authority to issue temporary permits; §11. 1381, which establishes the commission's authority to issue term permits; §11.139, which establishes the commission's authority to issue emergency permits; §11.140, which establishes the commission's authority to issue permits for storage for project development; §11.141, which establishes the commission's authority to set priority dates for appropriations of water; §11.142, which establishes the commission's jurisdiction over permit exemptions for the use of state water; §11.1421, which establishes the commission's jurisdiction regarding permit exemption for mariculture activities; §11.1422, which establishes the commission's jurisdiction regarding permit exemptions for historic cemeteries; §11.143, which establishes the commission's jurisdiction over domestic and livestock reservoirs and uses for other purposes; §11.145, which establishes the commission's jurisdiction over when construction must begin for a permit to appropriate water by direct diversion; §11.146, which establishes the commission's jurisdiction over forfeitures and cancellation of permits for inaction; §11.147, which establishes the commission's authority regarding effects of permits on bays and estuaries and instream uses; §11.1491, which establishes the commission's authority regarding the evaluation of bays and estuaries data prepared under TWC, §16.058; §11.150, which establishes the commission's jurisdiction over permit effects on water quality; §11.151, which establishes the commission's jurisdiction over permit effects on groundwater; §11.152, which establishes the commission's jurisdiction over permit effects on fish and wildlife habitats; §11.153, which establishes the commission's jurisdiction over pilot projects for storage of appropriated water in aquifers; §11.154, which establishes the commission's authority regarding permits to store appropriated water in aquifers; §11.155, which establishes the commission's authority regarding aquifer storage pilot project reports; §11.173, which establishes the commission's authority regarding the cancellation of permits in whole; §11.175, which establishes the commission's authority regarding notice requirements for permits being considered for cancellation; §11.176, which establishes the commission's authority regarding hearings for permits being considered for cancellation; §11. 177, which establishes the commission's regarding commission findings and action on a permit being considered for cancellation; §11.303, which establishes the commission's jurisdiction over recordation and limitation of certain water rights claims; §11.502, which establishes the commission's definition for wetlands within the State of Texas; §16.1331, which establishes the commission's jurisdiction over the reservation and appropriation of water for bays and estuaries and instream uses; and §16.195, which es-

tablishes the commission's authority regarding the emergency release of water.

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

§297.1. Definitions.

The following words and terms, when used in this chapter and in Chapter 295 of this title (relating to Water Rights Rules, Procedural), shall have the following meanings, unless the context clearly indicates otherwise:

(1) Appropriations - The process or series of operations by which an appropriative right is acquired. A completed appropriation thus results in an appropriative right; the water to which a completed appropriation in good standing relates is appropriated water.

(2) Appropriative right - The right to impound, divert, store, take or use a specific quantity of state water acquired by law.

(3) Aquifer Storage and Retrieval Project - A project with two phases that anticipates the use of a Class V aquifer storage well, as defined in §331.2 of this title (relating to Definitions), for injection into a geologic formation, group of formations, or part of a formation that is capable of underground storage of appropriated surface water for subsequent retrieval and beneficial use. Phase I of the project requires commission authorization by a temporary or term permit to determine feasibility for ultimate storage and retrieval for beneficial use. Phase II of the project requires commission authorization by permit or permit amendment after the commission has determined that Phase I of the project has been successful.

(4) Baseflow or normal flow - The portion of streamflow uninfluenced by recent rainfall or flood runoff and is comprised of springflow, seepage, discharge from artesian wells or other groundwater sources, and the delayed drainage of large lakes and swamps. (Accountable effluent discharges from municipal, industrial, irrigation, or other uses of ground or surface waters may be included at times.)

(5) Beneficial inflows - Freshwater inflows providing for a salinity, nutrient, and sediment loading regime adequate to maintain an ecologically sound environment in the receiving bay and estuary that is necessary for the maintenance of productivity of economically important and ecologically characteristic sport or commercial fish and shellfish species and estuarine life upon which such fish and shellfish are dependent.

(6) Beneficial use - Use of the amount of water which is economically necessary for a purpose authorized by law, when reasonable intelligence and reasonable diligence are used in applying the water to that purpose and shall include conserved water.

(7) Certificate of adjudication - An instrument evidencing a water right issued to each person adjudicated a water right in conformity with the provisions of the Texas Water Code, §11.323, or the final judgment and decree in State of Texas v. Hidalgo County Water Control and Improvement District No. 18, 443 S.W.2d 728 (Texas Civil Appeals - Corpus Christi 1969, writ ref. n.r.e.).

(8) Certified filing - A declaration of appropriation or affidavit which was filed with the State Board of Water Engineers under the provisions of the 33rd Legislature, 1913, General Laws, Chapter 171, §14, as amended.

(9) Claim - A sworn statement filed pursuant to Texas Water Code, §11.303.

(10) Commencement of construction - An actual, visible step beyond planning or land acquisition, which forms the beginning of the on-going (continuous) construction of a project in the manner specified in the approved plans and specifications, where required, for that project. The action must be performed in good faith with the bona fide intent to proceed with the construction.

[Commission - The Texas Water Commission.]

(11) Conservation - Those practices, techniques, and technologies that will reduce the consumption of water, reduce the loss or waste of water, improve the efficiency in the use of water, or increase the recycling and reuse of water so that a water supply is made available for future or alternative uses.

(12) Conserved water - That amount of water saved by a water right holder through practices, techniques, or technologies that would otherwise be irretrievably lost to all consumptive beneficial uses arising from the storage, transportation, distribution, or application of the water. Conserved water does not mean water made available simply through its non-use without the use of such practices, techniques or technologies.

(13) Dam - Any artificial structure, together with any appurtenant works, which impounds or stores water. All structures which are necessary to impound a single body of water shall be considered as one dam. A structure used only for diverting water from a watercourse by gravity is a diversion dam.

(14) Diffused surface water - Water on the surface of the land in places other than watercourses. Diffused water may flow vagrantly over broad areas coming to rest in natural depressions, playa lakes, bogs, or marshes. (An essential characteristic of diffused water is that its flow is short-lived.)

[Director or executive director - The executive director, or an acting executive director of the Texas Water Commission, or any authorized individual designated by the executive director to act in his place for the commission unless a direct authorization from the executive director or acting executive director is required by the Texas Water Code or these rules.]

(15) District - Any district or authority created by authority of the Texas Constitution, either Article III, §52, (b), (1) and (2), or Article XVI, §59.

(16) Domestic use - Use of water by an individual or a household to support domestic activity. Such use may include water for drinking, washing, or culinary purposes; for irrigation of lawns, or of a family garden and/or orchard [when the produce is not sold]; for watering of domestic animals; and for water recreation including aquatic and wildlife enjoyment [for which no consideration is given or received]. If the water is diverted, it must be diverted solely through the efforts of the user. Domestic use does not include water used to support activities for which consideration is given or received or for which the product of the activity is sold.

(17) Drought of record - The historic period of record for a watershed in which the lowest flows were known to have occurred based on naturalized streamflow.

(18) Firm yield - That amount of water, based upon a simulation utilizing historic available stream flows that the reservoir could have produced annually if it had been in place during the worst drought of record. In performing this simulation, the full exercise of upstream senior water rights is assumed as well as the passage of sufficient water to satisfy all downstream senior water rights valued at their full authorized amounts and conditions.

(19) Groundwater - Water under the surface of the ground other than underflow of a stream and underground streams, whatever may be the geologic structure in which it is standing or moving.

(20) Hydropower use - The use of water for hydroelectric and hydromechanical power and for other mechanical devices of like nature.

(21) Industrial use - The use of water in processes designed to convert materials of a lower order of value into forms having greater usability and commercial value, including commercial feedlot operations, commercial fish and shellfish production and the development of power by means other than hydroelectric.

(22) Instream use - The beneficial use of instream flows for such purposes including, but not limited to, navigation, recreation, hydropower, fisheries, game preserves, stock raising, park purposes, aesthetics, water quality protection, aquatic and riparian wildlife habitat, freshwater inflows for bays and estuaries, and any other in stream use recognized by law. An in stream use is a beneficial use of water. Water necessary to protect in stream uses for water quality, aquatic and riparian wildlife habitat, recreation, navigation, bays and estuaries, and other public purposes may be reserved from appropriation by the commission.

(23) Irrigation use - The use of water for the irrigation of crops, trees, and pasture land, including but not limited to golf courses and parks which do not receive water through a municipal distribution system.

(24) Irrigation water use efficiency - the percentage of that amount of irrigation water which is beneficially used by agriculture crops or other vegetation relative to the amount of water diverted from the source(s) of supply. Beneficial uses of water for irrigation purposes include but are not limited to evapotranspiration needs for vegetative maintenance and growth and salinity management and leaching requirements associated with irrigation.

(25) Livestock use - The use of water for the open-range watering of livestock, exotic livestock, game animals or fur-bearing animals [~~connected with farming, ranching, or dairy enterprises~~]. For purposes of this definition, the terms livestock and exotic livestock are to be used as defined in Section 142.001 of the Agriculture Code, and the terms game animals and fur-bearing animals are to be used as defined in Section 63.001 and 71.001, respectively, of the Parks and Wildlife Code.

(26) Mariculture - The propagation and rearing of aquatic species, including shrimp, other crustaceans, finfish, mollusks, and other similar creatures in a controlled environment using brackish or marine water.

(27) Mining use - The use of water for mining processes including hydraulic use, drilling, washing sand and gravel, and oil field repressuring.

(28) Mitigation - Actions taken to off-set anticipated adverse environmental impacts from a proposed project. Such actions and their sequence include:

(A) avoiding the impact altogether by not taking a certain action or parts of an action or pursuing a reasonably practicable alternative;

(B) minimizing impacts by limiting the degree or magnitude of the action and its implementation;

(C) rectifying the impact by repairing, rehabilitating, or restoring the affected environment;

(D) reducing or eliminating the impact over time by preservation and maintenance operations during the life of the project; and

(E) compensating for the impact by replacing or providing substitute resources or environments.

(29) Municipal per capita water use - The sum total of water diverted into a water supply system for residential, commercial, and public and institutional uses divided by actual population served.

(30) Municipal use - The use of potable water within a community or municipality and its environs for domestic, recreational, commercial, or industrial purposes or for the watering of golf courses, parks and parkways, or the use of reclaimed water in lieu of potable water for the preceding purposes or the application of municipal sewage effluent on land, pursuant to a Texas Water Code, Chapter 26, permit where:

(A) the application site is land owned or leased by the Chapter 26 permit holder; or

(B) the application site is within an area for which the commission has adopted a no-discharge rule.

(31) Navigable stream - By law, Natural Resources Code §21.001(3), any stream or streambed as long as it maintains from its mouth upstream an average width of 30 feet or more, at which point it becomes statutorily nonnavigable.

(32) One-hundred-year flood - The flood peak discharge of a stream, based upon statistical data, which would have a l% chance of occurring in any given year.

(33) Permit - The authorization by the commission to a person whose application for a permit has been granted. A permit also means any water right issued, amended, or otherwise administered by the commission unless the context clearly indicates that the water right being referenced is being limited to a certificate of adjudication, certified filing, or unadjudicated claim.

~~[Person - Any individual, corporation, organization, government, or governmental subdivision or agency, business trust, estate, trust, partnership and any other legal entity or association.]~~

(34) Pollution - The alteration of the physical, thermal, chemical, or biological quality of, or the contamination of any water in the state that renders the water harmful or detrimental to humans, animal life, vegetation, or property, or the public health, safety or welfare, or impairs the usefulness of the public enjoyment of the waters for any lawful or reasonable purpose.

(35) Priority - As between appropriators, the first in time is the first in right, Texas Water Code, §11.027, unless determined otherwise by an appropriate court or state law [~~, except as provided by the Texas Water Code, §11.028~~].

(36) Reclaimed water - Municipal or industrial wastewater or process water that is under the direct control of the treatment plant owner/operator, or irrigation tailwater that has been collected for reuse, and which has been treated to a quality suitable for the authorized [~~a~~] beneficial use.

(37) Recreational use - The use of water impounded in or diverted or released from a reservoir or watercourse for fishing, swimming, water skiing, boating, hunting, and other forms of water recreation, including non-domestic use of aquatic and wildlife resources, and aesthetic land enhancement of a subdivision, golf course or similar development.

(38) Register - The Texas Register.

(39) Reservoir system operations - The coordinated operation of more than one reservoir [~~reservoirs within a common watershed or river basin or owned or operated by the same entity~~] in order to optimize available water supplies.

(40) Return water or return flow - That portion of state water diverted from a water supply and beneficially used which is not consumed as a consequence of that use and returns to a watercourse. Return flow includes sewage effluent.

(41) Reuse - The authorized use for one or more beneficial purposes of use of water that remains unconsumed after the water is used for the original purpose of use and before that water is either disposed of or discharged or otherwise allowed to flow into a watercourse, lake or other body of state-owned water.

(42) Runoff - That portion of streamflow comprised of surface drainage or rainwater from land or other surfaces during or immediately following a rainfall.

(43) Secondary use - The reuse of state water for a purpose after the original, authorized use.

(44) Sewage or sewage effluent - Water-carried human or animal wastes from residences, buildings, industrial establishments, cities, towns, or other places, together with any groundwater infiltration and surface waters with which it may be commingled.

(45) Spreader dam - A levee-type embankment placed on alluvial fans or within a flood plain of a watercourse, common to land use practices, for the purpose of overland spreading of diffused waters and overbank flows.

(46) State water - The water of the ordinary flow, underflow, and tides of every flowing river, natural stream, and lake, and of every bay or arm of the Gulf of Mexico, and the stormwater, floodwater, and rainwater of every river, natural stream, and watercourse in the state. State water also includes water which is imported from any source outside the boundaries of the state for use in the state and which is transported through the beds and banks of any navigable stream within the state or by utilizing any facilities owned or operated by the state. Additionally, state water injected into the ground for an aquifer storage and recovery project remains state water. State water does not include percolating groundwater; nor does it include diffuse surface runoff, seepage, or springwater before it reaches a state watercourse.

(47) Stormwater or floodwater - Water flowing in a watercourse as the result of recent rainfall.

(48) Streamflow - The [~~total~~] water flowing within a watercourse.

(49) Surplus water - [~~For the purposes of Chapter 295 of this title (relating to Water Rights, Procedural) and this chapter, water~~] Water taken from any source in excess of the initial or continued beneficial use of the appropriator [~~needs and not used beneficially~~] for the purpose or purposes authorized by law. Water that is recirculated within a reservoir for cooling purposes shall not be considered to be surplus water.

(50) Unappropriated water - The amount of water remaining in a watercourse or other source of supply after taking into account complete satisfaction of all existing water rights valued at their full authorized amounts and conditions.

(51) Underflow of a stream - Water in sand, soil, and gravel below the bed of the watercourse, together with the water in the lateral extensions of the water-bearing material on each side of the surface channel, such that the surface flows are in contact with the subsurface flows, the latter flows being confined within a space reasonably defined and having a direction corresponding to that of the surface flow.

(52) Waste - The diversion of water if the water is not used for a beneficial purpose; the use of that amount of water in excess of that which is economically reasonable for an authorized purpose when reasonable intelligence and reasonable diligence are used in applying the water to that purpose. Waste may include, but not be limited to, the unreasonable loss of water through faulty design or negligent operation of a water delivery, distribution or application system or the diversion or use of water in any manner that causes or threatens to cause pollution of water. Waste does not include the beneficial use of water where the water may become polluted because of the nature of its use, such as domestic or residential use, but is subsequently treated in accordance with all applicable rules and standards prior to its discharge into or adjacent to water in the state so that it may be subsequently beneficially used.

(53) Water conservation plan - a strategy or combination of strategies for reducing the volume of water withdrawn from a water supply source, for preventing or reducing the loss or waste of water, for maintaining or improving the efficiency in the use of water, for increasing the recycling and reuse of water, and for preventing the pollution of water. A water conservation plan may be a separate planning document or may be contained within another water management document(s).

(54) Water [~~or water~~] 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.

(55) Watercourse - A definite channel of a stream in which water flows within a defined bed and banks, originating from a definite source or sources. (The water may flow continuously or intermittently, and if the latter with some degree of regularity, depending on the characteristics of the sources.)

(56) Water right - A right or any amendment thereto acquired under the laws of this state to impound, divert, store, convey, take or use state water.

(57) Watershed - A term used to designate the area drained by a stream and its tributaries, or the drainage area upstream from a specified point on a stream.

(58) Water supply - Any body of water, whether static or moving, either on or under the surface of the ground, available for beneficial use on a reasonably dependable basis.

(59) Wetland - An area (including a swamp, marsh, bog, prairie pothole, playa, or similar area) having a predominance of hydric soils that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support and that under normal circumstances supports the growth and regeneration of hydrophytic vegetation. The term "hydric soil" means soil that, in its undrained condition is saturated, flooded, or ponded long enough during a growing season to develop an anaerobic condition that supports the growth and regeneration of hydrophytic vegetation. The term "hydrophytic vegetation" means a plant growing in water or a substrate that is at least periodically deficient in oxygen during a growing season as a result of excessive water content. The term "wetland" does not include:

(A) irrigated acreage used as farmland;

(B) man-made wetlands of less than one acre; or

(C) man-made wetlands not constructed with wetland creation as a stated objective, including but not limited to impoundments made for the purpose of soil and water conservation which have been approved or requested by soil and water conservation districts. This definition does not apply to man-made wetlands described under this subparagraph constructed or created on or after August 28, 1989. If this definition conflicts with the federal definition in any manner, the federal definition prevails.

This 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 September 28, 1998.

TRD-9815172
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: November 8, 1998
For further information, please call: (512) 239-4640

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Subchapter B. Classes of Water Rights [~~Permit~~]

30 TAC §§297.11, 297.13-297.19

STATUTORY AUTHORITY These amendments and new section are proposed under Texas Water Code, §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.

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

§297.11. General Authorization to Divert, Store or Use State Water, [~~Permit~~ ~~Under~~] Texas Water Code, §11.121.

Except as provided under Texas Water Code §§11.142, 11.1421 and 11.1422 , no person may divert, store, impound, take or use water or begin construction of any work designed for the storage, taking, or diversion of water without first obtaining a water right. Such authorization may be with or without a term, on an annual or seasonal basis, or on a temporary or emergency basis as provided by this chapter. [~~A Texas Water Code, §11.121, permit authorizes the appropriation of state water on a repetitive year-round basis or for a term of years. If for a term of years, it does not vest the holder with any permanent water right and expires under its own terms.~~]

§297.13. Temporary Permit Under the Texas Water Code, §§11.138 and 11.153-11.155.

(a) A commissioner may authorize temporary permits under this section for beneficial purposes to the extent that they do not interfere with or adversely affect prior appropriations or vested rights on a stream from which water is to be diverted under such temporary water rights. A temporary permit is primarily designed for those persons who require state water for highway construction, oil or gas well drilling projects, evaluation of Phase I of an aquifer storage and retrieval project, hydro-static tests for pipelines, and other types of short duration projects. [~~A temporary permit, as its name implies, is short-lived in nature and designed for purposes of a temporary nature. A temporary permit may not be granted for a period of time exceeding three years. This permit does not vest in the holder any permanent right to the use of state water and expires in accordance with its terms. (It is primarily designed for those persons who require state water for highway construction, oil or gas well drilling projects, evaluation of Phase I of an aquifer storage and retrieval project and other types of short duration projects.) Temporary permits may be issued for beneficial purposes to the extent that they do not interfere with or adversely affect prior appropriations or vested rights on a stream. The period of time to use water authorized by a temporary permit which was initially granted for a period of less than three years may be extended, but in no event shall the entire period exceed three years nor shall an extension of time seek a change of diversion rate, diversion point, or additional water.~~]

(b) A temporary permit may not be granted for a period of time exceeding three years and shall be junior to all affected prior appropriations and vested rights on a stream. This permit does not vest in the holder any permanent right to the use of state water and expires in accordance with its terms and may be suspended upon notice by the executive director or watermaster, as applicable, in order to protect senior water rights. The permit may also have conditions for the protection of instream uses, water quality, aquatic and wildlife habitat, and freshwater inflows to bays and estuaries.

(c) The period of time to use water authorized by a temporary permit which was initially granted for a period of less than three years may be extended by the commissioner upon written request by the permittee, but in no event shall the entire period including the initial period as well as any extension exceed three years nor shall an extension of time seek a change of diversion rate, diversion point, or additional water.

(d) A temporary permit for the use of ten acre-feet or less for a period of one calendar year or less may be authorized without notice or hearing upon the thirtieth day after a registration and fee as provided by §295.132 of this title (relating to Filing, Recording, and Notice Fees) is filed with the TNRCC regional director or the watermaster, as applicable, unless the applicant is notified by the regional director or watermaster within the thirty day period that the registration is denied for failure to meet the requirements of this section. The registration must contain a sworn statement by the applicant containing the following minimum information:

(1) the name, mailing address and telephone number of the applicant;

(2) the diversion point and location of use as indicated on a USGS 7.5 minute map(s);

(3) the purpose of use, as authorized under Texas Water Code, §11.023;

(4) the proposed maximum diversion rate;

(5) amount of water to be diverted not to exceed ten acre-feet per year; and

(6) the period for which the water is to be used, not to exceed one year from the thirtieth (30th) day from the date the registration is filed with the regional director or watermaster, as applicable.

§297.14. Contractual Permit.

A contractual permit authorizes the use of state water where the source of supply is water lawfully authorized for the use of another person and a written agreement has been entered into with said person. The permit is for a period of time limited by the contract, and no permanent right is acquired by the holder. [~~Although some contractual permits are still in existence, they are no longer being~~

~~issued by the commission.~~] See Subchapter J of this chapter (relating to Water Supply Contracts and Amendments).

§297.15. Permit For Additional Uses from a Domestic and Livestock Reservoir, [~~Under the~~] Texas Water Code, §11.143.

A Texas Water Code, §11.143, permit authorizes anyone owning a dam or reservoir on his or her own property which impounds or contains not more than 200 acre-feet of water for domestic and livestock purposes, to take state water therefrom for any lawful purpose authorized in the permit. (A permit is not required to use water from such a reservoir for domestic and livestock use.) Reservoirs on navigable streams are not exempt under the Texas Water Code, §11.142. Application requirements and procedures are less detailed than those required for the Texas Water Code, §11.121, permits. It may be permanent in nature, seasonal, or granted for a term of years. The owner of an exempt impoundment under the Texas Water Code, §11.142, who subsequently desires to use state water therefrom for other than domestic and livestock purposes may elect to apply for a permit under the Texas Water Code, §11.143, or proceed under the provisions of the Texas Water Code, §11.124, et seq.

§297.16. Conveyance of Water Down Bed and Banks.

(a) A person who wishes to discharge treated wastewater derived from privately owned groundwater into a stream or other state watercourse and then subsequently divert and reuse such water must obtain prior authorization from the commission for the diversion and reuse of this water. The authorization may allow for the diversion and reuse by the discharger of existing discharges, less carriage losses, and shall be subject to special conditions if necessary to protect an existing water right that was granted based on the use or availability of these discharges. Special conditions may also be provided to help maintain instream uses and freshwater inflows to bays and estuaries. A person wishing to divert and reuse future increases of discharged wastewater derived from privately owned groundwater must obtain authorization to divert and reuse such increases in discharges before the increase occurs.

(b) Except as provided by Subchapter I of this chapter (relating to Conveying Stored Water), a person who wishes to convey and subsequently divert water in a watercourse or stream must obtain the prior approval of the commission through a bed and banks authorization. The authorization shall allow to be diverted only the amount of water put into a watercourse or stream, less carriage losses and subject to any special conditions that may address the impact of the discharge, conveyance, and diversion on existing water rights, instream uses, and freshwater inflows to bays and estuaries.

(c) Water discharged into a watercourse or stream under this section shall not cause a degradation of water quality to the extent that the stream segment's classification would be lowered. Authorizations under this section and water quality authorizations may be approved in a consolidated permit proceeding. Nothing in this chapter affects the obligation to obtain a permit under Chapter 26 of the Texas Water Code if received.

(d) Nothing in this section shall be construed to affect an existing project for which water rights and reuse authorizations have been granted by the commission before September 1, 1997.

§297.17. Emergency Authorization [~~Permit under the~~] (Texas Water Code, §11.139).

(a) An authorization under this section may be for an emergency appropriation of water or the emergency use of water appropriated to another. [~~An emergency permit authorizes the appropriation of state water for a period of not more than 30 days to alleviate conditions which threaten the public health, safety, and welfare.~~]

(b) An emergency authorization provides for the use of state water for an initial period of not more than 120 days if the commission finds emergency conditions to exist which present an imminent threat to the public health and safety and which override the necessity to comply with established statutory procedures and there are no feasible, practicable alternatives to the emergency authorization. Such emergency action may be renewed once for not longer than 60 days. Feasible, practicable alternatives include, but are not limited to, the implementation of water conservation and drought contingency measures or the purchase of water or water rights for reasonable price.

(c) If the commission finds the applicant's statements required under §295.91 of this title (relating to Application for Emergency Authorization) to be correct, the commission may grant the emergency authorization after notice has been provided in accordance with §295.156 of this title (relating to Notice for Emergency Water Use).

(d) If the commission grants an emergency authorization under this section without a hearing, the authorization shall fix a time and place for a hearing to be held before the commission. The hearing shall be held as soon after the emergency authorization is granted as practicable but not later than 20 days after the emergency authorization is granted.

(e) At the hearing, the commission shall affirm, modify, or set aside the emergency authorization. Any hearing on an emergency authorization shall be conducted in accordance with Chapter 2001, Government Code, and rules of the commission. Additionally, in the case of an emergency transfer of water, the commission shall also issue an order notifying water right holders from which the water is being transferred of the emergency transfer and directing them to limit the exercise of their water rights to the extent necessary to provide for the emergency transfer of water.

(f) If an imminent threat to the public health and safety exists which requires emergency action before the commission can take action as provided by subsections (c) - (e) of this section and there are no feasible alternatives, the executive director may grant an emergency authorization after notice to the governor. If the executive director issues an emergency authorization under this subsection, the commission shall hold a hearing as provided by subsections (d) and (e) of this section. The application requirements of §295.91 of this title (relating to Application for Emergency Authorization) must be satisfied before action is taken by the executive director on the request for emergency authorization.

(g) The commission or executive director may grant an emergency authorization under this section for the temporary transfer of all or part of a water right for other than domestic or municipal use to a retail or wholesale water supplier for public health and safety purposes.

(h) The commission or executive director may direct that the applicant will timely pay the amounts for which the applicant may be potentially liable under subsections (k) and (l) of this section and to the extent authorized by law will fully indemnify and hold harmless the state, the executive director, and the commission from any and all liability for the authorization sought. The commission or the executive director may also order bond or other surety in a form acceptable to the commission or the executive director as a condition for such emergency authorization.

(i) It shall be a condition of granting an emergency authorization under this section that the applicant develop and implement

water conservation and drought contingency plans meeting applicable requirements of Chapter 288 of this title (relating to Water Conservation and Drought Contingency Plans), unless the applicant has already done so.

(j) The commission or executive director will not grant an emergency authorization under this section which would cause a violation of a federal regulation.

(k) Before considering an emergency transfer of water, the commission or executive director shall first determine whether there is sufficient available unappropriated water to meet the emergency needs of the applicant. In transferring the amount of the water requested by the applicant, the executive director or the commission shall allocate the requested amount among two or more water rights for other than domestic or municipal use. In determining the water rights from which the water will be transferred, the commission shall be guided by the applicable approved regional water plan and statutory preferences of use provided by Texas Water Code, §11.024, and shall also look first to water rights that are unperfected or are not otherwise being used and for which the transfer would not jeopardize existing financial commitments made for the water to be transferred. Nothing in this section is intended to limit a person from demonstrating that the person is an affected person for the purposes of this section.

(l) If the transferred water was being used by the water right holder or the transfer jeopardized existing financial commitments made by the water right holder for the transferred water, the person granted an emergency transfer authorization under this section is liable to the affected water right holder and the holder's agent or lessee from whom the use is transferred for the fair market value of the water transferred as well as for any damages caused by the transfer of use. If within 60 days of the termination of the authorization, the parties do not agree on the amount due, or if full payment is not made, either party may file a complaint with the commission to determine the amount due. The commission shall use dispute resolution procedures provided under Chapter 40 of this title (relating to Alternative Dispute Resolution Procedure) for a complaint filed under this subsection.

(m) The commission designation of affected water right holders under this section does not preclude other water right holders from demonstrating impact by the transfer to them through commission proceedings or other appropriate legal means.

(n) After exhausting all administrative remedies under subsections (k) and (l) of this section, a water right holder from which the use is transferred may file suit to recover or determine the amount due in state district court in the county where the owner resides or has its headquarters. The prevailing party in a suit filed under this subsection is entitled to recover court costs and reasonable attorneys fees.

(o) An emergency authorization does not vest in the grantee any continuing right to the diversion, impoundment or use of water and shall expire and be canceled in accordance with its terms.

§297.18. Interbasin [~~Interwatershed~~] Transfers, Texas Water Code §11.085.

(a) No person may take or divert any state water from a river basin and transfer such water to any other river basin without first applying and receiving a water right or an amendment to a water right authorizing the transfer. For purposes of this section, a river basin is defined and designated by the Texas Water Development Board by rule pursuant to Texas Water Code, §16.051 [~~A permit is required to transfer state water from one named river basin or coastal basin to another~~]. See Texas Water Code, §11.085.

(b) An increase in the amount of water being transferred to the receiving basin under an existing water right constitutes a new interbasin transfer for purposes of this section.

(c) In addition to the other requirements of this chapter relating to the review of and action on an application for a new or amended water right, the commission shall weigh the effects of the proposed transfer by considering:

(1) the need for the water in the basin of origin and in the proposed receiving basin based on the period for which the water supply is requested, but not to exceed fifty years;

(2) factors identified in the applicable approved regional water plans which address the following:

(A) the availability of feasible and practicable alternative supplies in the receiving basin to the water proposed for transfer;

(B) the amount and purposes of use in the receiving basin for which the water is needed;

(C) proposed methods and efforts by the receiving basin to avoid waste and implement water conservation and drought contingency measures;

(D) proposed methods and efforts by the receiving basin to put the water proposed for transfer to beneficial use;

(E) the projected economic impact that is reasonably expected to occur in each basin as a result of the transfer; and

(F) the projected impacts of the proposed transfer that are reasonably expected to occur on existing water rights, instream uses, water quality, aquatic and riparian habitat, and bays and estuaries in each basin. If the water sought to be transferred is currently authorized to be used under an existing water right in the basin of origin, such impacts shall only be considered in relation to that portion of the water right proposed for transfer and shall be based on the historical uses of the water right for which amendment is sought.

(3) proposed mitigation or compensation, if any, to the basin of origin by the applicant;

(4) the continued need to use the water for the purposes authorized under the existing water right if an amendment to an existing water right is sought;

(5) comments received from county judges required to be provided notice of the application as provided by §295.17 of this title (relating to Emergency Authorization, Texas Water Code, §11.139); and

(6) information required to be submitted by the applicant.

(d) The commission may grant, in whole or in part, an application for an interbasin transfer only to the extent that:

(1) the detriments to the basin of origin during the proposed transfer period are less than the benefits to the receiving basin during the proposed transfer period as defined by the factors provided in subsection (c) of this section; and

(2) the applicant for the interbasin transfer has prepared drought contingency and water conservation plans meeting the requirements of Chapter 288 of this title (relating to Water Conservation Plans, Drought Contingency Plans, Guidelines and Requirements) and has implemented a water conservation plan that will result in the highest practicable levels of water conservation and efficiency achievable within the jurisdiction of the applicant.

(e) The commission may grant new or amended water rights under this section with or without specific terms or periods of use and with specific conditions under which a transfer of water may occur.

(f) If an interbasin transfer of water is based on a contractual sale of water, the new or amended water right authorizing the transfer shall contain a condition for a term or period not greater than the contract term, including any extension or renewal of the term.

(g) The parties to a contract for an interbasin transfer of water may include provisions for compensation and mitigation. If the party from the basin of origin is a governmental entity, each county judge located in whole or in part in the basin of origin may provide comment on the appropriate compensation and mitigation for the interbasin transfer.

(h) A new water right or amendment to an existing water right for a proposed interbasin transfer of water is junior in priority to water rights in the basin of origin granted before the time an administratively complete application for the transfer is filed with the chief clerk in accordance with §281.17 of this title (relating to Notice of Receipt of Application and Declaration of Administrative Completeness). If an amendment is made to the water right to effectuate an interbasin transfer of water for a term, the affected portion of the water right shall be junior to all existing water rights in the basin of origin only for the term of the amendment.

(i) A new water right or amendment to an existing water right for a transfer of water from a river basin in which two or more river authorities or water districts have written agreements or permits that provide for the coordinated operation of their respective reservoirs to maximize the amount of water for beneficial use within their respective water service areas shall be junior in priority to water rights granted in that basin before the time an administratively complete application for the interbasin transfer is filed with the chief clerk in accordance with §281.17 of this title. If an amendment is made to the water right to effectuate an interbasin transfer of water for a term, the affected portion of the water right shall be junior to all existing water rights in the basin of origin only for the term of the amendment.

(j) An appropriator of water for municipal purposes in the basin of origin may, at the appropriator's option, be a party in any hearings under this section.

(k) The provisions that are contained in subsections (b) - (j) of this section that are in addition to those generally required for an application for a new or amended water right do not apply to:

(1) a proposed transfer which in combination with any existing transfers totals less than 3,000 acre-feet of water per annum from the same water right;

(2) a request for an emergency transfer of water as provided by §297.17 of this title (relating to Emergency Authorizations; Texas Water Code, §11.139);

(3) a proposed transfer from a basin to its adjoining coastal basin; or

(4) a proposed interbasin transfer from the basin of origin to a county or municipality or the municipality's retail service area that is partially within the basin of origin for use in the part of the county or municipality and the municipality's retail service area not within the basin of origin. The further transfer and use of this water outside of such county or municipal retail service area other than back to the basin of origin shall not be exempt under this paragraph. For purposes of this subparagraph, a county, municipality, or municipality's retail service area refers to a geographic area.

§297.19. Term Permit under Texas Water Code, §§11.1381 and 11.153 - 11.155.

(a) The commission may issue a permit for a term of years for the use of unused appropriated water when there is insufficient unappropriated water in the source of supply to satisfy the application. [~~The commission may grant a permit for a limited term of years when it determines that inadequate water is available in the source of supply on a perpetual basis to satisfy an application but that adequate water is available on a limited basis due to the underutilization of existing water rights in the source of supply.~~]

(b) An application for a term permit under this section shall be denied if:

(1) the commission finds there is a substantial likelihood that the issuance of the term permit will jeopardize financial commitments made for water projects that have been built or that are being built to optimally develop the water resources in the area; or

(2) if the holder of an affected unused appropriation can demonstrate that the issuance of the permit would prohibit the holder from beneficially using the water right during the term of the permit. Such demonstration may be made by using water use projections contained in the state or regional water plans, economic indicators, population growth projections, or other reasonable projections based on accepted methods.

(c) A term permit is subordinate to any vested or senior appropriative water right.

(d) The commission may grant a permit under this section for an aquifer storage and retrieval project as defined in §297.1 of this title (relating to 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.

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Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
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30 TAC §297.16, §297.20

(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.)

STATUTORY AUTHORITY These repeals are proposed under Texas Water Code, §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.

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

§297.16. Conveyance of Water Down Bed and Banks.

§297.20. Permit for Diversion from Unsponsored or Storage-Limited Reservoirs.

This 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 C. Types of Uses

30 TAC §§297.21-297.29

(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.)

STATUTORY AUTHORITY These repeals are proposed under Texas Water Code, §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.

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

§297.21. Direct Diversion.
§297.22. Diversion from a Reservoir.
§297.23. On-Channel Reservoir.
§297.24. Off-Channel Reservoir.
§297.25. Storage in Another's Reservoir.
§297.26. Spreader Dams, Contouring, Terracing.
§297.27. Permit Exemption for Mariculture Activities.
§297.28. Permit Exemption for Drilling and Producing of Petroleum.
§297.29. Permit Exemption To Use State Water for Emergency 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.

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Subchapter C. [~~Types of~~] Uses Exempt from Permitting

30 TAC §§297.21-297.27

STATUTORY AUTHORITY These sections are proposed under Texas Water Code, §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.

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

§297.21. Domestic and Livestock Use.

(a) In accordance with Texas Water Code §11.303(l), a person may directly divert and use water from a stream or watercourse for domestic and livestock purposes on land owned by the person and that is adjacent to the stream without obtaining a permit. Manner of diversion may be by pumping or by gravity flow. Such riparian domestic and livestock use is a vested right that predates the prior appropriation system in Texas and is superior to appropriative rights. A vested riparian right is only to the normal flow in the stream, not to the storm water and floodwater

(b) In accordance with Texas Water Code §11.142, a person may construct on his own property a dam or reservoir with a normal storage of not more than 200 acre-feet of water for domestic and livestock purposes without obtaining a permit. The reservoir may be on-channel or on land riparian to the stream from which the water is diverted. For purposes of this subsection, normal storage means the conservation storage of the reservoir, i.e., the amount of water the reservoir may hold before water is released uncontrolled through a spillway or into a standpipe.

(c) A person's domestic and livestock use may not unreasonably interfere with another's domestic and livestock use. A dam and impoundment under subsection (b) of this section must allow sufficient inflows to pass-through downstream for the benefit of other domestic and livestock uses. Such dam may not be located on a navigable stream.

§297.22. Storage in Another's Reservoir.

A permit is required to appropriate state water for storage in another's lawful reservoir and to divert and use water therefrom. Consent of the reservoir owner must be obtained in writing and provided to the executive director. If the reservoir is a project of the Natural Resources Conservation Service, U. S. Department of Agriculture, consent must be obtained from the local, sponsoring Soil and Water Conservation District or any others having jurisdiction over the reservoir before a permit can be acquired.

§297.23. Spreader Dams, Contouring, Terracing.

No permit shall be required to construct or maintain any system of contouring, terracing, spreader dams or other such practices designed to make maximum beneficial use of diffused surface water and overbank flooding and to implement any generally accepted conservation practices necessary to prevent or reduce erosion on one's own property.

§297.24. Permit Exemption for Mariculture Activities.

(a) Without obtaining a permit from the commission, a person engaged in mariculture activities on land may take an appropriate amount of water from the Gulf of Mexico or adjacent bays and arms of the Gulf of Mexico for that purpose if:

(1) prior to the first taking of water, the person gives notice to the commission of the proposed appropriation including:

(A) the name and address of the person(s);

(B) the location of the project;

(C) the name of the water source;

(D) the maximum annual amount of water to be appropriated; and

(E) the month and year of the first appropriation.

(2) The person submits annual water use reports as required by §295.202 of this title (relating to Reports).

(b) After notice and hearing, if the commission determines that as a result of low freshwater inflows under subsection (a) of this section are interfering with natural productivity of bays and estuaries, the commission shall issue an order requiring interruption or reduction of the use of water under this section.

§297.25. Permit Exemption for Drilling and Producing of Petroleum.

Without obtaining a water use permit from the commission, a person engaged in drilling for petroleum, or producing petroleum, may take for those purposes not to exceed one acre-foot of water per 24-hour period from the Gulf of Mexico or from the adjacent bays and arms of the Gulf of Mexico. A person using water for such purposes is not required to file water use reports.

§297.26. Permit Exemption to Use State Water for Fire and Emergency Use.

Without obtaining a permit from the commission, county and rural community fire departments and other emergency service providers may divert and use state water from streams and reservoirs, including exempt domestic and livestock reservoirs for fire and emergency purposes. Emergency purposes under this rule include use of water to fight fires, manage chemical spills, and as needed to deal with emergency public welfare concerns. Emergency purposes does not include domestic, livestock or other purposes defined by §297.1 of this title (relating to Definitions). Rural emergency service providers (entities) may also establish "Dry Hydrant" installations in streams and reservoirs, including exempt reservoirs. Dry hydrant installations shall be exempt from permitting requirements provided that:

(1) Hydrant locations are identified and documented by the installing entities and the entities file these identification codes and location descriptions with the executive director within 120 days after completion of an installation;

(2) Facilities installed before the adoption of this rule are documented within six months after the rule is adopted;

(3) Ingress and egress authorizations are obtained from private property owners and/or public entities on whose property the installations are located;

(4) Installations conform to design and installation requirements and guidelines recommended by the USDA, Natural Resources Conservation Service; and

(5) Diversions from dry hydrant installations are reported to the executive director by the using entities within 60 days of use. Pump testing of facilities is not required to be reported.

(A) Local offices of the USDA, Natural Resources Conservation Service can provide technical assistance and recommendations for installation of dry hydrant facilities.

(B) Hydrant facilities which do not meet the above minimum requirements must be authorized by Water Code, §11.121 permits granted by the commission.

§297.27. Permit Exemptions for Use of State Water for Irrigation of Certain Historic Cemeteries and for Sedimentation Control Structures within Surface Coal Mining Operations.

(a) Permit Exemption for Use of State Water for Irrigation of Certain Historic Cemeteries.

(1) Without obtaining a water use permit from the commission, a tax-exempt non-profit corporation that owns a cemetery may divert from a stream not more than 200 acre-feet of water each year to irrigate the grounds of the cemetery if the cemetery:

(A) borders the stream; and

(B) is more than 100 years old.

(2) If the executive director, or a watermaster who has jurisdiction over the stream from which a cemetery diverts water under this section, determines that the diversion will harm a person downstream of the cemetery who acquired a water right before May 23, 1995, the executive director or the watermaster may order the cemetery to restrict the diversion to the extent and duration of the harm. The executive director may also request appropriate commission action.

(3) Any person dissatisfied with the action taken by the executive director or the watermaster pursuant to paragraph (2) of this subsection may appeal to the commission for relief.

(b) Permit Exemption to Use State Water for Sedimentation Control Purposes within a Surface Coal Mining Operation. Without obtaining a permit from the commission, a person may construct or maintain a reservoir for the sole purpose of sedimentation control as part of a surface coal mining operation under the Texas Surface Coal Mining and Reclamation Act (Art. 5920-11, Vernon's Texas Civil Statutes).

This 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 E. Issuance and Conditions of Water Permit or Certificate of Adjudication

30 TAC §§297.41-297.56

(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.)

STATUTORY AUTHORITY These repeals are proposed under Texas Water Code, §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.

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

§297.41. Subject to Prior and Superior Water Rights.
§297.42. Additional Limitations.
§297.43. Requiring Storage Facilities.
§297.44. Acceptance of Permit or Certificate of Adjudication.

§297.45. Return and Surplus Waters.

§297.46. Suppliers of Water for Irrigation.

§297.47. Time Limitations for Commencement or Completion of Construction.

§297.48. Low-Flow Outlets for Dams.

§297.49. Habitat Mitigation.

§297.50. Water Quality Effects.

§297.51. Estuarine Considerations.

§297.52. Instream Uses.

§297.53. Conservation and Beneficial Use.

§297.54. Waste.

§297.55. Consideration of Water Conservation Plans.

§297.56. Conserved Water.

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30 TAC §§297.41-297.56, 297.58, 297.59

STATUTORY AUTHORITY These new sections are proposed under Texas Water Code, §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.

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

§297.41. General Approval Criteria.

(a) Except as otherwise provided by this chapter, the commission shall grant an application for a water right only if:

(1) the application conforms to the requirements prescribed by Chapter 295 of this title (relating to Water Rights, Procedural) and is accompanied by the prescribed fee;

(2) unappropriated water is available in the source of supply;

(3) the proposed appropriation:

(A) is intended for a beneficial use;

(B) does not impair existing water rights or vested riparian rights;

(C) is not detrimental to the public welfare;

(D) considers the effects of any hydrological connection between surface water and groundwater; and

(E) addresses a water supply need in a manner that is consistent with the state water plan and an approved regional water plan for any area in which the proposed appropriation is located, unless the commission determines that new, changed, or unaccounted for conditions warrant waiver of this requirement; and

(4) the applicant has provided evidence that reasonable diligence will be used to avoid waste and achieve water conservation as defined by §297.1 of this title (relating to Definitions).

(b) Beginning September 1, 2001, the commission will not issue a water right for municipal purposes in a region that does not have an approved regional water plan in accordance with Texas Water Code §16.053(i) unless the commission determines that new, changed, or unaccounted for conditions warrant the waiver of this requirement.

§297.42. Water Availability.

(a) Except as provided by Texas Water Code, §11.1381, and §297.19 of this title (relating to Term Permit Under Texas Water Code §§11.1381 and 11.153, 11.155), an application for a new or increased appropriation will be denied unless there is a sufficient amount of unappropriated water available for a sufficient amount of the time to make the proposed project viable and ensure the beneficial use of water without waste.

(b) The availability of unappropriated water for a new water right may be limited as appropriate to protect instream uses, water quality, aquatic and wildlife habitat, and freshwater inflows to bays and estuaries as provided by Texas Water Code §§11.147, 11.150, and 11.152.

(c) For the approval of an application for a direct diversion from a stream without subsequent on-channel water storage facilities for irrigation use, approximately seventy-five percent (75%) of the water requested must be available approximately seventy-five percent (75%) of the time when distributed on a monthly basis and based upon the available historic stream flow record. Lower availability percentages may be acceptable if the applicant can demonstrate that a long-term, reliable, alternative source or sources of water of sufficient quantity and quality are economically available to the applicant to make the proposed project viable and ensure the beneficial use of state water without waste.

(d) Projects that are not required to be based upon the continuous availability of historic, normal stream flow include, but are not limited to: the artificial recharge of the Edwards Aquifer pursuant to Texas Water Code §11.023(c); conjunctive ground and surface water management projects such as aquifer storage and recovery projects; diversions or impoundments at times of above-normal stream flow (e.g., "scalping" operations) for seasonal or supplemental use; non-consumptive instream uses; or other similar type projects. The required availability of unappropriated water for these special type projects shall be determined on a case-by-case basis based upon whether the proposed project can be viable for the intended purposes and the water will be beneficially used without waste.

(e) For an application for an on-channel storage facility to be authorized for domestic or municipal water use, the proposed yield of the reservoir must be equal to its firm yield. The purpose of this limitation is to ensure a secure and dependable source of water supply for uses necessary to protect the public health, safety, and welfare (see also 30 TAC §290.41(b) requiring public water systems to have a "safe" yield capable of supplying the maximum daily demands during extended periods of peak usage and "critical hydrologic conditions"). Such reservoir may be authorized in excess of its firm yield when the implementation of a drought management plan or alternative sources of water supply such as groundwater, other reservoir systems, or other means are available to satisfy water needs during drought periods when the reservoir's normal supply capabilities would be exceeded.

(f) Except for an application for an emergency, temporary, seasonal, or term permit, or as provided by this section, the commission may require an applicant to provide storage sufficient to yield the requested annual diversion.

(g) In order to make the optimum beneficial use of available water, a water right may be granted based upon the availability of return flows or discharges. However, a water right granted upon return flows or discharges that may cease in the future because of new or increased direct reuse (i.e., the lawful reuse of water before it is returned or discharged into the stream) or that may cease for other lawful reasons will be granted with the express provision that the water available for the water right is dependent upon potentially interruptible return flows or discharges.

§297.43. Beneficial Uses.

(a) State water may be appropriated, stored, or diverted for the following purposes of use:

(1) domestic and municipal;

(2) industrial;

(3) irrigation;

(4) mining and the recovery of minerals;

(5) hydroelectric power;

(6) navigation;

(7) recreation and pleasure;

(8) stock raising;

(9) pubic parks;

(10) games preserves; and

(11) other beneficial purposes of use recognized by law.

(b) Unappropriated storm water and floodwater may be appropriated to recharge freshwater bearing sands and aquifers in the portion of the Edwards Aquifer located within Kinney, Uvalde, Medina, Bexar, Comal, and Hays counties if it can be established by expert testimony that an unreasonable loss of state water will not occur and that the water can be withdrawn at a later time for application to a beneficial use. The normal or ordinary flow of a stream or watercourse may never be appropriated, diverted, or used by a water right holder for this recharge purpose.

(c) The amount of water appropriated for each purpose listed under this section shall be specifically appropriated for that purpose. The commission may authorize the appropriation of a single amount or volume of water for more than one purpose of use. In the event that a single amount or volume of water is appropriated for more than one purpose of use, the total amount of water actually diverted for all of the authorized purposes may not exceed the total amount of water appropriated.

(d) State policy regarding preferences for certain type uses provided by Texas Water Code §11.024 does not alter the basic principle of priority based upon first in time established under Texas Water Code §11.027. Rather, such preferences will be used, in part, by the commission in determining which competing new uses will be granted water rights as provided by Texas Water Code §11.123.

(e) The water of any arm, inlet, or bay of the Gulf of Mexico may be changed from salt water to sweet or fresh water and held or stored by dams, dikes, or other structures and may be taken or diverted for any purpose authorized by this chapter. A permit to store or divers state water would be required under Texas Water Code §11.121.

§297.44. Subject to Prior and Superior Water Rights.

(a) Except as provided by subsection (b) of this section, a certificate of adjudication, permit, certified filing or unadjudicated claim to appropriate state water is subject to all prior and vested riparian rights of others using water on the stream or other source of supply.

(b) Except for water rights granted on the mainstem of the Rio Grande below the Amistad Reservoir (see, generally, Chapter 303 of this title relating to Operation of the Rio Grande) and certain uses exempt from permitting under Texas Water Code §§11.142, 11.1421 and 11.1422 (see, generally, Subchapter C of this Chapter), as between appropriators, first in time is first in right.

(c) The time priority of an appropriation of water dates from the filing of the related application with the commission. The application is considered filed after the application has been declared administratively complete in accordance with §281.17 of this title (relating to Notice of Receipt of Application and Declaration of Administrative Completeness) and filed with the chief clerk.

§297.45. "No Injury" Rule.

(a) An application for a new water right or an amended water right providing for an increase in the appropriative amount, a change in the point of diversion or return flow, an increase in the consumptive use of the water based upon a comparison between the full, legal exercise of the existing water right with the proposed amended right, an increase in the rate of diversion, or a change from the direct diversion of water to on-channel storage shall not be granted unless the commission determines that such new or amended water right shall not cause adverse impact to the uses of other appropriators. For the purposes of this section, adverse impact to an appropriator includes: the possibility of depriving an appropriator of the equivalent quantity or quality of water that was available before the change; increasing an appropriator's legal obligation to a senior water right holder; or otherwise substantially affecting the continuation of stream conditions as they existed at the time of the person's appropriation.

(b) Subject to meeting all other applicable requirements for an application to amend an existing water right, an amendment to a water right, except for the increase in the appropriative amount or diversion rate, shall be approved as provided by Texas Water Code §11.122(b) if the requested change will not cause such adverse impact on other water right holders or the environment of the stream of greater magnitude than under circumstances in which the water right being sought for amendment was fully exercised according to its terms and conditions as they existed prior to the amendment.

(c) If it is determined that a proposed amendment for a change in the diversion point may adversely affect existing water rights, the amendment, if approved, shall be subordinant only to such affected water rights and the amended water right shall otherwise retain its priority date.

(d) The burden of proving that no adverse impact to other water right holders or the environment will result from the approval of the application is on the applicant.

§297.46. Consideration of Public Welfare.

The commission may grant an application for a new or amended water right only if it finds that it would not be detrimental to the public welfare. In making this determination, the commission shall consider the social, economic and environmental impact statement submitted with an application if required by Chapter 261, Subchapters B and D, of this title (relating to Environmental, Social and Economic Impacts Statements).

§297.47. Impacts on Groundwater.

(a) In its review and action on an application for a new or amended water right, the commission shall consider the hydrological connection between surface and groundwater and the effects, if any, from the granting of the application on groundwater use, quality, or recharge. In its assessment, the commission shall consider whether the proposed diversion is from a stream that provides significant recharge to a "sole source" aquifer as designated under the federal Safe Drinking Water Act, an aquifer for which there is a certified groundwater management plan under Texas Water Code Chapter 36, or an aquifer that is located within all or part of a priority groundwater management area designated under Texas Water Code Chapter 35.

(b) If the commission determines that the granting of an application for a new or amended water right would significantly impair existing uses of groundwater, groundwater quality, or springflow upon which existing surface rights, water quality, aquatic and wildlife habitat, or bays and estuaries depend, the commission may deny the application or place restrictions and limitations in the water right necessary to prevent or mitigate such impacts.

(c) In determining the extent of the protection to be provided in a proposed new or amended water right to existing downstream water rights or environmental water needs, the commission may take into consideration instream losses because of recharge occurring in the bed of the stream downstream of the proposed diversion.

§297.48. Waste Prevention.

(a) The waste of water is prohibited and is an unlawful use of state water. A water right holder using state water shall use those measures necessary to ensure the beneficial use of water without waste in accordance with these rules and the terms and conditions of the water right and applicable law.

(b) The use of that amount of water in excess of that which is economically reasonable for an authorized purpose when reasonable intelligence and reasonable diligence are used in applying the water to that purpose constitutes waste. Waste also includes the diversion or use of water in any manner that causes or threatens to cause pollution of water in violation of applicable rules and standards.

(c) A person who permits an unreasonable loss of water through faulty design or negligent operation of any waterworks commits waste, and the commission may declare the waste to be a public nuisance. Faulty design or negligent operation shall include, but not be limited to, the design or operation of waterworks not in accordance with applicable state or federal law, commission rules, plumbing fixture codes or ordinances, or other applicable law or, in the absence of such law, not in accordance with commonly accepted industry standards, engineering principles, and best management practices.

(d) The commission or a person injured by the waste of water as provided by subsection (c) of this section may seek civil action in the appropriate state district court to have the nuisance abated and the commission may direct the person supplying the water to close the gates of the person wasting the water and keep them closed until the commission determines that the unlawful use of water is corrected.

(e) The right to appropriate that amount of water not beneficially used cannot be perfected and is subject to limitation, cancellation, or forfeiture as provided by law.

§297.49. Return and Surplus Waters.

(a) A right to take and use water is limited to the extent and purposes authorized in the water right. Except as specifically provided otherwise in the water right, state water appropriated under a water right may be beneficially used and reused by the water right holder in accordance with the water right prior to its release into a watercourse or stream.Once water has been diverted under a water right and then returned to a watercourse or stream, however, it is considered surplus water and, therefore, subject to maintaining instream uses, beneficial inflows to bays and estuaries, or appropriation by others unless expressly provided otherwise in the water right.

(b) A person who takes or diverts water from a watercourse or stream shall conduct surplus water back to the watercourse or stream from which it was taken if the water can be returned by gravity flow and it is reasonably practicable to do so. In addition, the commission may include in the water right a specific amount or percentage of water diverted to be returned and the return point on the stream or watercourse, if necessary to protect senior downstream water rights or to provide flows for instream uses and bays and estuaries.

(c) Return waters must meet water quality standards provided by Chapter 307 of this title (relating to Texas Surface Water Quality Standards) prior to their discharge into water in the state. Additionally, such discharge shall not impair an existing or potential beneficial use of groundwater as to its water quality. Nothing in this chapter affects the obligation to obtain a permit under Texas Water Code Chapter 26, if required.

§297.50. Consideration of Water Conservation Plans.

(a) Information in the water conservation plan provided by a water right applicant shall be considered by the commission in determining whether any practicable alternative to the requested appropriation exists, whether the requested amount of appropriation as measured at the point of diversion is reasonable and necessary for the proposed use, the term and other conditions of the water right, and to ensure that reasonable diligence will be used to avoid waste and achieve water conservation. Based upon its review, the commission shall determine whether to deny or grant, in whole or in part, the requested appropriation.

(b) A water conservation plan submitted with an application requesting an appropriation for new or additional state water must include data and information which:

(1) supports the applicant's proposed use of water with consideration of the water conservation goals of the water conservation plan;

(2) evaluates conservation as an alternative to the proposed appropriation; and

(3) evaluates other feasible alternatives to new water development, including but not limited to, waste prevention, recycling and reuse, water transfer and marketing, reservoir system operations, and optimum water management practices and procedures. It shall be the burden of proof of the applicant to demonstrate that no feasible alternative to the proposed appropriation exists and that the requested amount of appropriation is necessary and reasonable for the proposed use.

(c) Any water conservation measures prescribed by the commission shall be implemented as required by the terms and conditions of a commission order or water right, or by rule. The holder of a water right for which a conservation or drought contingency plan is required to be submitted in accordance with §288.30 or §295.95 of this title (relating to Required Plans and Water Conservation and Drought Contingency Plans, respectively) shall install and maintain a measuring device at such point or points as may be determined by the executive director or water master, as applicable, to be necessary for the proper and efficient administration of water rights. All such measuring devices shall be subject to approval of the executive director or watermaster, as applicable. The measuring devices shall measure within 5.0% accuracy unless

otherwise approved by the executive director or watermaster. The diverter shall provide reasonable access to such measuring device.

§297.51. Time Limitations for Commencement or Completion of Construction.

When a water right is issued for appropriation by direct diversion or construction, modification or repair of a storage reservoir, or any work in which a time limitation is set by the water right for commencement or completion of construction, a water right holder shall commence and complete actual construction of the proposed facilities within the time fixed by the commission. Failure to commence or complete construction within the time specified in the permit or extension granted by the commission shall cause the water right holder to forfeit all rights to the permit, subject to notice and hearing. See §295.72 of this title (relating to Applications for Extension of Time) and §295.202 of this title (relating to Reports).

§297.52. Suppliers of Water for Irrigation.

Persons supplying state water for irrigation purposes shall charge the purchaser on a volumetric basis. The commission may direct suppliers of state water to implement appropriate procedures for determining the volume of water delivered.

§297.53. Habitat Mitigation.

(a) In its consideration of an application for a new or amended water right to store, take, or divert state water in excess of 5,000 acre-feet per year, the commission shall assess the effects, if any, of the granting of the application on fish and wildlife habitats. The commission shall also consider whether the proposed project would affect an area of unique ecological value as designated by the applicable approved regional water plan in accordance with Texas Water Code §16.051(e).

(b) For an application for a new or amended water right to store, take, or divert state water, the commission may require the applicant to take reasonable actions to mitigate adverse impacts, if any, on fish and wildlife habitat.

(c) An assessment under this section shall include the project site as well as potentially impacted habitat upstream, adjoining, and downstream of the project site.

(d) In determining whether to require an applicant to mitigate adverse impacts on a habitat, the commission may consider any net environmental benefit to the habitat produced by the project. The commission shall offset any mitigation it requires by any mitigation required by the United States Fish and Wildlife Service pursuant to 33 Code of Federal Regulations §§320-330.

(e) The goal of the mitigation of wetlands is to achieve "no net loss" of wetland functions and values. In addition to aquatic and wildlife habitat, wetland functions also include, but are not limited to, water quality protection through sediment catchment and filtration, storage plans for flood control, erosion control, groundwater recharge, and other uses.

(f) In case of unavoidable wetlands loss, impacts to wetland habitat are mitigated in accordance with the following guidelines:

(1) Wetlands shall be classified using the USFWS's "Classification of Wetlands and Deepwater Habitats of the United States" (USFWS 1979). Specific functions and values for wetlands habitats shall be determined on an individual case basis using the most technically appropriate habitat evaluation methodology (e.g., USFWS's Habitat Evaluation Procedures and Wetlands Evaluation Techniques; TPWD's Wildlife Habitat Appraisal Procedure).

(2) Mitigation for wetland habitat loss shall seek first to be an on-site and in-kind replacement of lost wetland function and value whenever possible. Habitat mitigation shall be considered only after the complete sequencing (avoidance, minimization or modification, and compensation/replacement) process has been performed in accordance with 40 CFR §230.10 et seq.

(3) Habitats shall be evaluated using the most appropriate methodology (e.g., USFWS's Habitat Evaluation Procedures and Wetlands Evaluation Techniques; TPWD's Wildlife Habitat Appraisal Procedure). Total habitat value for each habitat type shall be determined on an individual case basis for the area impacted by a project.

(4) Mitigation for terrestrial and riparian habitat loss shall be based upon on-site and in-kind replacement of lost habitat whenever possible. Habitat mitigation shall be considered only after it has been established that habitat impacts are unavoidable and there is suitable mitigation habitat available for complete compensation for the lost habitat. Where on-site, in-kind replacement of habitat is not possible, mitigation shall be limited to the same watershed and ecoregion.

(5) Replacement of affected terrestrial and riparian habitats shall be of equal or greater value with respect to affected habitat. Mitigation will not be limited to a total habitat replacement, but will consider the threatened or endangered nature of the habitat(s) being lost or degraded and the limiting effects of surrounding land use on success compensation. Buffer zones around the mitigation area may be required to fully compensate for the total habitat loss.

(6) Water right permit reviews shall examine both direct and indirect impacts to terrestrial and riparian habitats, as well as long and short-term effects to the watershed or ecoregion that may result from the permitted activity.

(7) Habitat mitigation plans and agreements shall be ensured through binding legal contracts, permit provisions, and detailed management plans and shall include goals and schedules of completion of those goals. The mitigation habitat shall be managed in perpetuity by a party approved by the commission to maintain the habitat value lost because of project impacts.

(g) The assessment of and conditions upon a proposed amendment to a water right under this section shall be limited by §297.45(b) of this title (relating to "No Injury" Rule) as provided by Texas Water Code §11.122(b).

§297.54. Water Quality Effects.

(a) In its consideration of an application for a new or amended water right to store, take or divert water, the commission shall assess the effects, if any, of the granting of the application on water quality of the stream or river to which the application applies, as well as associated bays and estuaries. Assessment of water quality impacts shall consider the maintenance of State of Texas Surface Water Quality Standards provided by Chapter 307 of this title (relating to Texas Surface Water Quality Standards) and the need for all existing instream flows to be passed up to that amount necessary to maintain the water quality standards for the affected stream. Such flows may also be used to protect uses of existing, downstream water rights by providing water of a usable quality and to provide, in part, for the protection of vested riparian water rights and domestic and livestock uses.

(b) The assessment of any conditions upon a proposed amendment to a water right under this section shall be limited by §297.45(b) of this title (relating to "No Injury" Rule) as provided by Texas Water Code §11.122(b).

§297.55. Estuarine Considerations.

(a) In its consideration of an application for a new or amended water right to store, take, or divert water, the commission shall assess the effects, if any, of the granting of the application on the bays and estuaries of Texas. For permits issued within an area that is 200 river miles of the coast, to commence from the mouth of the river thence inland, the commission shall include in the water right, to the extent practicable when considering all public interests, those conditions considered necessary to maintain beneficial inflows to any affected bay and estuary system.

(b) For purposes of making a determination under this section, the commission shall consider:

(1) the need for periodic freshwater inflows to supply nutrients, sediments, and modify salinity to preserve the sound environment of the bay and estuary, using any available information, including studies and plans specified in Texas Water Code §11.1491 and other studies considered by the commission to be reliable; together with existing circumstances, natural or otherwise, that may prevent the conditions imposed from producing benefits;

(2) the ecology and productivity of the affected bay and estuary system;

(3) the expected effects on the public welfare of not including in the water right some or all of the conditions considered necessary to maintain the beneficial inflows to the affected bay or estuary system;

(4) the quantity of water requested and the proposed use of the water by the applicant, as well as the needs of those who would be served by the applicant;

(5) the expected effects on the public welfare of the failure to issue all or part of the water right being considered; and

(6) the declarations as to preferences for competing uses of water as found in Texas Water Code §§11.023 and 11.024 as well as the policy statement in Texas Water Code §11.003.

(c) At least five percent (5%) of the annual firm yield of water in any reservoir or associated works on which construction began on or after September 1, 1985, and which is constructed with state financial participation and is located within 200 river miles from the coast, to commence from the mouth of the river thence inland, is appropriated to the Texas Parks and Wildlife Department for use to make releases to bays and estuaries and instream uses. This five percent figure may not be indicative of the full instream needs or the freshwater inflow needs of the affected bay or estuary system and the commission may impose additional water right conditions to provide a greater amount of water for this purpose, if necessary and appropriate after considering all the factors provided by subsection (b) of this section.

(d) Pursuant to Texas Water Code, §16.195, unallocated water and other water of the state permitted to the Texas Water Development Board and stored in any facility acquired by and under the control of the Texas Water Development Board may be released without charge to relieve any emergency condition arising from drought, severe water shortage, or other calamity including, but not limited to, insufficient flows for existing instream uses and beneficial inflows for the maintenance of bays and estuaries, if the commission first determines the existence of the emergency and requests the Texas Water Development Board to release the water. Such release may not impair a contractual obligation of the Texas Water Development Board. The Texas Parks and Wildlife Department may also petition the commission to request such release for the maintenance of existing instream uses and beneficial inflows to bays and estuaries.

(e) The assessment of and conditions upon a proposed amendment to a water right under subsections (a) and (b) of this section shall be limited by §297.45(b) of this title (relating to "No Injury" Rule) as provided by Texas Water Code §11.122(b).

§297.56. Instream Uses.

(a) In its consideration of an application for a new or amended water right to store, take, or divert water, the commission shall consider the effects, if any, of the granting of the application on existing instream uses of the stream or river to which the application applies. In its determination of flows necessary to maintain recreational and navigational flows, the commission shall consider, but not be limited to, the designation of major waterways by the Texas Parks and Wildlife Department in its publication entitled "An Analysis of Texas Waterways" (1979), and as revised, and the definition of "navigable" stream provided by Texas Natural Resources Code §21.001(3). Additionally, flows necessary to protect a federally listed species under the Endangered Species Act or other species that are considered to be of "high interest" (self-sustaining wild populations that are endemic to the affected stream or have significant scientific or commercial value) shall also be considered.

(b) The assessment of and conditions upon a proposed amendment to a water right under this section shall be limited by §297.45(b) of this title (relating to "No Injury" Rule) as provided by Texas Water Code §11.122(b).

§297.58. Accounting; Multiple Uses for the Same Amount.

(a) If the use of the appropriated water is authorized for multiple purposes, the water right shall contain a special condition limiting the total amount of water that may be actually diverted for all the purposes to the amount of the water appropriated.

(b) If a water right has appropriations with different priority dates, the oldest priority water shall be credited against the water first used unless the water right expressly provides otherwise.

§297.59. Additional Limitations.

(a) The commission will incorporate into every permit or certificate of adjudication any condition, restriction, limitation or provision reasonably necessary for the enforcement and administration of the water laws of the state and the rules of the commission.

(b) All dams proposed for authorization by the commission shall provide for outlets of size and location sufficient to pass such flows of water as the commission finds necessary to satisfy the rights of downstream domestic and livestock users, the senior and superior rights of other authorized users, instream flow requirements, and estuarine inflow requirements.

(c) Acceptance of the water right by the water rights holder will be an acknowledgment and agreement that the holder will comply with all the terms, provisions, conditions, limitations and restrictions embodied in such water right. The exercise of rights under a permit authorizing the inundation or installation of a structure upon the land of another will be conditioned upon the continued effectiveness of an easement or agreement between the parties.

This 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 September 28, 1998.

TRD-9815178
Margaret Hoffman
Director, Environmental Law Division

Texas Natural Resource Conservation Commission
Earliest possible date of adoption: November 8, 1998
For further information, please call: (512) 239-4640

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Subchapter G. Cancellation and Revocation of Water Rights

30 TAC §§297.71-297.74

(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.)

STATUTORY AUTHORITY These repeals are proposed under Texas Water Code, §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.

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

§297.71. Cancellation With Consent.
§297.72. Cancellation Under Texas Water Code, §11.146.
§297.73. Cancellation Under Texas Water Code, §§11.171-11.186.
§297.74. Revocation of Authorization To Divert from a Locally Unsponsored or Storage-Limited Reservoir.

This 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 September 28, 1998.

TRD-9815179
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: November 8, 1998
For further information, please call: (512) 239-4640

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Subchapter G. Cancellation, [~~and~~] Revocation, Abandonment, and Forfeiture of Water Rights

30 TAC §§297.71-297.75

STATUTORY AUTHORITY These sections are proposed under Texas Water Code, §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.

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

§297.71. Cancellation in Whole or in Part.

(a) Except as provided by subsection (b) of this section, if all or part of a water right has not been put to beneficial use during a consecutive ten year period, such water right is subject to cancellation in whole or in part as provided by this subchapter.

(b) A water right is not subject to cancellation as provided by subsection (a) of this section to the extent that such nonuse is the result of:

(1) the water right holder's participation in the Conservation Reserve Program authorized by the Food Security Act, Pub. L. No. 99-198, Secs. 1231-1236, 99 Stat. 1354, 1509-1514 (1985) or a similar governmental program;

(2) regional water planning in accordance with the applicable regional water plan approved pursuant to Texas Water Code §16.053;

(3) the deposit of the water right in the Water Trust for the maintenance of environmental flows needs in accordance with Texas Water Code §15.7031; or

(4) the deposit of the water right in the Texas Water Bank and the water right is protected from cancellation in accordance with Texas Water Code §15.703.

§297.72. Notice and Hearing.

(a) When commission records show that all or part of a water right has not been used during the past ten years, the executive director may file a petition with the commission for a hearing before the commission to show cause why the water right should not be canceled. Except as specifically provided otherwise by this Subchapter, such proceedings shall be held in accordance with the general hearing provisions of Chapter 50 of this title (relating to Action on Applications) of the commission rules.

(b) At least 45 days before the date of the hearing, the commission shall send notice of the petition and hearing to the affected water right holder. Notice shall be sent by registered mail, return receipt requested, to the last address shown by the records of the commission. The commission shall also send notice by regular mail to all water right holders in the same watershed.

(c) The commission shall also have the notice of the hearing published once a week for two consecutive weeks, at least thirty (30) days before the date of the hearing, in a newspaper published in each county in which the diversion of water from the source of supply was authorized or proposed to be used, as shown by the records of the commission. If in any such county no newspaper is published, then the notice may be published in a newspaper having general circulation in the county.

(d) Except as provided by subsection (e) of this section, the commission shall hold a hearing and shall give the affected water right holder and other interested persons an opportunity to be heard and to present evidence on any matter pertinent to the questions at issue.

(e) A hearing on the cancellation of the water right is unnecessary if the right to such hearing is expressly waived by the affected water right holder.

(f) A water right for a term does not vest in the water right holder any right to the diversion, impoundment, storage, taking or use of water for longer than the term of the water right and shall expire and be canceled in accordance with its terms without further need for notice or hearing.

§297.73. Commission Finding; Action.

(a) At the conclusion of the hearing, the commission shall cancel the water right in whole or in part to the extent that it finds that:

(1) the water or any portion of the water under the water right has not been put to an authorized beneficial use during the ten-year period; and

(2) the water right holder has not used reasonable diligence in applying the water or the unused portion of the water to an

authorized beneficial use or is otherwise unjustified in the nonuse as provided by subsection (b) of this section.

(b) In determining what constitutes due diligence or a justified nonuse as provided in subsection (a)(2) of this section, the commission shall give consideration to:

(1) whether sufficient water is available in the source of supply to meet all or part of the appropriation during the ten-year period of nonuse;

(2) whether the nonuse is justified by the water right holder's participation in the federal Conservation Reserve Program or a similar governmental program as provided by §297.71 of this title (relating to Cancellation in While or In Part);

(3) whether the water right was obtained to meet demonstrated long-term public water supply or electric generation needs as evidenced by a water management plan developed by the water right holder in accordance with Chapter 288, Subchapter B of this title (relating to Drought Contingency Plans), and consistent with projections of future water needs contained in the state water plan;

(4) whether the water right was obtained as a result of the construction of a reservoir funded, in whole or in part, by the water right holder as a part of the water right holder's long-term water planning;

(5) whether the existing or proposed authorized purpose and place of use are consistent with an approved regional water plan as provided by Texas Water Code §16.053;

(6) whether the water right has been deposited into the Texas Water Bank or Water Trust as provided by Texas Water Code §§15.7031 and 15.704 or whether it can be shown by the water right holder that the water right or water is currently being made available for purchase through private marketing efforts at fair market value and under reasonable terms and conditions; or

(7) whether the water right has been reserved for instream uses or beneficial inflows for bays and estuaries.

(c) Regardless of the other provisions of this subchapter, no portion of a water right held by a city, town, village, or municipal water district authorizing the use of water for municipal purposes shall be canceled if the water has been put to beneficial use under the water right at any time during the ten-year period immediately preceding the initiation of cancellation proceedings.

(d) Failure to initiate cancellation proceedings under this subchapter does not validate or improve the status of any water right in whole or in part.

(e) Once cancellation proceedings have been initiated against a particular water right and a hearing has been held, further cancellation proceedings shall not be initiated against the same water right within the five-year period immediately following the date of the hearing.

§297.74. Forfeiture and Revocation of Water Right.

(a) A water right may be forfeited for failure to timely commence or complete construction of the diversion facilities as provided by §295.72 of this title (relating to Applications for Extension of Time).

(b) A temporary or term permit may be revoked or suspended upon written or verbal notice by the executive director or watermaster, as applicable, without hearing if necessary to protect senior and vested water rights or instream uses and freshwater inflow needs for bays and estuaries. Notice of such revocation shall also be provided to the affected water right holder by registered mail, return receipt requested.

(c) Authorization to divert water from a reservoir constructed by the federal government for which no local sponsor has been designated nor permit issued or a reservoir permitted for storage solely for the purpose of optimum development of the project may be revoked when compliance with the conditions contained in the letter authorizing the diversion of water is not occurring or, in the case of authorized diversions for domestic use, water becomes reasonably available through a water supply system. Revocation shall be made by a letter setting forth the basis of the revocation signed by a commissioner. Upon receipt of the letter, the user shall cease diverting water and remove diversion facilities.

§297.75. Abandonment of Water Right.

(a) A water right shall be determined to have been abandoned if the water right holder:

(1) has the intent to knowingly relinquish the water right; and

(2) the water right has not been used for a consecutive three-year period or more.

(b) The requisite intent for abandonment can be shown by express statements of the water right holder.

(c) Petition, notice and hearing under this section shall be provided in the same manner as the cancellation of a water right provided by §297.72 of this title (relating to Notice and Hearing).

(d) If the commission's records reflect that the amount of water authorized to be appropriated under a water right is not being used, either in whole or in part, the executive director may send an appropriate form to the holder of the water right by which the holder or the holder's authorized agent may request cancellation of the unused portion of the right or the entire right.

This 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 September 28, 1998.

TRD-9815180
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: November 8, 1998
For further information, please call: (512) 239-4640

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

Part I. General Land Office

Chapter 9. Exploration and Leasing of State Oil and Gas

31 TAC §§9.1–9.3, 9.5, 9.6, 9.8, 9.9

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

The General Land Office (GLO), with the approval of the School Land Board (SLB), proposes the repeal of §9.1, relating to Definitions; §9.2, relating to Leasing Guide; §9.3, relating to General Provisions; §9.5, relating to Leasing State Property for Oil and Gas; §9.6, relating to Maintaining the Lease; §9.8, relating to Discontinuing the Leasehold Relationship; and §9.9, relating to Pooling and Utilization of State Leases.

The repealed sections are being concurrently proposed as new rules covering the same subject matter. The proposed new rules contain both organizational and substantive changes. The organizational changes make these rules easier to use and to amend. The substantive changes make these rules conform to current statutes, reflect current agency practice and policies and enhance clarity or readability.

Spencer Reid, General Counsel, has determined that for the first five-year period the repeals are in effect there will be no fiscal implications for state or local government, because the repealed rules will be replaced by new proposed rules covering the same subject matter.

Mr. Reid also has determined that for the first five-year period the repeals are in effect the public will benefit from improvements found in the new proposed rules covering the same subject matter and the repeal itself will have no fiscal implications for individuals or small businesses.

Comments on the proposed repeal may be submitted to Ms. Carol Milner, Texas Register Liaison, General Land Office, 1700 North Congress, Room 626, Austin, Texas 78701-1495. The deadline for comments is 5:00 p.m. November 9, 1998.

The repeals are proposed under Texas Natural Resources Code, §31.051 which gives the commissioner rulemaking authority and Texas Natural Resources Code, §32.062 which gives the SLB rulemaking authority.

Because this proposed repeal is non-substantive, no statutes are affected.

§9.1. Definitions.

§9.2. Leasing Guide.

§9.3. General Provisions.

§ 9.5. Leasing State Property for Oil and Gas.

§ 9.6. Maintaining the Lease.

§ 9.8. Discontinuing the Leasehold Relationship.

§9.9. Pooling and Utilization of State Leases.

This 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 September 28, 1998.

TRD-9815197

Garry Mauro

Commissioner General Land Office

General Land Office

Earliest possible date of adoption: November 8, 1998

For further information, please call: (512) 305–9129

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Subchapter A. General Provisions

31 TAC §9.1, §9.2

The General Land Office (GLO), with the approval of the School Land Board (SLB), proposes new §9.1, relating to Definitions, §9.2, relating to Scope and Applicability; §9.21, relating to Leasing Guide, §9.22, relating to Leasing Procedures; §9.31, relating to General Provisions, §9.32, relating to General Responsibilities of State Lessees, §9.33, relating to Delay Rental Payments, §9.34, relating to Drilling and Reworking Operations, §9.35, relating to Producing the State Lease, §9.36, relating to Shut-In Royalty, §9.37, relating to Offset Well Obligations and Compensatory Royalties, §9.38, relating to Suspending the State Lease; §9.81, relating to Pooling and Unitizing State Property; §9.91, relating to General Provisions, §9.92, relating to Release, §9.93, relating to Assignment, §9.94, relating to Termination, and §9.95, relating to Forfeiture.

These new rules are being proposed concurrently with the repeal of §9.1, relating to Definitions; §9.2, relating to Leasing Guide; §9.3, relating to General Provisions; §9.5, relating to Leasing State Property for Oil and Gas; §9.6, relating to Maintaining the Lease; §9.8, relating to Discontinuing the Leasehold Relationship; and §9.9, relating to Pooling and Utilization of State Leases. Section 9.4, relating Geophysical and Geochemical Exploration Permits, and §9.7, relating to Royalty and Reporting Obligations to the State, are being addressed in additional, concurrent rule actions.

Partly because the legislature has mandated certain state lease provisions, the oil and gas leases issued or administered by the GLO or SLB are not taken on a standard industry form. Consequently, oil and gas companies and practitioners routinely ask questions about our leases. The new rules are designed to explain how the GLO construes its basic lease provisions and associated statutes, what the GLO routinely expects of its state lessees, and what procedures/steps are needed to implement certain lease provisions.

Additionally, the legislature has amended several of the statutes relating to the current rules. The new proposed rules have incorporated these statutory changes. The new rules have also been renumbered to subdivide long sections, gapped for expansion, and reorganized into subchapters, which have generally been placed in the order of how an oil and gas lease progresses: that is, from obtaining a lease, to maintaining and/or pooling, and finally to discontinuing the leasehold relationship.

Finally, these new rules include changes made to reflect current agency policy and practices and to enhance clarity or readability. Many changes also make leasing, lease administration or lease compliance easier or more certain. Further clarification of these rules and some of the most noteworthy of the changes included in them are mentioned in a section-by-section discussion.

In promulgating these rules, the state is not intending to place itself in the position of adjudicating property rights or to create a right to an evidentiary hearing where such right is not required by statute. In fact, nothing in these rules should be construed to place the state in the position of adjudicating property rights or creating a right to an evidentiary hearing where such right is not created by statute.

Spencer Reid, General Counsel, has determined that for the first five-year period that the rules are in effect there will be no negative fiscal implications for state or local government. Since these rules clarify the state's expectations of its lessees, staff may expend less time explaining lease requirements, but this potential saving is hard to quantify.

Mr. Reid also has determined that for each year of the first five year-period that the rules are in effect, the public will benefit by having a better understanding of how to comply with state lease provisions. In particular, the rules narrow down the global requests for operational materials and records and instead require specific, routine submissions, with the state taking the responsibility for requesting additional data.

Mr. Reid has further determined that there may be fiscal implications for small businesses and individuals as a result of enforcing or administering the rules. In particular, certain requirements concerning a lessee's responsibilities that are contained in §9.32 and §9.91(c)(5)(D) may impose some costs on small businesses and individuals. However, because the provisions of these sections either reflect standard industry practice, are the typically expected actions of a reasonably prudent operator, or are already required of a lessee by federal or state law or a lease provision, the fiscal implications of these provisions will not result in new costs being imposed on lessees. Because the exact number of state lessees will inevitably vary, and due to other variables particular to each individual lessee, the fiscal impact of such costs is not quantifiable. Additionally, under §9.32(c)(3)(B), lessees will be subjected to a penalty if they fail to supply the operational materials and records to the GLO as provided by the rule. However, these rules also make submitting materials easier by setting definite filing requirements and allowing the faxing of documents to meet the deadlines. The agency is unable to determine the total amount of such costs because the GLO cannot estimate the number of small businesses and individuals who may incur penalties for failure to supply materials.

SECTION-BY-SECTION DISCUSSION:

SUBCHAPTER A: General Provisions

Section 9.1. Definitions: Derived from the current §9.1, of this title (relating to Definitions), this section contains definitions of terms used throughout all of Chapter 9.

Section 9.2. Scope and Applicability: Derived from the current §9.3, of this title (relating to General Provisions), this section contains important principles that apply to all Chapter 9 rules.

Subsection (f) has been added to state expressly that these rules shall not limit the automatic termination of acreage under a lease's retained acreage clause.

SUBCHAPTER B: Issuing Exploration Permits & Oil and Gas Leases

Section 9.21. Leasing Guide: Derived from the current §9.2, of this title (relating to Leasing Guide), this section is formatted by types of state properties and provides a quick overview of how each type of property is leased.

Section 9.22. Leasing Procedures: Derived from the current §9.5, (relating to Leasing State Property for Oil and Gas), this section contains detailed leasing procedures for all types of state properties leased or administered by the GLO or SLB.

Paragraphs (2) and (3) cover the leasing of Relinquishment Act lands, with paragraph (2) covering leasing by the surface owner acting as the state's agent and paragraph (3) covering direct leasing by the state when the surface owner will not or cannot act as our agent. Both of these paragraphs have been updated to include statutory changes to the Relinquishment Act found in Texas Natural Resources Code, §52.189 and §52.190. Additionally, §9.22(2)(B) reflects a change in longstanding agency policy. This provision now authorizes an attorney-in-fact to act on behalf of a surface owner in executing a Relinquishment Act lease under certain circumstances. However, the new provision makes it clear that the surface owner and the attorney-in-fact both continue to owe fiduciary duties to the state. This rule change is intended to make it easier to lease certain Relinquishment Act property while still protecting the state's interests.

Paragraph (5) covering the leasing of highway rights-of-way has been amended to incorporate statutory changes found at Texas Natural Resources Code, §32.002(c) and §32.201.

SUBCHAPTER C: Maintaining a State Oil & Gas Lease

This subchapter subdivides and replaces the current §9.6, of this title (relating to Maintaining the Lease). However, the current §9.6 is generally organized around lease clauses, while the new Subchapter C is now divided into operational activities that are likely to occur on a state lease.

Section 9.31. General Provisions: Subsection (a) describes the scope and applicability of the rules included in this subchapter. Subsection (b) defines the key terms used throughout this subchapter.

Subsection (a) is a refinement of current §9.6(a). Subsection (b) is new in that the current §9.6 does not contain a segregated definitional section. However, definitions of key terms are presently scattered throughout the substantive subsections of §9.6. For examples, §9.6(c)(2)(C) describes a drilling and reworking operation and §9.6(d)(1)(A) describes a drilling operation. To make the new rules easier to use, all definitions have been placed at the beginning of the subchapter in §9.31(b).

Section 9.32. General Responsibilities of State Lessees: This section sets out the state's minimum expectations of how lessees should conduct operations on state properties. It also makes routine lease administration easier by specifying exactly what reports, information, and materials related to lease operations should be routinely submitted to the GLO and when they should be submitted. Our statutes and leases generally ask for operational materials and records and are sometimes not specific about when they should be submitted. Accordingly, compliance has been sporadic and poor. To give lessees clearer guidance about what documents must be filed with the GLO, subsection (c)(3) narrows the requirements to specific items and records and sets specific due dates. The GLO reserves the right to ask for additional materials when needed. Of particular note is subsection (c)(3)(C)(ii)(V), which requires lessees to send additional records when they complete a well on a state tract that is within 1,000 feet of another state tract.

Because subsection (c)(3) clearly sets out the required filings and allows the faxing of documents to meet the deadlines, it is expected that compliance will dramatically increase. However, this rule also sets out a penalty if these items and records are not timely received.

Subsections (a), (b), (c)(1) and (2) are derived from the current §9.6(i). Subsection (c)(3) is new.

Section 9.33. Delay Rental Payments: Derived from the current §9.6(b), this section explains how to hold a lease by tendering delay rentals to the state.

Section 9.34. Drilling and Reworking Operations: Derived from the current §9.6(c) and (d), this section explains how to hold a lease by drilling and reworking operations. Subsection (c)

explains how to obtain an extension of the primary term. An extension is allowed under state fee leases when a lessee is conducting drilling operations at the expiration of the primary term.

Section 9.35. Producing the State Lease: Derived from the current §9.6(f), this section explains how to hold a lease by production. Subsections (a)(2) and (3), respectively, require the use of a separator when a well produces liquids and require the GLO's permission to commingle production from a separate lease or reservoir with any other production.

Section 9.36. Shut-in Royalty: Derived from the current §9.6(g), this section explains how to hold a lease by tendering shut-in royalty payments.

Section 9.37. Offset Well Obligations & Compensatory Royalties: Derived from the current §9.6(h), this section sets out our current practice of handling offset wells and authorizing compensatory royalties in lieu of requiring an offset well. It implements Texas Natural Resources Code, §52.034 and §52.173 and the associated offset obligation lease provisions.

Texas Natural Resources Code, §52.034 and §52.173 create statutory obligations to drill offset wells on state property when a well on adjoining property is either draining state hydrocarbons or is within 1,000 feet of the state property. (The wells that trigger the offset obligation are referred to as "encroaching wells" under these rules.) These same statutes give the commissioner the sole discretion to accept compensatory royalties instead of requiring an offset well. Under these statutes, the commissioner is not acting as an adjudicator of property rights and an evidentiary hearing is not a prerequisite to the commissioner's decision.

Texas Natural Resources Code, §52.034 and §52.173 do not require the state to prove actual drainage when the encroaching well is within 1,000 feet and nothing in §9.37 is intended to impose any such requirement. The statutes mandate the drilling of an offset well when the encroaching well is within 1,000 feet and specify that any compensatory royalties shall be based on total volumes produced from the encroaching well. Nevertheless, these provisions, if applied indiscriminately in all circumstances, could lead to harsh results that do not serve the legitimate purpose of protecting the state's mineral interests. For example, one such result is requiring an offset well to be drilled when the scientific evidence shows that a geological fault would prevent any possible drainage of the state's hydrocarbons. The following new rule provisions mitigate against these kinds of results: (1) §9.37 (b) allows the commissioner, in his discretion, to reach an agreement that no offset well is necessary because he is convinced that there can be no drainage of state minerals in that particular instance and (2) §9.37(c)(4)(A)(1) allows the commissioner, in his discretion, to reduce the volumetric component of compensatory royalties based on sound scientific evidence.

Any decision to mitigate against harsh results in a particular instance under §9.37 is a matter committed to the commissioner's discretion. A contested case hearing is neither required nor contemplated under this rule. Moreover, nothing in this rule is intended: (a) to impose on the state any burden of proof beyond what may be required by statute, or (b) to introduce the issues of drainage, failure to pool, or other matters that the commissioner may consider under this rule in any legal proceeding concerning the offset obligation under Texas Natural Resources Code, §52.034 and §52.173 or the associated offset obligation lease provisions.

Section 9.38. Suspending the State Lease: Derived from the current §9.6(e), this section explains when a suspension of a state lease is warranted and how to obtain one.

SUBCHAPTER E: Pooling and Unitization

Section 9.81. Pooling and Unitizing State Property: Derived from the current §9.9, of this title (relating to Pooling and Utilization of State Leases), this section explains how to pool or unitize state properties.

SUBCHAPTER F: Discontinuing the Leasehold Relationship

This subchapter subdivides and replaces the current §9.8, of this title (relating to Discontinuing the Leasehold Relationship).

Section 9.91. General Provisions: Derived from the current §9.8(a), (f) and (g), this section sets out how the leasehold relationship between the state and a lessee may be discontinued and explains what duties and obligations are still owed to the state when that relationship is discontinued.

Subsection (c)(5)(D) is new and sets out in more detail what is expected of a lessee in cleaning up submerged leased premises when operations have ceased. These provisions reflect standard industry practice and the typically expected actions of a reasonably prudent operator.

Section 9.92. Release: Derived from the current §9.8(b), this section explains how to file releases, including both voluntary releases and those resulting from total or partial lease termination.

Section 9.93. Assignment: Derived from the current §9.8(c), this section explains how to properly effectuate assignments.

Section 9.94. Termination: Derived from the current §9.8(d), this section describes the process the GLO undertakes in determining and recording the fact that a lease has terminated.

Section 9.95. Forfeiture: Derived from the current §9.8(e), this section describes the process the commissioner undertakes in forfeiting a lease and considering a forfeited lease for reinstatement. Under Texas Natural Resources Code, §52.176, the commissioner has the sole discretion to forfeit or reinstate a lease under certain circumstances.

These new rules are primarily operational in nature and, to the extent they add new requirements that impact leasehold interests, will only apply to leases issued after the effective date of these new rules and to any other leases that refer to or otherwise contemplate being controlled by administrative rules. Section 9.2(c), relating to Scope and Applicability, expressly states that these rules shall not be construed to impair any existing contract. Therefore, the GLO has determined that this action has no impact on private real property. A Takings Impact Analysis restating that conclusion is on file at the GLO.

By its own terms the new rules must be consistent with the Coastal Management Plan. Section 9.2(g) requires consistency with the Coastal Management Plan and clarifies that if provisions in Chapter 9 conflict with provisions in Chapter 16 of this title (relating to Coastal Protection), then Chapter 16 is controlling.

Comments on the proposed rules may be submitted to Ms. Carol Milner, Texas Register Liaison, General Land Office, 1700

North Congress, Room 626, Austin, Texas 78701-1495. The deadline for comments is 5:00 p.m., November 9, 1998.

The new sections are proposed under Texas Natural Resources Code §31.051 and §52.131(h) which give the commissioner rulemaking authority and Texas Natural Resources Code, §§32.062, 32.154 and 32.205 which give the SLB rulemaking authority.

Texas Natural Resources Code, Chapter 32, Subchapters A, C, E and F, and Chapter 52 are affected by the proposed new rules.

§9.1. Definitions.

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

(1) Assignment - A transfer of an interest in an oil and gas lease.

(2) Commissioner - Commissioner of the General Land Office.

(3) Counterparts - Instruments executed by different parties and recorded as separate instruments or fully executed instruments recorded in different counties.

(4) Exploration - Geological, geophysical, geochemical, and other surveys and investigations conducted for the purposes of discovering and locating oil and gas.

(5) Forfeiture - The cancellation or dissolution of an oil and gas lease by the commissioner when lessee fails to satisfy or breaches certain lease provisions, statutes or rules.

(6) Free royalty lands - Lands sold by the state in which the state reserved a free royalty interest but did not retain any leasing or executive rights. (See, e.g., Texas Natural Resources Code, §51.054).

(7) GLO - General Land Office.

(8) GLO Lease Number - Synonymous with mineral file number.

(9) Lessee - The initial holder of the leasehold interest or a successor, assignee, devisee, heir, or any other person who acquires that interest or any portion thereof.

(10) Mineral file number - The identification assigned by the GLO to the GLO jacket in which lease records are kept.

(11) Oil and gas - Crude oil, crude petroleum oil, crude petroleum, natural gas, and associated hydrocarbons, including, without limitation, casinghead gas, condensate, distillate, and liquids extracted from natural gas.

(12) Operator - A person that explores for, develops, or produces oil and gas from a particular lease, field, or area; also any employee, agent, servant, contractor, subcontractor, trustee, or receiver of an operator, or any other agent in control of any or all of the leasehold interest.

(13) Person - Any individual, partnership, corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, association, or other legal entity.

(14) Premises - Any state property subject to an oil and gas lease.

(15) PSF - Permanent School Fund.

(16) Release - A statement by a lessee indicating that all or part of an oil and gas lease has terminated or expired or has been surrendered or forfeited.

(17) Relinquishment Act lands - Any public free school or asylum lands, whether surveyed or unsurveyed, sold with a mineral classification or reservation between September 1, 1895, and May 29, 1931, encompassing any other lands, including vacancy lands, patented with all minerals reserved to the state and expressly made subject to the leasing terms and procedures governing Relinquishment Act lands.

(18) Relinquishment Act leases - Leases issued under Texas Natural Resources Code, Chapter 52, Subchapter F, and §9.22(2) and (3) of this title, (relating to Leasing Procedures).

(19) RRC - Texas Railroad Commission.

(20) SLB - School Land Board.

(21) Submerged lands - Islands, salt water lakes, bays, inlets, marshes, and reefs within tidewater limits and that portion of the Gulf of Mexico within the jurisdiction of the State of Texas.

(22) Surface owner - Owner of the soil under the Relinquishment Act that acts as the state's agent in leasing Relinquishment Act property.

(23) TDCJ - Texas Department of Criminal Justice.

(24) Termination - The automatic, nondiscretionary expiration of all or part of an oil and gas lease under its own terms.

(25) TPWD - Texas Parks and Wildlife Department.

§9.2. Scope and Applicability.

(a) Scope of this chapter. Unless expressly limited or expanded elsewhere in this chapter, this chapter shall apply to all lands specified in §9.21(1)-(5) of this title, (relating to Leasing Guide). Those lands specified in §9.21(6) are governed by the statutes and rules referenced in that paragraph of §9.21.

(b) Other applicable rules and statutes. Operations on state lands are subject to all valid, applicable, state and federal regulatory authorities and this chapter supplements the regulatory powers of such authorities.

(c) Existing Contracts. These rules shall not be construed to unlawfully impair any existing contract.

(d) Compliance. Lessee shall comply with the provisions of its lease, applicable statutes and this chapter. Nothing in this chapter shall be construed as relieving a lessee of these duties or as impairing any remedies available to the state, including forfeiture of a lease. If a lessee, operator or any party acting on lessee's behalf fails to comply with the lease, applicable statutes or this chapter, the state may seek any remedy allowed by law, including forfeiture of the lease. Lessee shall be liable for the damages caused by such failure and any costs and expenses incurred while enforcing this chapter and cleaning areas affected by any pollution or discharged waste. A lessee is responsible and liable for the actions or omissions of its operator and its employees, agents, servants, contractors, subcontractors, trustees, receivers, any other agent in control of any or all of the leasehold interest and any other party acting on lessee's behalf.

(e) Exceptions to this chapter. The commissioner may, if authorized by law and upon proper written request, grant exceptions to the provisions of this chapter if the commissioner deems the exceptions to be in the best interest of the state. No such exception shall be effective until a written request by the lessee and a written

explanation, signed by the commissioner, is placed in the appropriate mineral file or other GLO file.

(f) Partial termination. Nothing in this chapter can limit the automatic termination of specified acreage and/or depths under a retained acreage clause (as defined in §9.31(b) of this title, relating to Definitions Applicable to this Subchapter) if a lease contains this kind of clause.

(g) Consistency with Coastal Management Program. Except as otherwise provided in §16.1(c) of this title (relating to Definitions and Scope), an action listed in §16.1(b) taken or authorized by the GLO or SLB pursuant to this chapter that may adversely affect a coastal natural resource area, as defined in §16.1 is subject to, and must be consistent with, the goals and policies identified in Chapter 16 of this title, (relating to Coastal Protection) in addition to any goals, policies, and procedures applicable under this chapter. If the provisions of this chapter conflict with and can not be harmonized with certain provisions of Chapter 16, such conflicting provisions of Chapter 16 will control.

This 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 September 28, 1998.

TRD-9815202
Garry Mauro
Commissioner General Land Office
General Land Office
Earliest possible date of adoption: November 8, 1998
For further information, please call: (512) 305–9129

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Subchapter B. Issuing Exploration Permits and Oil and Gas Leases

31 TAC §9.21, §9.22

The new sections are proposed under Texas Natural Resources Code §31.051 and §52.131(h) which give the commissioner rulemaking authority and Texas Natural Resources Code, §§32.062, 32.154 and 32.205 which give the SLB rulemaking authority.

Texas Natural Resources Code, Chapter 32, Subchapters A, C, E and F, and Chapter 52 are affected by the proposed new rules.

§9.21. Leasing Guide.

For exploration and development of minerals other than oil and gas, see Chapter 10 of this title, (relating to Exploration and Development of State Minerals Other than Oil and Gas).Oil and gas underlying state lands are leased in the following ways, depending on the type of land.

(1) PSF uplands, submerged lands, riverbeds and channels. PSF uplands submerged lands, riverbeds and channels are leased by the SLB under sealed bid procedures. For SLB sealed bid procedures see Texas Natural Resources Code, Chapter 32, Subchapters D and E, Chapter 52, Subchapter B, §9.22(1) of this title, (relating to Leasing Procedures), and Chapter 151 of this title, (relating to General Rules of Practice and Procedure). For only riverbeds and channels, also see Texas Natural Resources Code, Chapter 52, Subchapter C.

(2) PSF oil and gas interests owned with associated mineral leasing rights. Generally, whenever the PSF owns mineral interests coupled with leasing rights, oil and gas leases are issued by the SLB under the sealed bid procedures of paragraph (1) of this subsection. (For examples of these types of PSF mineral interests, see Texas Natural Resources Code, §51.054(a), §32.061 (see especially historical legislative note), §33.001(g), or §51.052(h).)

(3) PSF oil and gas interests owned without associated mineral leasing rights.

(A) Relinquishment Act lands. Leases are generally negotiated by surface owners as agents for the state. See Texas Natural Resources Code, Chapter 52, Subchapter F, and §9.22(2), and §9.22(3). Note: Relinquishment Act lands owned by a department, board, or agency of the state, including TDCJ land, TPWD land, and highway rights-of-way land, are leased under the sealed bid procedures of paragraph (1) of this subsection. See Texas Natural Resources Code, §32.002(d) and §34.002(b).

(B) Free royalty lands. Leases are issued by the executive right holders as the state's agents. See §9.22(4).

(4) Certain state agency lands. Lands owned by the state or held in trust for the use and benefit of the state or a department, board, or agency of the state, except TPWD, TDCJ, University of Texas System, A&M University System, or Relinquishment Act lands, are leased by the SLB under the sealed bid procedures of paragraph (1) of this subsection. See Texas Natural Resources Code, §§32.001(4)(D), 32.002 (a)(1), (2), (6), and (7), and 32.002(d).

(5) Texas Highway Department rights-of-way. Land owned by the state to construct or maintain a highway, road, street, or alley, except those subject to the Relinquishment Act, are leased through a preferential leasing system administered by the SLB. See Texas Natural Resources Code, §32.002(a)(4) and (5), §32.002(b), (c), and (d), Chapter 32, Subchapter F, and §9.22(5).

(6) TDCJ and TPWD lands, except for Relinquishment Act lands. Leases are issued by the appropriate board for lease through sealed bid procedures. See Texas Natural Resources Code, Chapter 34, and Chapter 201 of this title, (relating to Operations of the Texas Parks and Wildlife Department and Texas Department of Criminal Justice Boards for Lease).

§9.22. Leasing Procedures.

State property will be leased for the exploration and development of oil and gas under these procedures.

(1) Sealed bid leasing by the SLB.

(A) Lands affected. See §9.21 of this title, (relating to Leasing Guide) to determine which lands are leased by sealed bid. Generally, this includes all lands owned in fee by either the PSF or state agencies, except TPWD or TDCJ lands, and certain other lands in which the PSF owns a mineral interest.

(B) Nominations, advertising, and awarding leases. The SLB, GLO staff, or persons interested in leasing a specific tract may nominate a tract for lease. Nominated tracts will be evaluated by GLO geologists. The SLB will set the terms and conditions upon which tracts will be offered for lease. These terms will be advertised and bids taken. The SLB shall accept the best bid meeting the minimum requirements set by the SLB or by law, or, reject all bids. See Chapter 151 of this title, (relating to Operations of the School Land Board) for more details on the leasing procedure.

(2) Leasing of Relinquishment Act lands by surface owner as the state's agent.

(A) Lands affected. The leasing procedures as set out in this paragraph apply only to the leasing of Relinquishment Act lands.

(B) Identity of the state's agent. The surface owner of Relinquishment Act land acts as the state's leasing agent. A minor or a person of unsound mind, as these terms are defined in the Texas Probate Code, cannot act as the state's agent. However, a person authorized by law to act on such a person's behalf may do so. An agent of the surface owner, including an attorney-in-fact, cannot execute a Relinquishment Act lease, unless a power of attorney expressly authorizes the attorney-in-fact to execute Relinquishment Act leases. Said power of attorney shall be submitted to the GLO concurrently with the lease. Both the surface owner and attorney-in-fact shall owe the state the full fiduciary duty discussed in paragraph (2)(C) of this subsection, and as otherwise provided by law. If the surface owner is a corporation, a Relinquishment Act lease may be executed by any duly authorized officer or agent of the corporation.

(C) Authority and fiduciary duty of agent.

(i) Authority. The surface owner is authorized to execute oil and gas leases on behalf of the state, unless a surface owner's agency rights have been forfeited or waived. The surface owner may not enter into a seismic option or any other contract to execute a Relinquishment Act lease. As the state's agent, a surface owner owes the state a fiduciary duty and the duty of utmost good faith. A surface owner must fully disclose to the commissioner any facts affecting the state's interest and must act in the best interest of the state. Any conflict of interest must be resolved by putting the interests of the state before the interests of the surface owner. In addition to these duties, the surface owner owes the state all the common law duties of a holder of executive rights.

(ii) Consequences of a breach of the surface owner's fiduciary duty or a violation of the prohibition against self-dealing. When a surface owner engages in self-dealing by acquiring an assignment in a lease executed by that surface owner, such lease is void as of the time of assignment and the commissioner may forfeit the surface owner's agency rights. When a surface owner breaches any duty or obligation owed to the state, the commissioner may request that the attorney general file suit. A suit to enforce the surface owner's duties and obligations or to forfeit the surface owner's agency rights shall be filed in a district court in Travis County. See Texas Natural Resources Code, §52.188 and §52.189.

(iii) Penalty assessment for breach of the surface owner's fiduciary duty. A penalty of 10% shall be imposed on any sums due the state because a surface owner breaches a fiduciary duty. The imposition of this penalty does not limit the right of the state to obtain punitive damages, exemplary damages, or interest. Any punitive damages or exemplary damages assessed by a court shall be offset by the 10% penalty imposed by this paragraph.

(D) Prohibition against self-dealing. A surface owner as the state's agent may not engage in self-dealing either directly or indirectly. Except as provided in Texas Natural Resources Code, §52.188(a)(b) and (d) and §52.189(a)(3)(4), a surface owner will be considered to have engaged in self-dealing if the surface owner, either directly or indirectly, leases or assigns a lease executed by that surface owner to themselves or to any of the following persons:

(i) a nominee;

(ii) any corporation or subsidiary in which the surface owner is a principal stockholder or an employee of such a corporation or subsidiary;

(iii) a partnership in which the surface owner is a partner or an employee of such a partnership;

(iv) if the surface owner is a corporation or a partnership, a principal stockholder of the corporation or a partner of the partnership, or any employee of the corporation or partnership;

(v) a fiduciary representing the surface owner, including, but not limited to, a guardian, trustee, executor, administrator, receiver, or conservator; or

(vi) a person related to the surface owner within and including the second degree of consanguinity or affinity, including a person related by adoption, or;

(I) to a corporation or subsidiary in which that related person is a principal stockholder, or;

(II) to a partnership in which that related person is a partner, or;

(III) to an employee of such a corporation or subsidiary or partnership.

(E) Lease negotiation procedure.

(i) Subject to the limitations against self-dealing, the surface owner is authorized to act as the state's leasing agent with any person desiring to develop or explore for the oil and gas.

(ii) The lease shall be on the GLO lease form in use on the date of execution. This form will be prepared and furnished by the GLO.

(iii) All of the negotiated terms must be included in the lease instrument. No lease term or provision may be included in a collateral contract or agreement.

(iv) The proposed lease shall be submitted to the GLO for approval prior to recording the lease in the county records. The proposed lease shall be accompanied by the processing fee required by §1.3 of this title, (relating to Fees).

(F) State approval and filing of lease.

(i) Any additions, modifications, deletions, or changes to the GLO lease form must be approved by the commissioner.

(ii) A lease must adequately reflect the actual consideration paid or promised for the lease. The state and the surface owner must share equally in all consideration paid under the lease. However, the surface owner may waive or defer his or her share of the bonus. At any time after preapproval and before filing with the GLO, the adequacy of the consideration may be reassessed by the commissioner.

(iii) The commissioner may reject and refuse to file any lease deemed contrary to the best interests of the state. If the commissioner rejects a lease that has been recorded prior to submission to the commissioner, a release of the lease must be filed in the appropriate county or counties and a certified copy sent to the GLO.

(iv) If the commissioner rejects a proposed lease, the prospective lessee will be notified of the reasons for the rejection and any changes, deletions, or additions which would render the lease acceptable. The prospective lessee may request reconsideration of a rejection. This request shall be made to the commissioner.

(v) A Relinquishment Act lease may not provide for a primary term of more than five years.

(vi) A Relinquishment Act lease may not encompass more than four full sections or 2,560 acres. A "mother hubbard" or "coverall" clause in the lease is not acceptable.

(vii) Private land and Relinquishment Act land may not be included in the same lease.

(viii) A lease may encompass several smaller tracts if they are contiguous or within 1/2 mile of each other.

(ix) A Relinquishment Act lease must provide the state with a royalty of at least 1\16th and a delay rental during the primary term of at least $.10 per acre per year to the state, or, on paid up leases, a paid up payment of at least $.10 per acre per year in the primary term.

(x) When a proposed lease covering an undivided interest in Relinquishment Act land is submitted for approval, the person submitting the lease shall inform the GLO of all remaining undivided interest owners of that land. See also Texas Natural Resources Code, §52.190(k) and (l).

(xi) Upon approval, the lease shall be recorded in each county in which the land is located. Leases are not effective until approved by the commissioner, and until a certified copy of the lease, from each county in which it is recorded, has been filed with the GLO. Such filing and approval of leases shall not limit, waive, or affect any lawful claim or remedy available to the state. After a lease is properly filed, the term of the lease shall be treated as beginning on the effective date stated in the lease.

(xii) The state's share of the bonus payment and the filing fee prescribed by §1.3 of this title, (relating to Fees) shall be submitted along with the certified copy or copies of the lease.

(3) State as sole lessor of Relinquishment Act lands.

(A) Leasing procedure when surface owner's rights (including the right to receive any part of the bonus, royalty and other consideration relating to the lease) have been waived. A surface owner may lease Relinquishment Act land from the state by complying with Texas Natural Resources Code, §52.190, and any other relevant laws or regulations.

(B) Leasing procedure when surface owner cannot be located. If a potential lessee cannot locate a surface owner, the procedures set out in Texas Natural Resources Code, §52.186, shall be followed. The land will then be leased by sealed bid as provided in paragraph (1) of this subsection. The state will receive all the consideration paid under such a lease except as provided in Texas Natural Resources Code, §52.186(b)(4), which concerns certain rights available to surface owners (and to owner's of an undivided interest therein) who appear within two years after a lease has been executed on their land and who are able to satisfy the conditions of the statute.

(C) Leasing procedure when surface owner's agency rights are forfeited.

(i) When a surface owner's agency rights have been forfeited, the land shall be subject to lease by sealed bid as provided in paragraph (1) of this subsection. The surface owner shall not be entitled to share in the proceeds of such lease. Upon expiration or termination of such lease, the surface owner's agency rights will be ipso facto reinstated.

(ii) If no lease is executed within one year of forfeiture, the surface owner's agency rights may be reinstated at the commissioner's discretion.

(4) Leasing the state's free royalty interests.

(A) Lands affected. These leasing procedures apply to free royalty lands.

(B) Leasing by executive right holder on behalf of the state. The holder of the executive or leasing rights on free royalty land shall act as the state's agent in executing oil and gas leases covering the state's free royalty interest. In executing this lease, the executive right holder owes the state a duty of good faith and any other common-law duties which an executive right holder owes to a nonexecutive mineral interest owner. A free royalty interest bears no costs of production, including the costs of sale, treatment, transportation, gathering, compression, or delivery.

(C) Filing with the GLO. Leases covering the state's free royalty interest are not effective until a certified copy is filed with the GLO.

(5) Leasing of highway rights-of-way by the SLB.

(A) Definitions. As used in this paragraph, the terms "adjacent mineral owner", "highway right-of-way" and "tract", have the following meanings unless the context clearly indicates otherwise.

(i) Adjacent mineral owner: a person that owns the right to explore for, develop, and produce oil and gas from a tract of land adjoining a highway right-of-way.

(ii) Highway right-of-way: a tract of land owned by the state that was or may be acquired to construct or maintain a highway, road, street, alley, or other right-of-way.

(iii) tract: a highway right-of-way subject to lease under this paragraph.

(B) Lands affected.

(i) A tract may be leased if the state owns the minerals under it and if the tract is not within 2,500 feet of a well which was capable of producing oil or gas in paying quantities as of January 1, 1985. A tract may also be leased if the state owns the minerals under it and if the oil or gas is leased to facilitate the drilling of a horizontal well.

(ii) In its discretion, the SLB may establish the size and the outer boundaries of each tract to be leased; however, the lease extends only to the center of the width of the particular highway right-of-way adjacent to the property in which the lessee is the mineral owner.

(iii) The SLB may refuse to lease a particular tract, either on its own or upon the request of the highway department.

(iv) Tracts subject to the Relinquishment Act shall be leased by sealed bid under paragraph (1) of this subsection.

(C) Preliminary leasing procedures.

(i) The SLB may initiate the leasing of tracts by providing notice to adjacent mineral owners in accordance with paragraph (6)(C)(iv) of this subsection.

(ii) Any outside party, including the adjacent mineral owner, may apply to lease a tract by sending the following materials to the GLO:

(I) a written description of the tract sufficient for it to be located on the ground and a map showing the tract's boundaries and dimensions;

(II) the names and addresses of all adjacent mineral owners, as reflected in the tax assessor-collector's records

and county clerk's records in the county or counties where the tract is located;

(III) an affidavit stating either that there was no well capable of producing oil or gas in paying quantities within 2,500 feet of the tract as of January 1, 1985, or that the lease is necessary to facilitate the drilling of a horizontal well; and

(IV) the processing fee required by §1.3 of this title, (relating to Fees).

(iii) An applicant who is also an adjacent mineral owner must also submit the following:

(I) a written waiver of the notice to which the applicant as an adjacent mineral owner is entitled; and

(II) if the applicant is a lessee of the adjacent tract,

(-a-) certified copy or a reproduction of a certified copy of any recorded lease or leases on the land adjacent to the tract. If the lease has not been recorded, an applicant must submit a copy of the lease along with an affidavit stating that it is a true and correct copy of the lease on the adjacent land; and

(-b-) a notarized affidavit stating the consideration paid for any lease or leases on the adjacent land.

(iv) The GLO shall notify each adjacent mineral owner, by registered mail, of the proposed leasing of the tract. An adjacent mineral owner may waive this notice by providing a written waiver to the GLO. If the person who initiates the leasing process cannot determine the identity or address of an adjacent mineral owner from the county records, notice shall be by publication as provided in Texas Natural Resources Code, §32.201(d).

(D) Preferential leasing right of adjacent mineral owners.

(i) General rule. Each adjacent mineral owner is entitled to lease to the center of the tract in the same proportion as his or her ownership in the adjoining land. The preferential right to lease under this paragraph must be exercised by the adjacent mineral owner within 120 days of the actual notice (as defined by Texas Natural Resources Code, §32.201(d)) of the intention to lease, or such right is forfeited.

(ii) Examples.

(I) if the adjacent mineral owners on opposite sides of a tract differ, each is entitled to preferentially lease to the center of the tract, thereby leasing one-half of the tract.

(II) if the adjacent mineral owner on both sides of a tract is the same person, he or she may lease the entire tract.

(III) when the mineral ownership of leased or unleased land adjoining one side of a tract is owned in cotenancy among several adjacent mineral owners, each shall have a preferential right to lease to the center of the tract in proportion to his or her interest in the adjoining land.

(iii) Lease terms. Each lease issued on a tract shall grant the lessee the authority to pool the acreage in accordance with Texas Natural Resources Code, §32.202. A certified copy of the unit designation or the pooling agreement must be filed with the GLO. Each lease shall also provide for the payment of compensatory royalty in accordance with Texas Natural Resources Code, §32.203. The additional terms of a lease depend on whether lands adjacent to the tract are leased. If the adjacent land is unleased, the SLB shall set the terms of the lease. If the adjacent land is leased, the tract shall be leased upon terms at least as favorable to the state as those of the most favorable lease held on the adjoining land.

(iv) Lease approval and payments. A lease will not be issued until the SLB approves the lease and receives the bonus payment and the 1.5% sales fee provided by Texas Natural Resources Code, §32.110. If the adjacent mineral owner does not tender such sums within 120 days of receipt of notice under paragraph (4)(C)(i) of this subsection, the preferential right to lease is forfeited.

(v) Waiver. Any adjacent mineral owner may waive the preferential right to lease by filing with the GLO a written waiver executed and acknowledged by the mineral owner or their duly authorized agent.

(E) Leasing after forfeiture or waiver of preferential leasing right.

(i) Generally. Within 18 months of the forfeiture or waiver of the preferential right, the SLB may lease the tract directly to an adjacent mineral owner prior to a public offering to the highest bidder under a sealed bid sale.

(ii) Lease to adjacent mineral owners and applicants.

(I) If the adjoining land on one side of the tract is owned by several adjacent mineral owners in cotenancy, and one or more of these adjacent mineral owners forfeits or waives his or her preferential right, the SLB shall lease in equitable proportions to the remaining cotenants who have applied to lease the tract.

(II) If the adjacent mineral owners on one side of a tract waive or forfeit their preferential rights to lease, the SLB shall lease in equitable proportions to the adjacent mineral owners on the other side of the tract who have applied to lease such tract.

(III) If all or part of a tract is not leased to an adjacent mineral owner, the SLB shall lease all or part of the unleased tract to the first person who submitted an application to lease it.

(IV) The terms and conditions of a lease issued under this subparagraph will be the same as those found in leases issued to adjacent mineral owners. The SLB shall not lease to an applicant at a price or terms which are less than those offered to the adjacent mineral owner.

(V) A lease will not be issued until the SLB approves the lease and receives the bonus payment and the 1.5% sales fee provided by Texas Natural Resources Code, §32.110.

(iii) Lease by sealed bid. If all or part of the tract is not leased to an adjacent mineral owner or to an applicant, the SLB shall offer all or part of the unleased tract for lease by sealed bid under paragraph (1) of this subsection.

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

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Garry Mauro
Commissioner, General Land Office
General Land Office
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For further information, please call: (512) 305–9129

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Subchapter C. Maintaining a State Oil and Gas Lease

31 TAC §§9.31–9.38

The new sections are proposed under Texas Natural Resources Code §31.051 and §52.131(h) which give the commissioner rulemaking authority and Texas Natural Resources Code, §§32.062, 32.154 and 32.205 which give the SLB rulemaking authority.

Texas Natural Resources Code, Chapter 32, Subchapters A, C, E and F, and Chapter 52 are affected by the proposed new rules.

§9.31. General Provisions.

(a) Applicability of this Subchapter.

(1) Section §9.32 of this title, (relating to General Responsibilities of State Lessees) applies to all state leases covering lands described in §9.21(1)-(5) of this title, (relating to Leasing Guide).

(2) Those rule provisions in this subchapter that create procedures for coordinating with the GLO staff for a specific purpose would also generally apply to any state lease that authorizes such purpose. Some examples include the rules relating to tendering delay rentals and shut-in royalties to the state, to pooling state property and to suspending state leases.

(3) The remaining rules in this subchapter are largely based on the SLB's October, 1997 state fee lease form. Consequently, these remaining rules will only apply to leases executed on this October, 1997 lease form and to provisions in any other state leases covering lands described in §9.21(1)-(5) whenever the other relevant state lease provisions are substantively equivalent to the corresponding provisions in the October, 1997 lease form.

(b) Definitions Applicable to this Subchapter. The following terms shall have the following meanings unless the context or express language in a rule clearly indicates a contrary meaning.

(1) Dry Hole. A dry hole is a completed well not capable of producing in paying quantities.

(2) Drilling Operation. One drilling operation consists of all the activities designed and conducted in an effort to obtain initial production from a well. As long as the actual spud date of the well occurs within a reasonable time, a drilling operation begins when a RRC drilling permit has been obtained and preliminary work, such as grading roads, moving equipment, digging pits or staking locations, has started. A drilling operation continues as long as operations progress in a diligent manner toward the completion of that well. One drilling operation ends when lessee obtains production in paying quantities or when lessee abandons efforts to obtain such production.

(3) Effective Shut-In Date. If lessee has completed a shut-in well during the primary term of a lease and holds the lease in the secondary term by paying a shut-in royalty, the effective shut-in date is the expiration of the primary term. If lessee completes a shut-in well after the primary term expires, the effective shut-in date is the first day of the month following the month when the well was shut in.

(4) Encroaching well. This term has been created under these rules to characterize any well which triggers the offset well obligation under state leases or statutes. An encroaching well is one which: produces in paying quantities; has been completed on either private acreage or on state land leased at a lesser royalty; and is within 1,000 feet of state land or is actually draining such state land. For a multiple-completion well, each separate formation or productive zone will be treated as a separate encroaching well. (See definition of "well.") For purposes of construing lease provisions relating only to shut-in wells, an encroaching well must meet all criteria set above, but it must also be completed in the same producing reservoir as the shut-in well.

(5) Producing (or production). When used in this subchapter, the term "producing" shall mean "producing in paying quantities" (defined as follows).

(6) Producing (or production) in paying quantities. When a lease specifically defines this term, that definition applies. If a lease contains no such definition, the following definition shall apply: a lease or a well produces in paying quantities when receipts from the sale of oil and/or gas produced from the lease or well exceeds the lease's or well's total operating expenses and a reasonably prudent operator would continue to operate the well or the lease in the same manner for the purpose of making a profit and not merely for speculation. Minimum royalty payments are not revenue from actual production and will not be treated as revenue when calculating whether a lease or a well is capable of producing in paying quantities.

(7) Retained Acreage Clause. Any lease provision, regardless of its title, generally designed to limit the acreage and/or depths held by lease operations in the secondary term of a lease. The specific language in these kinds of clauses determines what acreage and/or depths remain held by lease production or operations, what acreage and/or depths terminate under the lease, and exactly when in the secondary term of the lease the clauses become effective.

(8) Reworking Operation. One reworking operation consists of all the activities designed and conducted on a well in an effort to restore or to enhance production in paying quantities from an existing well. One reworking operation continues as long as lessee diligently pursues the production or enhanced production. One reworking operation ends when lessee restores or enhances production within a reasonable time or when lessee abandons efforts to restore or to enhance such production. The production or enhanced production must be in paying quantities.

(9) Shut-In Well. A well capable of producing oil or gas in paying quantities but which is not being produced for reasons set forth in the shut-in provision of a lease. Such reasons may include lack of suitable production facilities or lack of a suitable market. For a multiple-completion well, each separate formation or productive zone will be treated as a separate shut-in well. See definition of "well."

(10) Solid Waste. Solid waste shall include, but shall not be limited to, garbage, containers, equipment, rubbish, plastic, glass, and other man-made nonbiodegradable items.

(11) Well Completion Date. The well completion date is the completion date reflected on the completion report filed with RRC unless this report is inaccurate.

(12) Well. For a multiple completion well, "well" shall refer to each separate formation or productive zone which is capable of producing hydrocarbons and which has been given a unique RRC identification number.

§9.32. General Responsibilities of State Lessees.

(a) Purpose and Scope. This section sets out some of the general responsibilities which lessees on properties leased under this chapter owe the state. Operations on state lands are subject to all valid, applicable, state and federal regulatory authorities and this section supplements the regulatory powers of these authorities.

(b) Minimum Standards of Lessee Conduct.

(1) Lessee shall use the highest degree of care in conducting operations on state leases and shall take all proper safeguards to prevent the discharge of any pollutant, including solid waste, and of any hazardous substances. To satisfy these requirements, lessee, at a minimum, must conduct operations as a reasonably prudent operator using standard industry practices and procedures, must satisfy express lease provisions, must satisfy implied lease obligations, and must comply with all valid, applicable federal and state regulations and rules.

(2) Operations or activities requiring such care and safeguards shall include, but are not limited to, the following:

(A) Drilling, reworking, testing, producing, and maintaining a well;

(B) Designing, constructing, treating, testing, maintaining and repairing pipelines;

(C) Producing, storing, transporting or otherwise handling hydrocarbons;

(D) Containing and recapturing discharged hydrocarbons, pollutants, or other hazardous substances and restoring public and private property damaged by such discharges;

(E) Transporting and disposing of solid waste, pollutants or hazardous substances, including all materials associated with drilling and producing hydrocarbons;

(F) Plugging abandoned well sites, removing structures and equipment and restoring the surface after operations have ceased. See also §9.91(c)(5) of this title, (relating to General Provisions);

(G) Installing, testing and maintaining signal lights at or near wells and structures that are located on submerged state tracts;

(H) Conducting any activities that could be destructive to marine life or its habitat on submerged state tracts;

(I) Conducting activities on upland tracts so as to prevent damage to livestock, crops and the surface, including adequately fencing or enclosing equipment and pits.

(J) Installing all necessary equipment, seals, locks or other protective devices to prevent theft of hydrocarbons and personal injury; and

(3) No provision in a state lease or in these rules shall relieve a lessee of the obligation to act as a reasonably prudent operator would under the circumstances. This obligation includes, but is not limited to, the drilling of such additional well or wells as may be reasonably necessary for the proper development of a state lease after a lease well capable of producing in paying quantities has been completed.

(4) No discharge of solid waste or other pollutant or hazardous substance shall be allowed into state waters from any drilling or support vessel, production platform, crew or supply boat, barge, jack-up rig, or other equipment located on state submerged tracts.

(c) Required Activities/Lessee Responsibilities:

(1) Posting Signs and Identifying State Wells.

(A) Any well drilled on property leased under §9.21(1)(2)(3)(a) and (4) of this title, (relating to Leasing Guide) shall be identified as a state well in RRC records by using "State" as the first word in its designated RRC name.

(B) All well locations and other structures, including drilling barges and platforms on submerged lands, shall be legibly marked and maintained to identify the state tract number, RRC well name, well number and the name of the company operating the lease.

(C) In a prominent location on each vessel and manned platform on a submerged state tract, lessee must display and maintain a sign with legible lettering of 1 inch or larger stating, "Discharge of any solid waste or garbage into state waters from vessels or platforms is strictly prohibited and may subject a State of Texas lease to forfeiture."

(2) Allowing access to leased state tracts. The commissioner of the GLO, the attorney general, and the governor or their representatives shall at all times have access to property leased under this chapter to make inspections for any reason deemed necessary to protect the state's property or minerals, including, but not limited to, any exploration, drilling, producing, gathering, and processing activities or any other operations on the state tract.

(3) Providing materials, records, reports and other information or items relating to lease operations.

(A) General Reporting Requirements. Unless otherwise indicated, lessee shall mail all materials, records, reports and other information or items required to be submitted to the GLO under this section to the following address: Texas General Land Office; Attention: Minerals Leasing; 1700 North Congress, Room 640; Austin, Texas, 78701-1495. Materials, records, reports and other information or items may also be simultaneously faxed to (512)475-1543 (Attention: Minerals Leasing) to insure that the GLO receives them by the due date as long as they are legible to the GLO staff. All materials, records, reports and other information or items submitted to the GLO must include the state mineral file number assigned to the affected state lease, a plat or description which shows the location of the affected state well or wells, and all appropriate attachments. Incomplete filings will not be recognized as received by the GLO.

(B) Timely Filing of Information or Items.

(i) Due Dates. This section sets out the due dates when certain information or items relating to lease operations and activities must be received by the GLO. Whenever GLO staff requests additional information or items, it must receive such information or items within the due date set in the request or if the request does not establish a due date, within 60 days of the date of the request. GLO staff may grant a written extension of a due date.

(ii) Evidence of Date of Receipt. Under the standard business practices and/or procedures of the GLO, the date that the GLO stamps, punches, or otherwise marks on the delay rental payment, check, draft, stub, or envelope establishes the date of actual receipt by the GLO.

(iii) Penalties for untimely filing. If the GLO does not receive appropriate materials, records, reports or other information or items by the due date set in this section or the due date set in a written extension, lessee shall be subjected to a penalty of $25 per day for every day that each material, record, report or other information or item is not filed at the GLO. Assessing this penalty does not prevent the state from pursuing any of its other remedies, including lease forfeiture.

(C) Routine Reports and Data Relating to Lease Operations and Activities. The following materials, records, reports, or

other information or items shall be submitted to the GLO by the due dates as set forth:

(i) Information relating to drilling.

(I) RRC W-1 and RRC W-1A (if applicable) with plat and any other supporting documentation: due at least 5 days before spudding a well;

(II) RRC P-12 (if applicable) with plat and any other supporting documentation: due at least 5 days before spudding a well; and

(III) any applicable Corps of Engineers permits: due at least 5 days before spudding a well.

(ii) Information relating to well completion, recompletion or testing.

(I) RRC W-2 (if oil well) with any other supporting documentation: due on the date it is submitted to or due at the RRC (whichever is earlier); or

(II) RRC G-1 (if gas well) and RRC G-5 and Back Pressure Curve (if applicable) with any other supporting documentation: due on the date it is submitted to or due at the RRC (whichever is earlier); and

(III) RRC W-12 with any other supporting documentation, an as-drilled plat and a directional survey (if applicable): due on the date it is submitted to or due at the RRC (whichever is earlier);

(IV) Potential Offset Well. If lessee completes a well within 1,000 feet of another state tract or tracts, on the date the RRC W-2 or RRC G-1 is submitted to or due at the RRC (whichever is earlier), lessee shall mail to the lessee or lessees of the adjacent state tract or tracts the following: a RRC W-2 or a RRC G-l (with any other supporting documentation), a RRC W-12 (with any other supporting documentation and a directional survey, if applicable), and a letter stating that the newly completed well may be a potential offset. A copy of this letter must be mailed to the GLO at the same time.

(V) RRC P-4 with any other supporting documentation: due on the date it is submitted to or due at the RRC (whichever is earlier);

(VI) RRC P-12 (if applicable and not filed before spudding a well) with any other supporting documentation: due on the date it is submitted to or due at the RRC (whichever is earlier);

(VII) RRC P-15 with plat (if applicable) and any other supporting documentation: due on the date it is submitted to or due at the RRC (whichever is earlier);

(VIII) All logs from any type of survey on the bore-hole section (from base of surface casing to total well depth) for each well on a state lease: due within 15 days of completing the survey.

(iii) Information required routinely upon production.

(I) RRC G-10: due on the date it is submitted to or due at the RRC (whichever is earlier); or

(II) RRC W-10: due on the date it is submitted to or due at the RRC (whichever is earlier); and

(III) RRC P-17 (if applicable): due on the date it is submitted to or due at the RRC (whichever is earlier). See also §9.35(a)(3) of this title, (relating to Producing the State Lease) for requirement to obtain state's permission before commingling state production.

(IV) Division Orders. For any well in which the state owns an interest, including a free royalty interest created under Texas Natural Resources Code, §51.054, a division order showing all ownership in such well is due at the GLO within 60 days of obtaining initial production from any such well and subsequent division orders are due thereafter within 30 days of any change in any ownership interest. (Note, however, that GLO employees are not authorized to execute such division orders on behalf of the state and that a GLO employee's acts, errors, or omissions in handling a division order cannot bind the state to any terms contained within it.)

(iv) Information required when production ceases (even if temporarily). If a well on a state lease has not produced for a 60-day period, written notice of this fact is due at the GLO within 70 days of cessation of production.

(v) Information required for dry holes or inactive wells.

(I) RRC SWR-14(b)2 with any other supporting documentation: due on the date it is submitted to or due at the RRC (whichever is earlier);

(II) RRC W-3A: due at least five days prior to plugging the well; and

(III) RRC W-3, with any other supporting documentation: due on the date it is submitted to or due at the RRC (whichever is earlier).

(vi) Information related to violations of state and/or federal law. If a violation of state and/or federal law impacts leased state property or the resources found on or under such property or if a requested exemption from state and/or federal law may impact leased state property or the resources found on or under such property, notice of the facts surrounding such violation or exemption is due at the GLO within 24 hours of the violation or the request for an exemption..

(D) Additional Reports and Data Relating to Lease Operations or Activities. The GLO retains the authority to require any additional records, data, information, records, memoranda, materials, or other information or items relating to any aspect of lease operations or activities. The following is a list of the type of information or items the GLO may typically request:

(i) an affidavit detailing all activities involved in any drilling or reworking operation conducted on any state well and the date of such activities;

(ii) any and all documentation necessary to assess whether production is in paying quantities; and

(iii) annual estimates of oil and gas reserves underlying a state lease.

§9.33. Delay Rental Payments.

(a) Effect of payment/non-payment of delay rentals. When delay rentals are properly paid on or before a lease anniversary date, lessee shall retain the rights granted under the lease and may postpone the commencement of drilling operations or production of oil or gas for a period of one year from such anniversary date. During the primary term, a lease shall terminate automatically on a lease anniversary date unless lessee either properly pays delay rentals or maintains the lease in force and effect under other lease provisions.

(b) Full payment of delay rental. Each lease specifically sets the amount of the delay rental. The delay rental payment is indivisible and may not be reduced for any reason unless a lease, or a pooling agreement covering a lease, expressly allows its proportionate reduction. If a lease has several working interest owners and any of such owners fails to pay timely its share of the full delay rental amount set in the lease, then the entire lease will terminate. The full delay rental amount must be timely paid to all proper delay rental payees to maintain the lease.

(c) Timeliness of delay rental payment to the state.

(1) For a lessee to maintain a lease by paying delay rentals, the GLO must receive such payments on or before each lease anniversary date during the primary term.

(2) If a lessee has temporarily held a lease during the primary term by other means, then see §9.34(b) of this title, (relating to Drilling and Reworking Operations) or §9.35(c)(1)(2) of this title, (relating to Producing the State Lease) to determine on which lease anniversary date delay rental payments may be resumed to hold a lease.

(3) If a lease anniversary date should fall on a Saturday, Sunday or a legal state or federal holiday, delay rentals may be timely received on the next calendar day which is not a Saturday, Sunday or such a holiday.

(4) Under the standard business practices and/or procedures of the GLO, the date that the GLO stamps, punches, or otherwise marks on the delay rental payment, check, draft, stub, or envelope establishes the date of actual receipt by the GLO.

(5) Payment of a delay rental to the GLO shall be considered timely, irrespective of the date of actual receipt, if lessee notifies the GLO in writing of its claim that its lease has been maintained under this subparagraph and then establishes that:

(A) payment was dispatched to the address found in §9.32(c)(3)(A) of this title, (relating to General Responsibilities of State Lessees) by certified or registered mail or equivalent proof;

(B) an acceptance form was initialed by an employee of the United States Post Office, a common carrier, or its equivalent and the date stamped by the United States Post Office, a common carrier, or its equivalent (not including private postal meters) showing the letter was received and accepted at least 14 days before the lease anniversary date;

(C) payment is actually received by the GLO no later than 30 days after the lease anniversary date; and

(D) no intervening third party has acquired any of the oil and gas interests originally leased by lessee.

(d) No ratification or revivor. If a lessee fails to pay or improperly pays delay rentals, no action by any delay rental payee, including the state or an owner of the soil on Relinquishment Act property, may ratify, re-grant or revive the terminated lease or may estop the state from asserting lease termination.

§9.34. Drilling and Reworking Operations.

(a) Requirement of Diligence. Any drilling operation or reworking operation will be conducted with reasonable diligence, in good faith and in a prudent, workmanlike manner.

(b) Drilling to well completion during the primary term.

(1) If a dry hole or shut-in well is completed within 60 days of a lease anniversary date during the primary term, the lease is maintained until the next anniversary date without payment of delay rentals. If a dry hole or shut-in well is completed more than 60 days before a lease anniversary date during the primary term, a delay rental must be timely paid on or before such anniversary date to maintain the lease by delay rentals.

(2) If a dry hole or a shut-in well is completed during the last year of the primary term or within the 60 days immediately preceding it, the lease is maintained until the end of the primary term.

(3) If a well completed during the primary term secures production in paying quantities, refer to the provisions of §9.35 of this title, (relating to Producing the State Lease) to maintain the lease.

(c) Drilling operations at the expiration of the primary term (extensions).

(1) To hold a lease by drilling operations at the expiration of the primary term, lessee must obtain an extension of the primary term as set out in this paragraph but may only obtain such an extension if the following conditions apply:

(A) the lease has not produced in paying quantities during the primary term, and

(B) lessee is conducting a drilling operation in good faith and in a good and workmanlike manner on the last day of the primary term.

(2) To obtain an extension of the primary term and prevent automatic lease termination, lessee shall complete the following requirements:

(A) Application. An application to extend the lease, on the appropriate GLO form and the correct payment, must be received by the GLO on or before the expiration date of the primary term. If such application and payment are not timely received, the lease shall expire automatically on the last day of the primary term.

(B) Payments. The payments required to extend the primary term of a lease for 30 days are as follows:

(i) if lease covers 640 acres or less: $3,000;

(ii) if lease covers more than 640 acres: $6,000.

(C) Affidavits required. Within 5 days after the expiration of the primary term, the GLO must receive an affidavit of drilling operations on the appropriate GLO form.

(D) Effect of extension. An extension granted under this paragraph maintains the lease for only 30 days. If the 30 day period expires without lessee completing a productive well or obtaining a timely additional extension, then the lease automatically terminates.

(3) Additional extensions for continued drilling operations.

(A) Additional 30-day extensions may be obtained (for up to a maximum of 12 additional, consecutive extensions) by filing:

(i) an application for additional extension on the appropriate GLO form and the appropriate payment, as established in subparagraph (B)of this section, prior to the expiration of the previous 30-day extension; and

(ii) an affidavit of drilling operations on the appropriate GLO form with the daily drilling summaries for the previous 30 days attached must be filed within 5 days following the expiration of the previous 30-day extension.

(B) Effect of additional extension. An additional extension granted under this paragraph maintains the lease for

only 30 additional days. If this 30 day period expires without lessee completing a productive well or obtaining a timely additional extension, then the lease automatically terminates.

(d) Drilling or reworking operations after the expiration of the primary term.

(1) Lessee may maintain a lease that has ceased production in paying quantities after the expiration of the primary term by conducting drilling or reworking operations.

(2) One drilling or reworking operation will maintain a lease if:

(A) the drilling or reworking operation begins within 60 days of the cessation of production in paying quantities;

(B) lessee conducts such drilling or reworking operation without interruptions totaling more than 60 days during the entire, single drilling or reworking operation; and

(C) such drilling or reworking operation results in production or enhanced production, or, such drilling or reworking operation results in a dry hole and a timely new drilling or reworking operation is commenced in compliance with the lease.

(e) No ratification or revivor. If a lessee fails to conduct drilling and reworking operations or to obtain an extension in accordance with this section and the lease terms and lessee has not otherwise maintained the lease, no action by the state or an owner of the soil on Relinquishment Act property, may ratify, re-grant or revive the terminated lease or may estop the state from asserting lease termination.

§9.35. Producing the State Lease.

(a) General provisions applicable to producing oil and/or gas on state leases.

(1) The GLO will treat a well as non-producing if no RRC production reports are filed for that well or if reports showing zero production are filed with the RRC for that well.

(2) All wells producing liquids must be produced through an oil and gas separator of ample capacity and in good working order.

(3) Lessee must obtain written permission from GLO staff before commingling state production with private production or before commingling state oil and/or gas from two separate leases, separate reservoirs or multiple stratigraphic or lenticular accumulations. Send commingling requests to the address found in §9.32(c)(3)(A) of this title, (relating to General Responsibilities of State Lessees).

(b) Effect of production during or after the primary term. If production in paying quantities is established during the primary term, lessee shall be exempt from paying further delay rentals so long as such production continues through the primary term. Thereafter, subject to other lease requirements, terms and conditions, a lease shall remain in effect so long as oil and/or gas is being produced in paying quantities from the lease.

(c) Cessation of production.

(1) If production ceases within 60 days of a lease anniversary date during the primary term, the lease is maintained until the next anniversary date without payment of delay rentals. If production ceases more than 60 days before a lease anniversary date during the primary term, a delay rental must be timely paid on or before such anniversary date to maintain the lease by delay rentals.

(2) If production ceases during the last year of the primary term or within the 60 days immediately preceding that last year, the lease will be maintained to the end of the primary term. To maintain a lease after such cessation of production, lessee may conduct drilling or reworking operations in compliance with §9.34(d) of this title, (relating to Drilling and Reworking Operations), treating the last day of the primary term as the date of cessation of production under such paragraph.

(3) If production ceases after the primary term has expired, Lessee may maintain its lease by conducting drilling or reworking operations under §9.34(d) or as otherwise authorized by the lease

(d) No ratification or revivor. If a lease ceases to produce and is not otherwise maintained in force and effect, no action by the state or an owner of the soil on Relinquishment Act property, may ratify, re-grant or revive the terminated lease or may estop the state from asserting lease termination.

§9.36. Shut-In Royalty.

(a) During the primary term. If lessee completes a shut-in well during the primary term, lessee may hold the lease by resuming delay rental payments. See §9.34(b)(1)(2) of this title, (relating to Drilling and Reworking Operations).

(b) After the primary term has expired.

(1) When a shut-in well is located on the premises, but the lease is being otherwise held in effect under the lease, no shut-in royalty is needed to maintain the lease.

(2) If a lease is not being otherwise held in effect, contains a shut-in provision and has a shut-in well located on the premises, then failure to make a timely, full shut-in royalty payment will result in the lease automatically terminating on the date the shut-in payment is due under subsection (d)(1) of this section. However, if lessee timely pays a full shut-in royalty under this section, the lease will be held for one year beginning on the effective shut-in date. Thereafter, the lease will terminate automatically on an anniversary date of the effective shut-in date, unless on or before such anniversary date lessee pays a timely subsequent shut-in royalty under subsection (d)(2) of this section or on or before 60 days after such anniversary date lessee commences drilling or reworking operations or actually produces oil or gas.

(3) If a lessee fails to pay or improperly pays a shut-in royalty, no action by any lessor, including the state or an owner of the soil on Relinquishment Act property, may ratify, re-grant or revive the terminated lease or may estop the state from asserting lease termination.

(c) Full payment of shut-in royalty. The lease sets the amount of the shut-in royalty payment and the full amount must be timely paid to all lessors to hold the lease. If the lease has several interest owners and any one such owner fails to pay its proportionate share of the full shut in royalty amount set in the lease, then the entire lease will terminate. Under the October, 1997 state fee form, the shut in royalty amount is the greater of the two following amounts:

(1) double the annual delay rental provided in the lease (which amount may be subject to proportionate reduction if the lease contains such a provision and if acreage is released); or

(2) $1,200 for each shut-in well.

(d) Timeliness of Shut-In Royalty Payment to the State.

(1) For lessee to maintain a lease by paying a shut-in royalty payment, the GLO must receive such payment on or before the latest of the following dates:

(A) the expiration of the primary term;

(B) 60 days after the date the well ceases to produce oil or gas; or

(C) 60 days after the date lessee completes drilling or reworking operations in accordance with the lease.

(2) Subsequent shut-in royalty payments are due as established in subsection (h)(1) of this section.

(3) If the date when a shut-in royalty payment is due falls on a Saturday, Sunday or a legal state or federal holiday, shut-in royalty payments may be timely received on the next calendar day which is not a Saturday, Sunday or a holiday.

(4) Under the standard business practices and/or procedures of the GLO, the date that the GLO stamps, punches, or otherwise marks on the shut-in royalty payment, check, draft, stub, or envelope establishes the date of actual receipt by the GLO.

(5) Payment of a shut-in royalty to the GLO shall be considered timely, irrespective of the date of actual receipt, if lessee notifies the GLO in writing of its claim that its lease has been maintained under this subparagraph and then establishes that:

(A) payment was dispatched to the address found in §9.32(c)(3)(A) of this title, (relating to General Responsibilities of State Lessees) by certified or registered mail or equivalent proof;

(B) an acceptance form was initialed by an employee of the United States Post Office, a common carrier, or its equivalent and the date stamped by the United States Post Office, a common carrier, or its equivalent (not including private postal meters) showing the letter was received and accepted at least 14 days before it was due;

(C) payment is actually received by the GLO no later than 30 days after it was due; and

(D) no intervening third party has acquired any of the oil and gas interests originally leased by lessee

(e) Affidavit required. Upon receipt of a shut-in royalty, the GLO will send a shut-in affidavit to the party paying the shut-in royalty. The affidavit must be completed and returned to the GLO. Failure to complete and return the affidavit as required may result in a penalty under §9.32(c)(3)(B)(iii), and/or forfeiture of the lease.

(f) Shut-in royalty on pooled leases. A shut-in well located within the boundaries of a pooled unit will be considered to be a shut-in well located upon each state lease within the pooled unit. The leases included within the pooled unit shall terminate unless shut-in royalties are paid on each lease wholly or partially within the unit, according to the terms of each lease.

(g) Intermittent production. A well on a lease maintained in force by shut-in royalty may be produced intermittently and shut in as often as desired. No additional shut-in payment is required during the year that the lease is held by shut-in royalty. However, such intermittent production and shut-ins shall not operate to change the due date for subsequent shut-in royalty payments under subsection (h) of this section or the date upon which actual production or additional drilling must occur under subsection (b)(2) of this section. Royalty also remains due on oil and gas that is intermittently produced.

(h) Subsequent shut-in payments.

(1) For a maximum of five years after the effective shut-in date, lessee may pay subsequent annual shut-in royalties meeting the requirements set in this section on or before each anniversary of the effective shut-in date. Each such payment will maintain the lease for an additional year. The right to make subsequent shut-in royalty payments may end as described in subsection (i) of this section.

(2) At the end of the maximum five year shut-in period provided for in the lease, the lease will terminate for cessation of production unless the operator or lessee begins actual production of oil or gas from the previously shut-in well or wells or otherwise maintains the lease in effect. After obtaining production from a previously shut-in well, the well may be shut in again for a maximum term of five years as provided in the lease and subsection (h)(1) of this section.

(i) Compensatory royalty on shut-in well.

(1) Encroaching well adjacent to shut-in well. If a state lease is maintained by a shut-in royalty when production from an encroaching well is sold and delivered, lessee's right to maintain the state lease by payment of a subsequent shut-in royalty ceases but the lease remains in effect until the shut-in royalty period expires. The lease may be held in effect after such date for four additional and successive periods of one year each by paying monthly compensatory royalties;

(2) Amount of the compensatory royalty.

(A) The monthly compensatory royalty payment is calculated using the royalty rate set in the state lease that has the shut-in well and the market value of monthly production from the encroaching well.

(B) If the annual total of the monthly compensatory royalty payments is less than what the annual shut-in royalty would have been for that time period, lessee shall pay additional compensatory royalty equal to the difference.

(3) Due dates for compensatory royalty.

(A) . The first monthly compensatory royalty is due on the last day of the second month after the shut-in royalty period expired. This first compensatory royalty is computed using the encroaching well's production for the month immediately after the shut-in royalty period expired. Thereafter, monthly compensatory royalties are due by the last day of each month and are computed on the encroaching well's production for the preceding month.

(B) For each year that monthly compensatory royalties are paid under subsection (i)(1) of this section, lessee shall remit additional compensatory royalty owed under subsection (i)(2)(B) of this section within 30 days of the end of each such year.

(4) Limited effect of compensatory royalties. Payment of compensatory royalties under this section does not satisfy the obligations to drill offset wells or of reasonable development. To pay a compensatory royalty in lieu of an offset obligation, written approval from the commissioner must be obtained under §9.37(c) of this title, (related to Offset Well Obligations & Compensatory Royalties).

§9.37. Offset Well Obligations and Compensatory Royalties.

(a) Obligation to drill an offset well. An offset well must be drilled on state property under the terms of this section whenever an encroaching well is completed unless one of the following conditions applies: lessee has properly pooled the state property with the property containing the encroaching well (see §9.81 of this title, (relating to Pooling and Unitizing State Property), the commissioner has granted written approval to allow payment of compensatory

royalties in lieu of drilling an offset well (see subsection (c) of this section) or the commissioner has agreed that the encroaching well cannot be draining state hydrocarbons (see subsection (b) of this section). Failure to drill an offset well can result in the forfeiture of a lease or of a surface owner's agency rights under the Relinquishment Act.

(1) Who is obligated. For any state property other than Relinquishment Act property, the lessee of the state property has the obligation to drill the offset well. For leased or unleased Relinquishment Act property, the surface owner, lessee, sublessee, receiver or other agent in control of the property has the obligation to drill the offset well.

(2) Drilling the offset well. In addition to meeting the requirements found in §9.32 of this title, (relating to General Responsibilities of State Lessees) and §9.34 of this title, (relating to Drilling and Reworking Operations), an offset well shall also be drilled to a sufficient depth and in such a manner as to prevent drainage of oil or gas from state land.

(3) When to begin drilling. The drilling operation associated with an offset well shall begin:

(A) for Relinquishment Act lands, within 100 days of the date that the encroaching well first produces commercially (excluding test production); or

(B) for other state properties, within 60 days of the date that the encroaching well first produces commercially (excluding test production).

(b) Agreement that no drainage of state hydrocarbons is possible.

(1) Application. If the person obligated to drill an offset well is certain that an encroaching well cannot be draining the state property, he should apply in writing to GLO staff at the address found in §9.32(c)(3)(A) of this title (relating to Required Activity Lessee Responsibilities). This application should include a full explanation of why applicant contends that no drainage of state hydrocarbons is possible and request the commissioner to agree with this contention.

(2) Information/Data supporting application. With the application, the applicant shall submit any evidence, data, or information necessary to support the application and request, including geological, geophysical, economic, engineering, or production data from the encroaching well, and any other data regarding the state property, the encroaching well or any shut-in well located on the state property. Applicant shall submit additional evidence, data or information upon request of GLO staff.

(3) Effect of reaching an agreement. If the commissioner, after reviewing all pertinent data and evaluating the GLO staff recommendation, agrees that the encroaching well cannot drain state hydrocarbons, then the commissioner will send a letter to the applicant as evidence of this agreement. This letter agreement will not prevent the state from claiming or collecting damages should later technology show that state hydrocarbons were drained or if the data submitted by applicant was false, inaccurate or incomplete.

(4) Effect of failing to reach an agreement. If the commissioner, in his sole discretion, concludes that the state property may possibly be drained, then a letter will be mailed to applicant stating that the drilling of an offset well is required under the statutory provisions and any corresponding lease provision. Applicant will then be given the opportunity to seek the commissioner's approval to pay compensatory royalties in lieu of an offset well under subsection (c) of this section.

(c) Agreement to accept compensatory royalty in lieu of drilling offset wells.

(1) Effect of reaching or failing to reach an agreement. If an agreement is reached with the commissioner under this section, the payment of a compensatory royalty will satisfy the obligation to drill an offset well on the state property involved. Reaching an agreement will not prevent the state from claiming or collecting damages should later technology show that additional state hydrocarbons were drained or if the data submitted by applicant was false, inaccurate or incomplete. If such an agreement cannot be reached and the state property cannot be pooled, an offset well must be drilled under the appropriate statutory provisions and any corresponding lease provisions.

(2) Application. If the person obligated to drill an offset well desires to pay compensatory royalty in lieu of drilling it, he should apply in writing to GLO staff at the address found in §9.32(c)(3)(A). This application should include, at a minimum, an explanation of why applicant does not plan to drill an offset well (or to produce and market production if there is a shut-in well on the state property), why applicant cannot pool the state property with the property containing the encroaching well, and why the payment of a certain compensatory royalty will adequately protect the state's interests.

(3) Information/Data supporting application. With the application, the applicant shall submit any evidence, data, or information necessary to support his application, including geological, geophysical, economic, engineering, or production data from the encroaching well, and any other data regarding the state property, the encroaching well or any shut-in well located on the state property. Applicant shall submit additional evidence, data or information upon request of GLO staff.

(4) Mandatory terms of the agreement. If, after reviewing the pertinent data and evaluating the GLO staff recommendation, the commissioner is able to reach an agreement with applicant under this section, the agreement may contain additional terms at the commissioner's sole discretion but must contain the following provisions:

(A) The amount of the compensatory royalty payment. The compensatory royalty on the state property burdened by the offset obligation shall be paid:

(i) on the royalty rate set in the lease covering such state property or on a royalty rate set by the commissioner if such property is unleased Relinquishment Act land; and

(ii) on the market value at the well of all production from the encroaching well unless the commissioner, in his sole discretion, agrees to reduce proportionately the compensatory royalty volumes based upon the amount of state hydrocarbons being drained as reflected by the data submitted by the applicant.

(B) Special provisions if state property already has a shut-in well. If compensatory royalties are paid on state property that has a shut-in well and the annual total of these compensatory royalty payments is less than the annual shut-in royalty payment set in the applicable state lease, lessee shall pay additional compensatory royalty equal to the difference. Such additional compensatory royalty is due one year and 30 days from the date that the first compensatory royalty was due and annually thereafter on the same date.

(5) Due date. Unless the agreement reached with the commissioner states otherwise, the first compensatory royalty payment (covering all past production from the encroaching well) is due by

the last day of the month following the month in which the agreement was reached and, thereafter, compensatory royalties are due by the last day of each month and computed based on the encroaching well's production for the preceding month.

§9.38. Suspending the State Lease.

(a) Conditions Warranting a Suspension. A lessee may apply for a suspension of the terms of a lease in the following circumstances:

(1) if a lease issued by the commissioner is the subject of litigation relating to the validity of the lease or to the commissioner's authority to issue the lease under Texas Natural Resources Code, §52.028;

(2) if, after making a diligent and good faith attempt, a lessee is unable to obtain access to the leased property or is unable to obtain in a timely manner a permit to drill on or produce from the leased premises by any duly constituted authority of the United States or of this state under Texas Natural Resources Code, §52.0301; or

(3) if lessee, having made a good faith effort to comply with the terms of the lease, to conduct drilling operations, or to produce oil or gas, is prevented from doing so by a reason set forth in the lease form, which reasons may include war, rebellion, riots, strikes, fire, acts of God, or any order, rule, or regulation of governmental authority.

(b) Procedure.

(1) A lessee seeking a suspension of the terms of a lease shall submit a written request to the GLO, detailing the reasons for the suspension. All materials relating to a suspension must be mailed to the following address: Texas General Land Office; Attention: Minerals Leasing; 1700 North Congress, Room 640; Austin, Texas, 78701-1495. These materials may also be simultaneously faxed to (512) 475-1543 (Attention: Minerals Leasing)

(2) The GLO staff will evaluate the request and any supporting documentation submitted. Applicants should be prepared to submit any additional information requested and should be prepared to appear before the SLB if requested to do so.

(3) For cases related to litigation or force majuere conditions, the GLO staff will submit a recommendation for a decision to the commissioner. The commissioner may choose to present the recommendation to the SLB for input. The commissioner may accept or reject the recommendation and may impose additional terms or conditions to the lease suspension as authorized or required by statute or lease provision.

(4) For cases related to failure to obtain access or a permit, the GLO staff will submit a recommendation to the SLB. The SLB may accept or reject the recommendation and may impose additional terms or conditions to the lease suspension as authorized or required by statute or lease provision.

(5) Unless a shorter time frame for reporting is set when the suspension is granted, a lessee granted a suspension shall submit a status report to the entity that granted the suspension and to GLO staff at the address and/or fax number, given in subsection (b)(1) of this section, six months after the effective date of the suspension and at six-month intervals thereafter as long as the cause for suspension exists. The status report shall detail relevant information explaining what actions have been taken to remove or to remedy the cause for suspension.

(6) In addition to the status report, each lessee granted a suspension shall immediately notify the entity that granted the extension and GLO staff of developments which affect the terms of suspension and shall promptly notify such entity when the cause for suspension ends.

This 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 September 28, 1998.

TRD-9815191
Garry Mauro
Commissioner, General Land Office
General Land Office
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For further information, please call: (512) 305–9129

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Subchapter E. Pooling and Unitizing State Property

31 TAC §9.81

The new section is proposed under Texas Natural Resources Code §31.051 and §52.131(h) which give the commissioner rulemaking authority and Texas Natural Resources Code, §§32.062, 32.154, and 32.205 which give the SLB rulemaking authority.

Texas Natural Resources Code, Chapter 32, Subchapters A, C, E and F, and Chapter 52 are affected by the proposed new rules.

§9.81. Pooling and Unitizing of State Property.

(a) Approval. An agreement to pool or unitize any state leases or royalty interests or to amend an existing unit must be approved by the SLB or appropriate board or agency and executed by the commissioner to be effective. The SLB has regular meetings on the first and third Tuesday of each month.

(b) Procedure.

(1) Submit a completed pooling application and the processing fee prescribed by §1.3 of this title, (relating to fees) to the GLO. Application forms may be obtained from the GLO upon request. The application must be submitted at least 14 days prior to the SLB meeting at which the application will be considered. If not timely submitted, the application will be considered at the next available meeting. Any proprietary information submitted with the application shall be kept confidential as required by law, and upon request of applicant, will be returned after examination by GLO staff. The application should include the following information if available:

(A) a legal description of the area to be pooled and a list of the leases to be pooled;

(B) geological and geophysical data; e.g., structural maps, isopach maps, cross-sections, productive limits, engineering studies and analysis;

(C) electrical and/or geophysical logs;

(D) information on wells drilled in the general area of the proposed unit, and current production rates of offset wells;

(E) names of all the working interest owners in the leases to be pooled and the names and respective capacities (e.g., president, vice-president, attorney-in-fact, etc.) of the persons authorized to execute the pooling agreement;

(F) for Relinquishment Act Leases; a list of the owners of the soil who have not authorized pooling in the lease and will be executing the pooling agreement; and

(G) any other data which may be requested.

(2) The pooling application will be reviewed by GLO staff and the pooling committee. The pooling committee consists of a representative from the GLO, the governor's office and the office of the attorney general. The pooling committee usually meets to review pooling applications on the Wednesday before the week of a SLB meeting. An appearance before the pooling committee is generally not required, however, an applicant may be present while the application is considered. The pooling committee will present the terms of the application to the SLB and make a recommendation.

(c) Agreement provisions. After approval by the SLB, the states' form of pooling agreement, or ratification will be prepared by the GLO and sent to the applicant for signature. The agreement may provide:

(1) the effective date of the agreement;

(2) the term of the agreement, whether it be for a specified term (a temporary pooled unit) or for so long as the pooled mineral is produced from the pooled unit or the leases in the unit are otherwise maintained in force (a permanent pooled unit). A new pooling application should be submitted prior to the expiration of a temporary pooled unit to extend its term or to obtain a permanent pooled unit;

(3) the manner in which unit production is to be allocated to each tract within the unit (e.g., surface acres, productive acreage or volumetric calculation, etc.); and

(4) any other provisions which the SLB considered necessary to protect the state's interests.

(d) Requirement of timely execution.

(1) If the pooling agreement or ratification is not signed and returned to the GLO within 90 days of approval by the SLB, the agreement shall be of no force and effect, unless a written request is made and accepted by the GLO to extend the 90 day period.

(2) An applicant may resubmit a pooling application to the GLO.

This 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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Garry Mauro
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General Land Office
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Subchapter F. Discontinuing the Leasehold Relationship

31 TAC §§9.91–9.95

The new sections are proposed under Texas Natural Resources Code §31.051 and §52.131(h) which give the commissioner rulemaking authority and Texas Natural Resources Code, §§32.062, 32.154 and 32.205 which give the SLB rulemaking authority.

Texas Natural Resources Code, Chapter 32, Subchapters A, C, E and F, and Chapter 52 are affected by the proposed new rules.

§9.91. General Provisions.

(a) Any discontinuance of a leasehold relationship, except for termination, is effective only upon complete compliance with §§9.91-9.95 of this subchapter. Terminations are effective according to the terms of the lease and the laws of the state.

(b) The leasehold relationship between the state and a lessee of state oil and gas may be discontinued by any of the following:

(1) release;

(2) assignment;

(3) termination;

(4) forfeiture.

(c) Effect of discontinuing the leasehold relationship. When the discontinuance of a leasehold relationship becomes effective, the lessee shall be relieved of all further obligations to the state due to the lessee's ownership of the lease except for the following:

(1) those obligations, liabilities, penalties, or the like owed by the lessee to the state as of the effective date of the release, termination, forfeiture, or assignment;

(2) the duty to pay all royalty owed by lessee in the manner set out in the lease and this chapter on all oil or gas produced under the lease as of the date of the discontinuance of the leasehold relationship;

(3) the accrual of penalty and interest, both in the past and in the future, as set out in this chapter on any delinquent royalty or report owed by the lessee;

(4) the duty to file with the GLO the reports, applications, and other records required by the lease, statutes, and/or this chapter regarding any activity by the lessee or lessee's operator relating to the previously leased premises and/or production therefrom; and

(5) if all oil and gas production, drilling, and rework activity has ceased on a well, the following clean-up duties:

(A) the duty to comply with all federal and state laws, particularly RRC and GLO statutes and administrative rules and United States Corps of Engineers regulations relating to plugging and abandoning wells and cleaning the property;

(B) the duty to remove all oil stored on the property and clean any residue remaining on the property unless the GLO agrees in writing to, or requests, an alternative plan. If such is not completed within 120 days of when the discontinuance of the leasehold relationship becomes effective, the state, at its option, may find that the lessee has abandoned the oil, and may take possession of the oil and dispose of it in a manner that is in the state's best interest;

(C) the duty to remove all equipment, structures, machinery, tools, supplies, and other items on the property and otherwise restore the property to the condition it was in immediately preceding issuance of that lease unless the GLO agrees in writing to, or requests, an alternative arrangement. If such is not completed within 120 days of when the discontinuance of the leasehold relationship becomes effective, a presumption shall arise that these items have been abandoned by the lessee or operator and the state shall become the owner of these items;

(D) with regard to operations in Texas state waters, the duty to remove all equipment, structures, machinery, tools, supplies, and other items on the property and otherwise restore the property to the condition it was in immediately preceding issuance of that lease unless the GLO and any other relevant authority agree in writing to, or request, an alternative arrangement. This duty will not be fulfilled until:

(i) lessee has examined an area within a 300-foot radius surrounding each wellbore on a given tract using one of the following means: side-scan sonar, trawler drag, divers, or any other method approved in writing by the GLO prior to use; and

(ii) a notarized affidavit shall be filed with the GLO within 120 days of when the discontinuance of the leasehold relationship becomes effective. It shall be signed by a senior officer of the company or a principal of any other entity and shall state that the property has been cleared of all navigational hazards and obstructions and has been restored as close as practicable to the condition that it was in immediately preceding issuance of that lease; and

(E) the duty to remove all fills for roads and drill sites if requested by the commissioner.

(d) Discharge of clean-up duties. Lessee shall be liable for any damages incurred due to lessee's failure to comply with subsection (c)(5) of this section. At the commissioner's discretion, the lessee may be excused from all or part of these duties upon presentation of proof to the commissioner's satisfaction that these duties will be otherwise met.

§9.92. Release.

(a) Release of a state oil and gas lease.

(1) Availability. All or part of a state oil and gas leasehold interest may be released to the state by its lessee at any time. See also Texas Natural Resources Code, §52.027.

(2) Procedure. A release is effectuated only by complete compliance with the following:

(A) recording the release in each county in which any part of the original acreage covered by the lease is located;

(B) filing with the GLO the recorded original or a certified copy of the recorded original of each release recorded as required by this subsection within 90 days after the execution of each such release; and

(C) properly paying the filing fees and providing the information as required in subsection (b) of this section.

(b) Fees and other required information. The following must accompany each release and counterpart required to be filed in the GLO under this section:

(1) a list clearly designating each state lease, as identified by its mineral file number, affected by the release;

(2) the payment of the filing fee required by §1.3 of this title, (relating to Fees) for each state lease, as identified by its mineral file number, affected by the release;

(3) an adequate legal description of the premises released including the survey name, block, township, county, and any other descriptive information requested by the GLO;

(4) in cases of vertical severance, partial releases shall be filed in the same manner as complete releases are filed, and must include a metes and bounds description of the area so released, including relevant plats, unless the area released can be and is accurately described as a part of the section; and

(5) in cases of horizontal severance, a partial release shall be filed in the same manner as complete releases are filed, and must include a description of all relevant depths and formations.

(c) If a release is not properly filed within 90 days of its execution, then the filing fee due shall be double the normal fee.

(d) Release of terminated lease.

(1) A lessee should record and file a release of a terminated lease in the manner set out in this subsection. Such filing must be made in accordance with all of the requirements of this section.

(2) A lessee's failure to file a release does not prevent the automatic termination of a lease.

(e) Acceptance by the GLO. The GLO may waive any or all of the requirements of this section and accept a signed release even if lessee has failed to fully comply with this section.

§9.93. Assignment.

(a) Assignment of a state oil and gas lease. All or part of a state oil and gas leasehold interest may be assigned at any time, except as prohibited by statute, administrative rule, or common law. All assignments, including assignments of overriding royalty interests on Relinquishment Act lands, must be recorded in each county in which all or part of the original acreage covered by the lease is located. The original recorded assignment or a certified copy thereof shall be filed in the GLO within 90 days of its execution. For purposes of this paragraph, the last execution date shown on the instrument shall be deemed to be the date of execution. The following must accompany each assignment required to be filed and every counterpart so filed in the GLO under this subsection:

(1) a list clearly designating each state lease, as identified by its mineral file number, affected by the assignment;

(2) the payment of the filing fee required by §1.3 of this title, (relating to Fees) for each state lease, as identified by its mineral file number, affected by the assignment;

(3) an adequate legal description of the premises assigned, including the survey name, block, township, county, and any other descriptive information requested by the GLO;

(4) in cases of vertical severance, partial assignments of state oil and gas leases shall be filed in the same manner as complete assignments are filed, and must include a metes and bounds description of the area so assigned, including relevant plats, unless the area assigned can be and is accurately described as a part of the section; and

(5) in cases of horizontal severance, partial releases of state oil and gas leases shall be filed in the GLO, and shall include a description of all relevant depths and formations.

(b) Any assignment not accompanied by the required information or fees shall not be accepted for filing. If an assignment is not properly filed within 90 days of its execution, the filing fee due shall be double the usual fee.

(c) In-lieu assignments will not be accepted or filed in the records of the GLO.

(d) An assignee cannot use a failure to comply with the requirements in this section to avoid its liability to the state.

(e) The assignor of any state oil and gas lease will remain liable to the state in the event of a breach of any covenant and/or condition of the lease.

(f) If an assignment has not been properly filed, the commissioner may forfeit the lease at his discretion.

(g) The current holder of a lease or of any interest therein shall be responsible for proper filing with the GLO of any assignments not previously filed by any predecessor in interest.

(h) The heir, devisee, executor, or administrator, as the case may be, of the estate of an assignee may file a statement of the parties entitled to hold the interest of the assignee in the lease. Such statement should include a list by mineral file number of all leases affected. No filing fee shall be required.

(i) Should an assignee formally change names, a notice of name change, accompanied by a list of file numbers of all leases affected, shall be submitted to the GLO. No filing fee shall be required.

(j) A corporate merger shall be considered an assignment under this section. A certified copy of the certificate of merger shall be furnished to the GLO not later than 90 days after it is accepted for filing by the Secretary of the State of Texas. A list of each state lease affected by the merger shall accompany the certified copy of the certificate of merger. Leases held by the surviving corporation prior to the merger need not be listed, unless the name of the surviving corporation is changed, in which event subsection (i) of this section shall apply.

(k) A deed of trust, mortgage or other security agreement shall be considered an assignment under this subsection. If a state lease is subject to a deed of trust, mortgage or other security agreement, a memorandum of such instrument shall be furnished to the GLO in accordance with this section.

(l) Upon complete compliance with this subsection, the assignee will:

(1) succeed to all rights and be subject to all liabilities, obligations, penalties, and the like incurred by any prior lessee, including any liability to the state for unpaid royalty; and

(2) assume all obligations, liabilities, and consequences arising from all covenants, conditions, and terms (whether express or implied) of the lease.

(m) Assignments of Relinquishment Act lease to surface owner. A surface owner may acquire by assignment a lease which he or she executed on land subject to the Relinquishment Act only by complying with Texas Natural Resources Code, §52.188, and any other relevant laws or regulations. See also §9.22(2) of this title, (relating to Leasing Procedures).

(n) Acceptance of an assignment by the GLO does not waive any claim the agency may have against a party relating to that assignment.

§9.94. Termination.

(a) Causes. The circumstances under which a state oil and gas lease will terminate are determined by certain provisions in each lease and by the laws of the state.

(b) Procedure.

(1) Termination occurs automatically whenever a condition of a lease, as defined by the lease and the laws of the state, is not met.

(2) When the GLO becomes aware of facts and circumstances which would result in the termination of a lease, the GLO will, as a courtesy, issue an initial notice of termination to the lessee as shown by the GLO files. This notice shall inform the lessee of the GLO's determination that the lease at issue has terminated and the reasons for this determination. This notice shall also inform the lessee that the lessee has 30 days in which to present evidence and convince the GLO that a termination has not occurred.

(3) If such evidence has not been presented at the expiration of the 30-day period, the mineral file shall be endorsed "terminated."

(4) Should such evidence be presented to the GLO within the 30-day period, the GLO shall review it and determine if it proves to the GLO's satisfaction that the lease at issue did not terminate. If the GLO is not so persuaded, a final notice stating this conclusion and the GLO's reasons shall be sent to the lessee and the mineral file shall be endorsed "terminated." If the GLO is persuaded by the evidence presented that the lease at issue did not terminate, a letter explaining this conclusion shall be sent to the lessee and filed in the mineral file.

(5) Failure of the GLO to send these notices, or failure of the appropriate parties to receive these notices, will not in any way affect the termination itself nor alter any liabilities accruing before or after termination.

(c) Release. See §9.92(d) of this title, (relating to Release), for the requirement of filing releases of terminated leases.

§9.95. Forfeiture.

(a) Forfeiture for failure to drill an offset well.

(1) Duty. See §9.37 of this title, (relating to Offset Well Obligations & Compensatory Royalties) for a full discussion of the duty to drill offset wells.

(2) Subject to forfeiture. A lease is subject to forfeiture if there is a failure or refusal to:

(A) begin the drilling operation required in §9.37 within the proper time frame set out in that section; or

(B) prosecute this activity as required and as is necessary to reasonably develop the state land and to protect it against drainage.

(b) Forfeiture for other breaches. Other circumstances under which a state oil and gas lease may be forfeited are determined by certain provisions in each lease or by the laws of the state.

(c) Procedure.

(1) When sufficiently informed of facts which subject a lease to forfeiture, it shall be the commissioner's policy to mail notice that the lease is being considered for forfeiture to those then shown in GLO records as the current lessee of the lease; and allow the lessee 30 days in which to present evidence and convince the commissioner that the commissioner should not forfeit the lease. The commissioner may, however, forfeit a lease without this prior notice in circumstances where the commissioner deems such action necessary to protect the best interest of the state. Failure of the commissioner to send this prior notice, or failure of the appropriate parties to receive this prior notice, will not in any way affect the validity of the forfeiture itself. However, upon any forfeiture, the lessee may request a reinstatement of the lease as set out in subsection (d) of this section.

(2) When sufficiently informed of facts which subject a lease to forfeiture, it is within the commissioner's discretion to forfeit that lease by endorsing the following on the mineral file:

(A) words declaring the lease forfeited;

(B) the commissioner's signature; and

(C) the date these actions are taken.

(3) Upon such endorsement, the lease and all rights and payments made thereunder shall be deemed forfeited.

(4) Promptly after forfeiture, the GLO shall mail notice of this action to those then shown in the GLO records as the current lessees of the lease and, in the case of Relinquishment Act land, to the surface owners then shown in the GLO records.

(d) Reinstatement.

(1) Within 30 days of forfeiture for failure to drill an offset well and upon satisfactory evidence of future compliance with the applicable laws, the commissioner has the discretion to reinstate the lease upon the terms required by law and upon any other terms the commissioner may prescribe.

(2) For forfeitures due to other breaches, the commissioner has the discretion to reinstate the lease at any time before the rights of another intervene. Upon satisfactory evidence of the lessee's future compliance with the applicable laws, and with any other term the commissioner may prescribe, the lease may be reinstated.

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

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Garry Mauro
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General Land Office
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31 TAC §9.4, §9.7

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

The General Land Office (GLO), with the approval of the School Land Board (SLB), proposes the repeal of §9.4, relating to Geophysical and Geochemical Exploration Permits, and §9.7, relating to Royalty and Reporting Obligation to the State. This repeal is necessary to allow these sections to be renumbered and placed into subchapters as part of a comprehensive set of proposed new rules.

These proposed organizational changes allow these rules to conform to the proposed renumbering of the remainder of Chapter 9 and also allow room for future subdivision and expansion of the rules. The existing text of these rules has not been changed except to update cross-references made obsolete by other concurrent rule actions.

Fiscal implications for state or local government, public benefit, and any effects on individuals or small businesses will be addressed in the published rule proposals reflecting the organizational changes to these rules.

Comments on any aspect of the proposed repeal may be submitted to Carol Milner, Texas Register Liaison, General Land Office, 1700 North Congress, Room 626, Austin, Texas 78701-1495. The deadline for comments is 5:00 p.m., November 9, 1998.

The repeals are proposed under Texas Natural Resources Code §31.051 which gives the commissioner rulemaking authority, and Texas Natural Resources Code, §32.062 which gives the SLB rulemaking authority.

Because this proposed repeal is non-substantive, no statutes are affected.

§9.4. Geophysical and Geochemical Exploration Permits.

§9.7. Royalty and Reporting Obligation to the State.

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

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General Land Office
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Subchapter B. Issuing Exploration Permits and Oil and Gas Leases

31 TAC §9.11

The General Land Office (GLO), with the approval of the School Land Board (SLB), proposes new §9.11, relating to Geophysical and Geochemical Exploration Permits. With only one exception, the newly renumbered rule contains the existing text found in the former §9.4, (relating to Geophysical and Geochemical Exploration Permits). The existing text of the rule has only been changed to update cross-references made obsolete by other concurrent rule actions.

The new section has been placed in a subchapter and includes updated cross-references so that it conforms to the proposed reformatting and renumbering of the remainder of Chapter 9. This also allows room for future subdivision and expansion.

Spencer Reid, General Counsel, 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 because these are non-substantive, organizational changes.

Mr. Reid also has determined that for each year of the first five year-period the rule is in effect, the public will benefit because, as reorganized, the rule will be easier to use.

Because these are non-substantive changes, the GLO has determined that this action has no impact on private real property and a Takings Impact Analysis is unnecessary.

This action is not a rulemaking subject to the Coastal Management Plan under Chapter 505 of this title.

Comments on the proposed amendment may be submitted to Ms. Carol Milner, Texas Register Liaison, General Land Office, 1700 North Congress, Room 626, Austin, Texas 78701-1495. The deadline for comments is 5:00 p.m., November 9, 1998.

The new rule is proposed under Texas Natural Resources Code, §31.051 which gives the commissioner rulemaking authority, and Texas Natural Resources Code, §32.062 which gives the SLB rulemaking authority.

Because these are non-substantive changes, these rulemaking actions affect no statutes.

§9.11. Geophysical and Geochemical Exploration Permits.

(a) General rule of application. The rules in this section shall apply to lands described in §9.21(1)(2)(3)(A) and (4) of this title (relating to Leasing Guide).

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

(1) Applicant–A person seeking authorization from GLO to conduct geophysical or geochemical exploration on state-owned lands.

(2) Client–One for whom the geophysical or geochemical exploration is to be conducted.

(3) Geochemical exploration–A survey or investigation conducted to discover or locate oil and gas prospects using techniques involving soil sampling and analysis.

(4) Geophysical exploration–A survey or investigation conducted to discover or locate oil and gas prospects using magnetic, gravity, seismic, and/or electric techniques.

(5) High velocity energy source–Energy sources which generate a sharp-peaked energy pulse including, but not limited to, dynamite, detonating cord, seismogel, and ammonium nitrate.

(6) Low velocity energy source–Energy sources which generate a bell shaped energy pulse including, but not limited to, pneumatic, acoustic, and vibrating devices.

(7) Operator–One who directs, supervises, controls, and/or performs the exploration operations, together with all employees and sub-operators.

(8) Oyster lease–An area leased from the state for the production of oysters and marked according to the requirements of TPWD.

(9) Oyster reef–Natural or artificial formations in intertidal or subtidal areas that are composed of oyster shell, live oysters, and other organisms that are discrete, contiguous, and clearly distinguishable from scattered oysters.

(10) Permit–License issued by the commissioner authorizing geophysical and/or geochemical exploration on public school land.

(11) Permittee–The holder of a permit.

(12) Recreational beaches–Any shoreline frequently utilized by the general public for recreational activities.

(13) Resource management codes–Abbreviations for environmental restrictions adopted by state and federal resource agencies and applicable to state-owned tracts.

(14) Shot–Any action resulting in the generation of an energy pulse from which geophysical data is obtained.

(15) Shrimping fleet–A group of five or more boats trawling for shrimp in an area not more than one mile in diameter.

(16) Structure–Any man-made improvement placed on or affixed to state-owned lands.

(c) Permit applications and procedures.

(1) Geophysical or geochemical exploration for mineral resources may not be conducted on state-owned lands without a permit issued by the commissioner.

(2) Permits shall be issued jointly to, and are the mutual responsibility of, the client and the operator. Permits shall not be transferred or assigned.

(3) Application for a permit shall be made by the operator. The application shall be made upon forms furnished by GLO, and shall include:

(A) the names, addresses, phone numbers, and taxpayer ID numbers of the client and the operator. If an applicant is a corporation, it shall include the names of the corporate representatives authorized to execute legal documents;

(B) maps showing the location of shot lines in relation to state lease tracts, including x and y coordinates of the beginning and end points of each line as designated by the Texas Coordinate System, the Texas Natural Resources Code, §21.071, (for submerged lands only);

(C) any resource management code information available regarding the tracts on which the exploration activity will be conducted; and

(D) a complete description of the number and spacing of shots, the size of charge per shot, and a description of the energy source to be used during exploration activities.

(4) Applications must be received by GLO at least 14 working days for submerged lands and at least seven working days for uplands before proposed commencement of operations. The application processing period may extend beyond this time period. Operations, including surveying of the area, shall not begin until operator receives approval by GLO and is assigned a permit number

(5) The application shall be accompanied by the following fees as specified in §1.3 of this title (relating to Fees):

(A) application filing fee;

(B) geophysical fee (applicable to submerged lands only);

(C) geochemical fee;

(D) exploration inspection fee (applicable to submerge lands only);

(E) surface damage fee; and/or

(F) bottom damage fee (applicable to submerged lands inside the barrier reef of the Gulf of Mexico only).

(6) Permits are issued subject to any existing lease or rights granted to a surface lessee on tracts to be explored.

(7) Prior to the issuance of a permit, applicant may be required to submit additional information.

(d) Insurance. Prior to the issuance of a permit, applicant shall file with GLO proof of current liability insurance from a company approved by the Texas Board of Insurance or alternatively such other evidence as may reasonably be required by GLO to establish

the applicant's financial ability to self-insure against potential liability. The extent of the insurance coverage shall be in the amount deemed sufficient by GLO.

(e) Geophysical or geochemical operational guidelines.

(1) The following provisions shall apply to all geophysical or geochemical operations conducted on state-owned lands.

(A) Permits shall be granted for a minimum of three days and a maximum of 30 days. A permit may be extended for a maximum of an additional 30 days at the discretion of the commissioner and upon payment of the applicable fees.

(B) Failure to comply with any conditions included in the permit which pertain to GLO or any other state or federal regulatory agency shall be considered a violation as specified in subsection (h) of this section.

(C) The client or operator shall give verbal notice to GLO prior to commencement of operations. GLO will assign a number to the permit and give written notice of its issuance to the permittee.

(D) Geophysical crews operating on state-owned lands shall have the following items in their possession and available for inspection at the project site by the commissioner or a designated representative, upon request:

(i) a copy of the seismic permit, including any special conditions, and the authorized permit number;

(ii) a copy of GLO rules governing geophysical and geochemical exploration;

(iii) detailed maps showing the approved shot lines and shot points covered by the permit; and

(iv) a copy of the resource management codes and definitions as provided by GLO for those tracts on which operations will be conducted (applicable to submerged lands only).

(E) No shot in excess of 20 pounds dynamite may be used in submerged areas and no shot in excess of 40 pounds dynamite equivalent shall be used in uplands areas without special permission of the commissioner. Applicants wishing to utilize shots in excess of these limitations shall submit written documentation to the commissioner explaining the necessity for the size shot proposed, the number of shots to be utilized, the location of all shot holes, the proposed date that operations will commence, and the expected operations period. After evaluation, the request will be approved or denied, at the commissioner's discretion.

(F) No shots shall be discharged other than in daylight hours except by written permission of the commissioner.

(G) No shots shall be detonated within three miles of a recreational beach between May 1st and September 10th.

(H) All operations shall be conducted using the highest degree of care to prevent damage to or pollution of all lands and waters. Any physical modification of the surface including, but not limited to, mounding, cratering, or vehicle tracks shall be remedied upon completion of the work and the area returned to its original condition as nearly as possible. Such surface restoration shall be coordinated with and approved by GLO.

(I) Persons using wheeled or tracked vehicles on state-owned lands shall use reasonable efforts to follow existing tracks or roadways to minimize impact to the area. Persons using wheeled or tracked vehicles on submerged lands or marsh areas shall follow a single track.

(J) Prior to conducting any operations, permittees shall coordinate with the appropriate regulatory agencies regarding any operations which could potentially impact state or federally protected species.

(K) No geophysical surveying or shooting shall be performed within 1,000 feet of a known bird rookery island, as depicted on maps maintained by GLO, between February 15th and September 1st.

(L) Any person conducting geophysical or geochemical activities under this section must immediately advise the commissioner of the following which presently exist or can reasonably be anticipated:

(i) the location and type of any dangerous condition which may constitute an imminent threat to human activity; or

(ii) activities or situations, whether caused by permittee's activities or otherwise, which may adversely affect the environment, aquatic life or wildlife, cultural resources, or other uses of the area in which the exploration activity is conducted.

(M) No vessel, vehicle, or equipment operating under permit shall discharge solid waste or garbage into state waters or state-owned lands. Solid waste includes, but is not limited to, nonbiodegradable containers, rubbish, or refuse. A sign, with letters no smaller than one inch in height, shall be displayed in a high traffic area of any vessel or equipment operating in state waters under permit, stating, "Discharge of any solid waste or garbage into state waters is strictly prohibited and may result in revocation of the state permit authorizing exploration operations."

(N) Any pollution, fish or wildlife kill, or loss of property shall be immediately reported to the commissioner.

(2) In addition to the provisions of paragraph (1) of this subsection, the following provisions shall apply to geophysical operations conducted on submerged lands.

(A) Each person applying to perform geophysical exploration on state-owned lands shall file with GLO a unique symbol, number, or series of characters which will be used to identify all equipment and materials used in geophysical and/or geochemical exploration.

(B) All equipment used in connection with geophysical survey work which is placed on submerged lands shall be:

(i) distinctly marked with permittee's unique symbol, number, or series of characters clearly identifying the company performing the geophysical operations;

(ii) in compliance with rules governing size, design, and marking, as promulgated by the United States Coast Guard and the United States Army Corps of Engineers;

(iii) anchored in such a way as to minimize potential damage to commercial fishing operations;

(iv) properly flagged during daylight hours and properly lighted when remaining in position after sundown; and

(v) removed immediately upon completion of geophysical work.

(C) Staging areas shall not be established in vegetated areas of tidal sand or mud flats, submerged aquatic vegetation, or

coastal wetlands, as those terms are defined in §16.1 of this title (relating to Definitions and Scope), or vegetated dune areas.

(D) No shot shall be detonated within one mile of a shrimping fleet operating in good faith in the area immediately prior to exploration.

(E) Shot holes shall be at least 120 feet below the mudline on submerged lands.

(F) Suspended high velocity energy sources shall not be used without express written authorization from the commissioner. Requests for the use of such explosives shall be in writing, giving the size of charges to be used, the depth at which they are to be detonated, and the specific precautionary methods proposed for the protection of fish, oysters, shrimp, other aquatic life, wildlife, or other natural resources. After evaluation, the request will be approved or denied, at the commissioner's discretion.

(G) Air boats may be required, at the discretion of GLO, for operations in waters less than three feet deep as measured from mean low water.

(H) No low velocity energy shot shall be discharged within 500 feet and no high velocity energy shot shall be discharged within 1,000 feet of any boat not involved in the permitted operations unless otherwise directed by GLO.

(I) No shot shall be discharged within 500 feet of any oyster reef, marked oyster lease, marked artificial reef, or marked red snapper bank, or within 500 feet of any dredged channel, dock, pier, causeway, or other structure. Assistance in locating oyster reefs and leases is available from TPWD.

(J) Buried shots shall not be left overnight in water less than four feet deep as measured at low tide, or within 1,500 feet of any shoreline unless the shots are properly buried and anchored, all wires are properly shunted to prevent accidental discharge, and all shot holes are properly marked and lighted.

(K) No shot in excess of 20 pounds shall be discharged within one mile of any pass, jetty, mouth of a river, or other entrance to the Gulf of Mexico from inland waters.

(L) A representative of the client shall be present any time the operator is discharging a high velocity energy source.

(3) In addition to the provisions of paragraph (1) of this subsection, the following provisions shall apply to geophysical operations conducted on state-owned uplands.

(A) A surface lessee shall be notified prior to any entry by operator or client onto permitted land, and shall be notified upon operator's or client's leaving the area.

(B) Operator and client shall be held liable for any damages to livestock on state-owned lands caused by geophysical or geochemical exploration.

(C) Neither client nor operator may negotiate with the surface lessee regarding the payment of surface damages. The client or the operator shall be liable to the state for any damages caused by geophysical or geochemical explorations.

(D) Fences shall not be damaged or permanently removed. Any fence which is disturbed to permit passage shall be replaced and restored to its pre-existing condition. All gates shall remain closed and locked when not in use.

(E) Operator is not permitted the use of water from stock tanks located on the tract, except as directed by GLO or in case of emergencies.

(F) In order to prevent erosion, operator shall construct terraces as directed by guidelines and instructions provided by GLO and shall not remove top soil when blading the surface.

(f) Inspection. All operations shall be subject to inspection by the commissioner or the commissioner's representatives at any time. Upon reasonable notice, the permittee shall furnish the commissioner or the commissioner's representatives with transportation over submerged lands from the normal staging site to and from the operations site, along with any meals and living quarters necessary while the inspection is being conducted. If TPWD assigns a representative to the exploration party, the representative shall be furnished with similar accommodations.

(g) Reporting after expiration of permit. Within 30 days of the expiration date of the permit, the permittee shall file with the commissioner a sworn summary of activities report, prescribed by GLO, which:

(1) identifies each tract worked each day during which exploration operations were conducted, including surveying of the area;

(2) provides maps showing any deviation in shot line or shot point location from the maps which were submitted with the permit application; and

(3) if high-velocity energy sources are used, shall include a sworn inventory of all explosives which are loaded, used, returned, or lost during execution of the permit. This inventory shall be on the inventory of explosives form prescribed by GLO.

(h) Violations.

(1) A permittee that violates or fails to comply with any provision of the Texas Natural Resources Code or this chapter is subject to immediate revocation of the permit and may be prohibited from further exploration on state-owned lands, except upon such additional terms, conditions, and safeguards as the commissioner may expressly stipulate. A permittee who commits such violation will be liable for any costs incurred from any damage resulting from the violation.

(2) Upon discovery of any violations, the commissioner or a designated representative may order temporary discontinuance of seismic operations until completely reviewed by the commissioner.

(i) Other records. At any time or from time to time GLO may require any additional records relating to any aspect of exploration operations, excluding interpretive data. These records shall be maintained by client or operator for a minimum period of five years.

(j) General limitations. These rules shall not be construed to enlarge or restrict the rights of any owner of a state mineral lease.

This 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 September 28, 1998.

TRD-9815203
Garry Mauro
Commissioner, General Land Office
General Land Office
Earliest possible date of adoption: November 8, 1998

For further information, please call: (512) 305–9129

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Subchapter D. Paying Royalty to the State

31 TAC §9.51

The General Land Office (GLO), with the approval of the School Land Board (SLB), proposes new §9.51, relating to Royalty and Reporting Obligations to the State. With only one exception, the newly renumbered rule contains the existing text found in the former §9.7, (relating Royalty and Reporting Obligations to the State). The existing text of the rule has only been changed to update cross-references made obsolete by other concurrent rule actions.

The new section has been placed in a subchapter and includes updated cross-references so that it conforms to the proposed reformatting and renumbering of the remainder of Chapter 9. This also allows room for future subdivision and expansion.

Spencer Reid, General Counsel, 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 because these are non-substantive, organizational changes.

Mr. Reid also has determined that for each year of the first five year-period the rule is in effect, the public will benefit because, as reorganized, the rules will be easier to use.

Because these are non-substantive changes, the GLO has determined that this action has no impact on private real property and a Takings Impact Analysis is unnecessary.

This action is not a rulemaking subject to the Coastal Management Plan under Chapter 505 of this title.

Comments on the proposed amendment may be submitted to Ms. Carol Milner, Texas Register Liaison, General Land Office, 1700 North Congress, Room 626, Austin, Texas 78701-1495. The deadline for comments is 5:00 p.m., November 9, 1998.

The new rule is proposed under Texas Natural Resources Code, §31.051 which gives the commissioner rulemaking authority, and Texas Natural Resources Code, §32.062 which gives the SLB rulemaking authority.

Because these are non-substantive changes, these rulemaking actions affect no statutes.

§9.51. Royalty and Reporting Obligations to the State.

(a) In-kind royalties and reports. Producers meeting their royalty obligations by delivering the state's royalty in-kind shall contact the General Land Office (GLO) for specific instructions for making and reporting in-kind royalties. Purchasers of the state's oil or gas in-kind must make the payment for this oil or gas separately from any payment of monetary royaltie

(b) Monetary royalties and reports.

(1) Basis for computing royalties.

(A) Gross proceeds. Lessees shall compute and pay oil and gas royalties due under each lease on the gross proceeds received by the seller, including amounts collected to reimburse the seller for severance taxes and production-related costs. Lessees shall not deduct production or severance taxes, or the cost of producing, processing, transporting, and otherwise making the oil, gas, and other products produced from the premises ready for sale or use.

(B) Volume subject to royalty.

(i) General. Royalties are due and payable by all lessees on 100% of each lease's gross production of oil and gas unless the lease contains language expressly exempting certain dispositions of oil and/or gas from state royalties.

(ii) Oil sales and stocks. As a matter of convenience, during periods of regular sales, the GLO will permit lessees to pay monthly oil royalties based on the number of barrels sold (or otherwise disposed of) in a given month rather than on the gross production as may be required by the lease. Unless the lessee is otherwise notified by the GLO, no royalties are payable on lease stocks until such stocks are disposed of either by sale or otherwise. The GLO reserves the right to require at any time, or from time to time, that lessees pay royalties on gross production rather than on barrels sold. The GLO requires that lessees pay royalties on existing stocks when there have been no sales from such stocks for several months.

(C) Plant products. Lessees shall calculate the volume and value of plant products subject to state royalty in accordance with the lease under which the gas is produced and processed and this volume and value shall never be less than the minimum percentage specified in the lease. In cases where the lease does not specify the manner in which lessees are to calculate plant product royalties, then the volume and value of plant products subject to state royalty shall be that volume and value for which settlement is being made to the producer, under a gas contract prudently negotiated between the producer and processor. When gas is processed for the recovery of liquid hydrocarbons or other products, lessees shall pay royalties on residue gas and plant products in an amount not less than the royalties which would have been due had the gas not been processed.

(D) Market value. Nothing in this subsection shall limit or waive the right of the state to receive its royalties based on market value of the oil and gas produced, if authorized by the lease, unit agreement, judgment, or other contract authorized by law.

(E) Determination of market value.

(i) For the purpose of computing and paying royalties to the state based on market value, the market value shall be presumed to be the gross proceeds received pursuant to a bona fide contract entered into at arm's length between nonaffiliated parties of adverse economic interests.

(ii) If a contract is not negotiated at arm's length, or was between affiliated parties, the presumption that market value is equal to gross proceeds shall not apply. In this situation, the lessee has the burden to establish that royalties paid to the state are based on market value.

(iii) The commissioner may overcome the presumption established under clause (i) of this subparagraph and assess additional royalties due by establishing a different price based on other sales in the general area which are comparable in time, quality, volume, and legal characteristics. If some of this information is not available to the commissioner, an assessment will be based on the best information available.

(iv) A lessee may challenge an assessment of additional royalties due by submitting information which establishes the prices used for comparison by the commissioner involve products of significantly different quality; were based on contracts to deliver significantly different volumes or for different terms; were not from a relevant market; were derived from an area in which deliverability is significantly different; or by presenting any other information which could establish a more accurate market price. However, under no circumstances will the state's royalty be computed on less than gross

proceeds received, including reimbursements received for severance taxes and production-related costs.

(v) Parties are affiliated under this subsection if they are related by blood, marriage, or common business enterprise, are members of a corporate affiliated group, or where one party owns a 10% or greater interest in the other.

(vi) The term "general area," as used in this subsection, means the smallest geographical area which contains sufficient data to establish a market price. Examples include a unit, a field, a county, or the applicable RRC district.

(vii) For the purpose of computing and paying oil royalties to the state based upon a market value determined by the highest posted price, that phrase is defined as the greater of:

(I) the highest price available to the producer; or

(II) the gross price posted by the purchaser of the oil, less a reasonable transportation allowance after sale and delivery if the price bulletin reflects on its face that the purchaser will deduct a marketing or transportation allowance, and a transportation allowance is actually deducted by the purchaser from its gross price.

(viii) For the purposes of clause (vii)(I) of this subparagraph, a price will be presumed to be available to the producer if it is offered in the field where the lease is located at the time of sale. A producer may overcome the presumption by submitting evidence that the price is not actually available to the producer. The terms "available" and "actually available," as used in this subsection, mean that a price is being offered to nonaffiliated parties by posting, contract listing or amendment, or otherwise and that if a producer presented a barrel of oil to an entity offering said price, assuming all quality specifications for the price were met, that producer would, in fact, receive that offered price.

(ix) Clause (vii) of this subparagraph shall not be construed to allow the lessee, when calculating royalties to the state, to make any deductions for the cost of producing, processing, or transporting the oil prior to its sale and delivery.

(2) Royalty payments and reports.

(A) Mode of payment. Except as provided in subsection (a) of this section, relating to payments made in-kind, and subject to clauses (i)-(vi) of this subparagraph, relating to mandatory electronic funds transfer, lessees may pay royalties and other monies due by cash or check, money order, or sight draft made payable to the commissioner. Lessees may also pay by electronic funds transfer or in any manner that may be lawfully made to the state comptroller. Information regarding alternative payment methods may be obtained from the GLO Royalty Management Division. Payors are required to make payments by electronic funds transfer in compliance with 34 Texas Administrative Code Chapter 15 in the circumstances outlined:

(i) For leases executed or amended after May 11, 1989, but before September 1, 1991, payors that have made over $500,000 in a category of payments, defined in clause (iv) below, to the GLO during the preceding state fiscal year shall make payments of $10,000 or more in the current fiscal year for those leases and in that category by electronic funds transfer.

(ii) For leases executed or amended after August 30, 1991, but before June 9, 1995, payors that have made over $250,000 in a category of payments, defined in clause (iv) below, to the GLO during the preceding state fiscal year shall make payments of $10,000 or more in the current fiscal year for those leases and in that category by electronic funds transfer.

(iii) For leases executed or amended on or after June 9, 1995, payors that have made over $25,000 in a category of payments, defined in clause (iv) below, to the GLO during the preceding state fiscal year shall make all payments in the current fiscal year for those leases and in that category by electronic funds transfer.

(iv) For purposes of clauses (i)-(iii) of this subparagraph, each of the following is a separate category of payments:

(I) royalties (including shut-in and minimum royalties);

(II) penalties;

(III) other payments to the state agency, excluding interest and extraordinary payments such as payments made in settlement of litigation.

(v) The GLO anticipates that those payors that have exceeded the threshold sums set out in clauses (i)-(iii) of this subparagraph in the preceding state fiscal year will also exceed those sums in the current state fiscal year. The application of clauses (i)-(iii) to a specific payor may be waived at the commissioner's discretion to the extent allowed by law, upon a showing that a payor will not exceed the threshold sums set out in clauses (i)-(iii) in the current fiscal year, or for other good cause.

(vi) The GLO will notify each payor to whom this subparagraph applies in compliance with 34 Texas Administrative Code Chapter 15.

(B) Information required with royalty payments. Lessees shall submit all royalty payments in a manner which identifies the assigned GLO lease number, the annual submission certification number, if any, and the amount of oil and gas royalty being paid. Royalty payments not identified by the lease number and the annual submission certification number, if any, shall be considered delinquent and shall be subject to the delinquency provisions of paragraph (3) of this subsection.

(C) Required reports. Lessees shall provide, in the form and manner prescribed by the GLO, production/royalty reports (Form GLO-1 for oil and condensate and Form GLO-2 for gas), other required reporting documents for gas or oil and condensate, and other supporting documents required by GLO to verify gross production, disposition, and market value of the oil and condensate, gas, and other products produced therefrom. Reporters for leases which the GLO has approved for annual royalty payments may submit such reports on an annual basis as well after receipt of an annual royalty certification number. Parties approved for annual reporting or payment shall notify the GLO in writing within ten business days of a complete release, forfeiture, termination, assignment, or change of operator or payor of a lease approved for annual reporting and payment. Failure to comply with the statutes and the reporting requirements of this chapter may subject a lease to forfeiture, delinquency penalties, or both.

(D) Timely receipt of royalty payments and reports.

(i) For the purpose of this subsection, the GLO will consider a report timely received if the report:

(I) arrives postpaid and properly addressed; and

(II) is deposited with the United States Postal Service or any parcel delivery service at least one day before it is

due and such deposit is evidenced by a postmark, a postal meter stamp, or a receipt.

(ii) For the purpose of this subsection, the GLO will consider a royalty payment timely made if:

(I) the payment is received by electronic funds transfer, it is received on or before the date it is due (please be advised that delivery of payment to the state comptroller's office does not satisfy this requirement. Due to the time required by the comptroller's office to process a payment and forward it to the GLO, payors are strongly encouraged to submit payments to the comptroller's office before 6:00 p.m. CST on the business day preceding the business day on which the payment is due).

(II) the payment is not made by electronic funds transfer, it arrives postpaid and properly addressed and it is deposited with the United States Postal Service or any parcel delivery service at least one day before it is due and such deposit is evidenced by a postmark, a postal meter stamp, or a receipt.

(iii) If a royalty payment or report is due on a Sunday or a legal state or federal holiday, then lessees shall ensure that such payment or report is either received by the GLO on the next calendar day which is not a Sunday or a holiday, or postmarked or stamped prior to the next calendar day which is not a Sunday or a holiday.

(E) Oil and condensate royalties–due date.

(i) Lessees shall ensure that all oil and condensate royalties, except royalties approved by GLO to be paid on an annual basis, are timely received by the GLO on or before the fifth day of the second month following the month of production.

(ii) Upon application to and written approval by the GLO, future royalties attributable to leases for which oil, condensate, and gas royalty due for the immediately preceding September 1 to August 31 period equaled $3, 000 or less may be paid on an annual, rather than monthly, basis. A party who is both a payor and a reporter for a lease shall submit both payments and reports on a monthly or, if the GLO grants approval, an annual, basis.

(I) The applicant shall designate the payor who will submit the annual royalty payments and, if there are multiple payors for a lease, the share of royalty the designated payors will submit. Upon approval, GLO staff will assign an annual submission certification number to the designated payor and the GLO will authorize the designated payor to submit the designated share of royalty payments on an annual basis. The applicant shall notify the GLO in writing of any change in the payor designation within ten business days of its effective date.

(II) Payors, after approval, shall pay annual royalties for the following January 1 to December 31 annual production periods.

(III) Payors, after approval, shall continue to make payments on a monthly basis until the commencement of the next annual production period.

(IV) Each year, payors shall ensure that all annual oil and condensate royalties are timely received by the GLO on or before the fifth day of February following each annual production period. Each year, payors shall ensure that all annual gas royalties are timely received by the GLO on or before the 15th day of February following each annual production period.

(V) After the payor receives GLO approval for annual royalty payments, if the total annual oil, condensate, and gas royalty due under a lease exceeds $3,000 for any annual production period, payors shall resume making monthly royalty payments starting with the January production month immediately following that annual production period.

(VI) For any royalty approved to be paid on an annual basis, payors shall ensure that the total royalties that have accrued as of the date of a complete lease forfeiture, release, termination, assignment, or any change of designated payor, are timely received by the GLO on or before 75 calendar days after that date. If a change of payor occurs for a lease with multiple payors, only the changing payor shall pay the accrued royalties for which he is designated as being responsible on or before 75 calendar days after the change.

(VII) Any forfeiture, release, termination, assignment, or change of operator or payor, does not affect the approved annual royalty payment status, subject to subclause (VI) of this clause. However, as provided in §9.93(l) of this title (relating to Assignment), an assignee or successor in interest is liable for all unsatisfied royalty requirements of the assignor or predecessor in interest.

(VIII) The GLO may prescribe further specific forms and instructions applicable to this subparagraph.

(IX) The GLO has the sole discretion to approve annual royalty payments. Approval does not affect the state's right to take its royalty in-kind, nor does it constitute a finding that a lease has been maintained in force and effect or otherwise ratify or revive any lease. GLO approval does not abrogate the lessee's responsibility to submit timely royalty payments and reports to the GLO as provided in subparagraphs (L) and (M) of this paragraph.

(X) Determination of royalty due for purposes of clause (ii) of this subparagraph is not an official GLO determination of royalty due under a lease. The GLO may audit any lease to determine if royalty was properly paid and may pursue its rights and remedies through an administrative hearing or litigation.

(F) Gas royalties–due date.

(i) Lessee shall ensure that all gas royalties, except royalties approved by GLO to be paid on an annual basis, are timely received by the GLO on or before the 15th day of the second month following the month of production.

(ii) The provisions of subparagraph (E)(ii)(I)-(X) of this paragraph apply to the payment of gas royalties.

(G) Required reports–due date.

(i) Lessees shall ensure that all required production/royalty reports and other required documents (hereafter "reports" in subparagraph (G) of this paragraph), in whatever format submitted, for gas or oil and condensate are timely received by the GLO on or before the due date of the corresponding monthly royalty payment.

(ii) Upon application to and written approval by the GLO, future reports for leases for which oil, condensate, and gas royalty due for the immediately preceding September 1 to August 31 period equaled $3,000 or less may be submitted on an annual, rather than monthly, basis. A party who is both a payor and a reporter for a lease shall submit both payments and reports on a monthly or, if the GLO grants approval, an annual, basis.

(I) The applicant shall designate the reporter who will submit the annual reports and, if there are multiple reporters for a lease, the information the designated reporter will submit. Upon approval, GLO staff will assign an annual submission certification

number to the designated reporter and the GLO will authorize the designated reporter to submit the designated reports on an annual basis. The applicant shall notify GLO in writing of any change in the reporter designation within ten business days of its effective date.

(II) Reporters, after approval, shall submit annual reports for the following January 1 to December 31 annual production periods.

(III) Reporters, after approval, shall continue to submit reports on a monthly basis until the commencement of the next annual production period. Unless the GLO expressly approves otherwise in writing, reporters shall submit unit production/royalty reports on a monthly basis regardless of the annual reporting status of individual leases within the unit.

(IV) Each year, reporters shall ensure that all annual reports concerning oil and condensate are timely received by the GLO on or before the fifth day of February following each annual production period. Each year, reporters shall ensure that all annual reports concerning gas are timely received by the GLO on or before the 15th day of February following each annual production period.

(V) After the reporter receives GLO approval for annual reporting, if the total annual oil, condensate, and gas royalty due under a lease exceeds $3,000 for any annual production period, reporters shall resume making monthly reports starting with the January production month immediately following that annual production period.

(VI) Reporters shall ensure that all reports approved by the GLO for submission on an annual basis are timely received by the GLO on or before 75 calendar days after a complete lease forfeiture, release, termination, assignment, or any change of designated reporter. If a change of reporter occurs for a lease with multiple reporters, only the changing reporter shall submit the reports for which he is designated as being responsible on or before 75 calendar days after the change.

(VII) Any forfeiture, release, termination, assignment, or change of operator or reporter does not affect the approved annual reporting status, subject to subclause (VI) of this clause. However, as provided in §9.93(l) of this title (relating to Assignment), an assignee or successor in interest is liable for all unsatisfied reporting requirements of the assignor or predecessor in interest.

(VIII) The GLO may prescribe further specific forms and instructions applicable to this subparagraph.

(IX) The GLO has the sole discretion to approve annual reporting. Approval does not affect the state's right to take its royalty in-kind, nor does it constitute a finding that a lease has been maintained in force and effect or otherwise ratify or revive any lease. GLO approval does not abrogate the lessee's responsibility to submit timely royalty payments and reports to the GLO as provided in subparagraphs (L) and (M) of this paragraph.

(X) Determination of royalty due for purposes of clause (ii) of this subparagraph is not an official GLO determination of royalty due under a lease. The GLO may audit any lease to determine if royalty was properly paid and may pursue its rights and remedies through an administrative hearing or litigation.

(iii) Lessees shall identify the relevant GLO lease numbers and annual submission certification numbers, if any, on all required reports. Reports that fail to identify these numbers shall be considered delinquent and shall be subject to the delinquency provisions of subsection (b)(3) of this section.

(H) Gas contracts. Lessees shall file with the GLO a copy of all contracts under which gas is sold or processed and all subsequent agreements or amendments to such contracts within 30 days of entering into or making such contracts, agreements, or amendments. Such contracts, agreements, and amendments, when received by the GLO will be held in confidence by the GLO unless otherwise authorized by lessee.

(I) Gas contract brief (Form GLO-5).

(i) Each gas contract, agreement, or contract amendment must be accompanied by a gas contract brief (Form GLO-5) completed in the form and manner prescribed by GLO. The GLO-5 must be submitted even if GLO is taking its royalty in-kind from the leases subject to the contract or agreement. The GLO-5 shall be submitted to the GLO within 30 days of executing a contract, agreement, or contract amendment. While the lessee is responsible for the preparation and filing of the GLO-5 and supplements, the lessee is not required to submit the GLO-5 or supplements for royalty volumes which the state is taking in kind. Rather, the lessee must submit the GLO-5 and supplements for other volumes produced from the lease or leases.

(ii) A gas contract brief supplement (GLO-5(s)) may be filed for sales of gas on the spot or other markets in which price changes occur monthly. A GLO-5(s) should be submitted to the GLO within 30 days of the completion of each six-month period of sales. A GLO-5 does not have to be submitted as long as other contract provisions remain unchanged.

(iii) For spot or similar sales situations in which supplements will be submitted, the GLO-5 is due within 30 days of the completion of the first six-month sales period.

(iv) Gas contract briefs and supplements should be directed to: General Land Office, Energy Resources Division, Stephen F. Austin Building, 1700 North Congress Avenue, Austin, Texas 78701-1465, Attention: Gas Contracts Administrator.

(J) Settlements and judgments. Lessee shall file with the GLO a copy of each settlement reached or judgment rendered in a dispute between the lessee and a purchaser regarding production from, and/or contracts relating to, state lands. Lessee shall file these documents with the GLO within 30 days of entering into any such settlement or within 30 days of the rendering of such judgment.

(K) Other records. At any time, or from time to time, the GLO may require any additional records relating to any aspect of lease operations and accounting.

(L) Responsibility of lessee to file royalty payments and required reports. Parties other than the lessee may remit royalties to the state on the lessee's behalf. This practice does not relieve the lessee of any statutory or contractual obligation to pay royalty or file reports and supporting documents. The lessee bears full responsibility for paying royalties and for filing reports and supporting documents as required in this chapter.

(M) Cooperation of operators, purchasers, payors, reporters, and lessees. The GLO recognizes that lessees may often delegate various lease obligations to third parties. However, such a delegation does not relieve a lessee of these obligations. Lessees must be aware that the acts and omissions of these third parties regarding these obligations may subject a lease to a delinquency penalty or forfeiture. Therefore, these parties must cooperate to responsibly discharge their obligations to each other and to the state.

(N) State's lien. The state has a first lien on all oil and gas produced from the leased area to secure the payment of all unpaid royalty or other sums of money that may become due.

(O) Certification of sufficient royalties. The GLO will not be responsible for certifying, prior to the rental anniversary date, that sufficient royalty has been received to obviate the necessity of paying rentals or minimum royalties as may be required by lease. Lessees should maintain adequate records relating to lease royalty and rental status to determine if additional liability exists. If there is uncertainty concerning whether or not rental or minimum royalties are due, a lessee may maintain a lease in effect by remitting the annual amount required under each lease. The GLO will refund or grant credit to lessees for payments received in this manner that are later found to have not been due.

(P) Partial payments. The GLO will apply a lessee's partial payment of amounts assessed (delinquent royalties, penalty, and interest) first to unpaid penalty and interest and then to delinquent royalties. Penalty and interest will continue to accrue until the delinquent royalties are fully paid.

(3) Penalties and interest.

(A) Penalties on delinquencies. Any royalty not paid when due, or any required report or document not submitted when due, is delinquent and penalties as provided in this subsection shall be added. Royalty payments or any required reports or documents that do not identify GLO lease numbers and annual submission certification numbers, if any, and any royalty payments not accompanied by any required reports or documents are also delinquent. The penalties on delinquent royalties specified in this subsection shall not be assessed in cases of title dispute as to the state's portion of the royalty or to that portion of the royalty in dispute as to fair market value.

(i) For royalties and reports due on or after September 1, 1985, including those for oil and gas produced since July 1, 1985, the GLO shall add:

(I) a penalty of 5.0% of the delinquent amount or $25, whichever is greater, to any royalty which is delinquent 30 days or less;

(II) a penalty of 10% of the delinquent amount or $25, whichever is greater, to any royalty which is more than 30 days delinquent;

(III) at its discretion, a penalty of $10 per document for each 30-day period that each report, affidavit, or other document is delinquent. The GLO shall impose this penalty of $10 per document only after the commissioner or a designated representative has notified the lessee in writing that reports, affidavits, or documents are not being filed correctly and that the GLO will assess the penalty on subsequent reporting errors.

(ii) For royalties and reports due before September 1, 1985, including those for oil and gas produced prior to July 1, 1985, the GLO shall add:

(I) a penalty of 1.0% of the delinquent amount or $5.00, whichever is greater, for each 30-day period that any royalty is delinquent;

(II) a penalty of $5.00 per document for each 30-day period that each report, affidavit, or other document is delinquent.

(iii) For royalties and reports due before September 1, 1975, including those for oil and gas produced prior to August 1, 1975, the GLO shall impose no penalty for delinquent royalties or delinquent reports.

(B) Interest on delinquencies. Any royalty not paid when due is delinquent and shall accrue interest as provided in this subsection.

(i) For royalties due on or after September 1, 1985, including those for oil and gas produced since July 1, 1985:

(I) interest shall accrue on all delinquent royalties at the rate of 12% per year (simple interest) pursuant to the Texas Natural Resources Code, §52.131(g);

(II) interest shall begin to accrue 60 days after the due date.

(ii) For royalties due before September 1, 1985, including those for oil and gas produced prior to July 1, 1985:

(I) interest shall accrue on all delinquent royalties at the rate of 6.0% per year compounded daily pursuant to Texas Civil Statutes, Article 5069-1.03;

(II) interest shall begin to accrue 30 days after the date due.

(C) Penalties for fraud. The commissioner shall add a penalty of 25% of the delinquent amount if any part of the delinquency is due to fraud or an attempt to evade the provisions of statutes or rules governing payment of royalty. The GLO shall apply this penalty in cases of title dispute as to the state's portion of the royalty or to that portion of the royalty in dispute as to the fair market value. The GLO shall apply this penalty in addition to any other penalty assessed.

(D) Forfeiture. The state's power to forfeit a lease is not affected by the assessment or payment of any delinquency, penalty, or interest as provided in this subsection. Specifically, the lessee's failure to pay royalties and other sums of money within 30 days of the due date or the failure to file reports completed in the form and manner prescribed by this section shall subject a lease to forfeiture under §9.95 of this title (relating to Forfeiture).

(E) Reduction of penalty and/or interest. The SLB may reduce penalties and/or interest assessed under Texas Natural Resources Code, §52.131, and/or any other penalties or interest relating to delinquent or unpaid royalties that have been assessed by the commissioner in the following circumstances:

(i) when a lessee brings a deficiency to the GLO's attention voluntarily; and/or

(ii) when a lessee and the GLO have reached an agreement regarding the reduction as part of a resolution of an outstanding audit issue.

(4) Corrections and adjustments to royalty payments and reports.

(A) Nonroutine corrections and/or adjustments, as used in this subsection, are defined as those corrections and adjustments by which someone seeks to change, on a lease basis, the originally reported royalty due for oil or the originally reported royalty due for gas by at least $25,000 or 25%.

(B) The GLO Royalty Management Division must receive at least 30 days advance written notice of the lessee's intention to take a nonroutine correction and/or adjustment which will result in a credit with written documentation explaining and supporting the requested credit. The credit may be taken 30 days after that GLO

division receives such notice if by that date, the GLO has not, in writing, denied lessee permission to take the credit. If the GLO denies permission, the GLO will set forth its reasons for such denial. Any nonroutine credit improperly taken may not be used to offset royalty due on current reports. The improper application of credits will result in a current month delinquency and the assessment of associated penalties and interest.

(C) Effective with the production month of March 1989, all prior month adjustments must be submitted on GLO-1 and GLO-2 report documents separate from the reports containing the current month royalty activity. The GLO-1 or GLO-2 containing prior month adjustments must be labeled as "Amended Reports" (underlined).

(5) Temporary reduction of gas royalty rates.

(A) Prerequisites. Application for a temporary reduction of the royalty rates established may be considered by SLB if:

(i) the lease covers any of the state lands described in §9.21 of this title (relating to Leasing Guide)

(ii) state land was leased by SLB on the basis of a royalty bid and at a royalty rate exceeding 25%; and

(iii) the lease has not been pooled or unitized with other leases.

(B) Amount of reduction. If the value of gas from such lands is at or below $3.00 for each 1,000 cubic feet of gas, the board may reduce the royalty rate for gas produced from such lands for any term set by SLB, such term to be set after September 1, 1987, and before September 1, 1990, as follows:

(i) for gas valued as $1.50 or less per Mcf of gas, the board may reduce a royalty rate to 25%;

(ii) for gas valued from $1.51 to $2.00 per Mcf of gas, the board may reduce a royalty rate to 30%;

(iii) for gas valued from $2.01 to $2.50 per Mcf of gas, the board may reduce a royalty rate to 35%;

(iv) for gas valued from $2.51 to $3.00 per Mcf of gas, the board may reduce a royalty rate to 40%.

(C) Definition of value. For purposes of this paragraph, the value of the gas is defined as the highest market price paid or offered for gas of comparable quality in the general area where produced and when run, or the gross price paid is offered to the producer, whichever is greater.

(D) Request for reduction. A lessee seeking the approval of SLB for a temporary reduction in gas royalty rates must make written request for an application to the Minerals Leasing Division, General Land Office, 1700 North Congress Avenue, Room 640, Austin, Texas 78701-1495. The application should be completed and returned to the Minerals Leasing Division of the GLO.

(i) The applicant must submit an affidavit and documentation in support of its request for a temporary reduction of gas royalty rates. The affidavit will attest to the fact that the requirements set out in this paragraph have been satisfied. The accompanying documentation will contain pertinent lease data, production and reserve data, gas price data, development data, and any other information which may be required to support the application, including the reason for requesting a royalty reduction.

(ii) SLB will consider the request for temporary reduction in gas royalty rates based upon lessee's affidavit, documents in support thereof, and the recommendation of the Minerals Leasing Division.

(iii) SLB may reevaluate the temporary reduction in gas royalty rates at any time.

(E) Verification of gas valuation. The gas valuation information submitted by the lessee will be subject to verification by the Royalty Audit Division.

(F) Effective dates for reduced royalty rates. The reduced royalty rates shall be effective beginning the first day of the next month following approval by SLB. Royalty rates on gas produced after September 1, 1990, will not be subject to reduction under this section.

(G) No retroactive effect. The reduced royalty rates will not be applied retroactively for previous months' production.

(c) Marginal Properties Royalty Incentive Program.

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

(A) Active well–Any well on the qualifying property as defined in subparagraph (H) of this paragraph in actual use either as a producing well or an injection well as defined in subparagraph (D) of this paragraph during at least six months of the qualifying period as defined in subparagraph (G) of this paragraph.

(B) Average daily per well production–

(i) Un-pooled leases: For a given reservoir, the total oil, condensate, and/or natural gas production from the lease for the qualifying period, in BOE as defined in subparagraph (C) of this paragraph, divided by the product of 365 and the number of the reservoir's active wells on the lease. Average daily per well production is calculated in BOE/day and is rounded down to the next whole number.

(ii) Pooled leases: For a given reservoir, the total oil, condensate, and/or natural gas production from the unit for the qualifying period, in BOE, divided by the product of 365 and the number of the reservoir's active wells in the unit. Average daily per well production is calculated in BOE/day and is rounded down to the next whole number.

(C) Barrel of oil equivalent (BOE)–One 42-gallon barrel of crude oil, or the greater of 6,000 cubic feet (6 Mcf) of natural gas available for sale off the lease or unit or a volume of natural gas available for sale off the lease or unit with a minimum heating value of 6,000,000 British thermal units (6,000 MBtu).

(D) Injection well–Any well approved by the RRC for use in the injection of gas or fluids in a secondary or tertiary enhanced recovery or pressure maintenance operation, excluding disposal wells.

(E) Mcf–Thousand cubic feet.

(F) Price–The five-day average spot price of West Texas Intermediate crude oil at the Midland, Texas, oil terminal as reported in The Oil Daily.

(G) Qualifying period–The 12-month period immediately preceding the most recent month of production.

(H) Qualifying property–Land subject to a State of Texas oil and gas lease issued pursuant to Texas Natural Resources Code, Chapter 32, Chapter 51, Subchapter E, or Chapter 52. Land subject to a free royalty reserved by the state under Texas Natural

Resources Code, §51.054 or its predecessor statutes cannot be qualifying property.

(I) Qualifying Gulf of Mexico property–Land described in Texas Natural Resources Code, §52.011(2), that is subject to a State of Texas oil and gas lease issued pursuant to Texas Natural Resources Code, Chapter 52, Subchapter B.

(J) Qualifying reservoir–A reservoir underlying a qualifying property or a reservoir within a pooled unit that includes qualifying property, having average daily per well production during the qualifying period equal to or less than 15 BOE/day. Unless specified or unless the context clearly requires a different interpretation, the term "qualifying reservoir" includes a "qualifying Gulf of Mexico reservoir."

(K) Qualifying Gulf of Mexico (GOM) reservoir–A reservoir underlying a qualifying GOM property or a reservoir within a pooled unit that includes qualifying GOM property, having average daily per well production during the qualifying period equal to or less than 50 BOE/day.

(L) Reservoir–A "common reservoir" as defined in Texas Natural Resources Code, Chapter 86, Subchapter A, §86.002.

(2) Qualification for Royalty Reduction.

(A) The SLB may consider a lease for a royalty reduction if:

(i) the average of the daily price of oil during the qualifying period was equal to or less than $25 per barrel; and

(ii) the applicant submits a sworn application to the SLB which includes:

(I) proof that the applicant is the lease operator as shown by the most current RRC records;

(II) proof that the land is qualifying property;

(III) proof that the reservoir is a qualifying reservoir, including proof of the reservoir's volume of oil, condensate, and/or natural gas produced from, or attributable to, the lease during the qualifying period;

(IV) a representation that the lease is in force and effect; and

(V) such additional information as may be required upon written request by GLO staff.

(B) GLO staff will review the application and submit it and a recommendation to the SLB. The staff shall include in the recommendation information regarding any other royalty interests in the tract, including royalty interests held by owners of the soil (or their successors in interest) of Relinquishment Act lands, as defined in §9.1 of this title (relating to Definitions). Thereafter, if the SLB finds that all requirements under subparagraph (A) of this paragraph are met, the SLB may approve the application or may condition approval on specified requirements. In determining whether to grant a reduction in the royalty rate, the SLB may consider whether the qualifying property or qualifying Gulf of Mexico property is being operated efficiently, including whether the property is pooled or has reasonable potential for the application of secondary or tertiary recovery techniques. If a qualifying reservoir for which a royalty rate reduction is sought under this section is included in a unit subject to SLB authority, the SLB may modify the terms and conditions for the unit as a condition of approving the requested reduction in the royalty rate. The SLB has the sole discretion to grant final approval. SLB approval of a reduced royalty applies only to the qualifying reservoir. The effective date of the royalty rate reduction is the first day of the month following SLB approval of the application. A reduced royalty under this incentive program is available only for a lease issued or approved by the state that is in effect on, or takes effect on or after, the effective date of this subsection.

(C) The approval of an application shall not constitute a finding that a lease has been maintained in force and effect or otherwise ratify or revive any lease.

(3) Royalty Rate. After the SLB approves an application:

(A) the SLB will determine the qualifying reservoir's applicable royalty rate according to the published reduced royalty schedules. The SLB may not set the royalty at a rate less than the lowest rate provided by statute for the category of property for which application is made.
Figure: 31 TAC 9.51(c)(3)(A)

(B) Except as provided in subparagraph (C) of this paragraph, the royalty rate may not be reduced to less than 6.25% of 100% (one-sixteenth of eight-eighths).

(C) Royalty rate under specific types of leases:

(i) The royalty rate owed to the state under a lease issued under Texas Natural Resources Code, Chapter 52, Subchapter F (Relinquishment Act leases) or §51.195(c)(2) or (d) may not be reduced under this subsection to less than 3.125% of 100% (one thirty-second of eight-eighths). The state's royalty rate may not be reduced under this clause only if the aggregate royalty rate for the owner(s) of the soil is reduced in the same proportion. Only royalty payable by the lessee to the commissioner may be reduced by the SLB pursuant to this rule.

(ii) The royalty rate under a lease issued under Texas Natural Resources Code, Chapter 52, Subchapter C (riverbed leases), may not be reduced to a rate lower than the rate under a lease of land that:

(I) adjoins the land leased under Subchapter C; and

(II) is held or operated by, or is under the significant control of, the state's lessee.

(iii) The royalty rate under a lease issued under Texas Natural Resources Code, Chapter 32, Subchapter F (highway leases), may not be reduced to a rate that is lower than the rate under a lease of land that adjoins the land leased under Subchapter F.

(D) The qualifying reservoir's reduced royalty rate applies for two years from the effective date of the royalty rate reduction. The SLB may extend the reduced rate for additional periods not to exceed two years each. An operator may apply for a two-year extension by filing an affidavit that the conditions that existed at the time that the original royalty rate reduction was granted have not changed materially. The GLO or the SLB may require an operator to submit additional information in support of an application for extension. An operator may apply for further royalty reduction to a qualified reservoir during the anniversary month of the effective date of the current royalty rate reduction.

(E) Except as provided in subparagraph (F) of this paragraph, a reservoir that has not produced during the preceding 12 months and is located under, or is attributable to, a lease with a royalty reduction under this program, may be granted the lowest royalty rate currently allowed by the SLB for any other reservoir under, or attributable to, that lease. Such rate applies for two years from the month production from the newly productive reservoir commences.

An operator must request and obtain written approval from the GLO for reduced royalty under this subparagraph.

(F) On leases with a royalty reduction under this program, a reservoir below the stratigraphic equivalent of any producing qualifying reservoir under, or attributable to, that lease may be granted the lowest royalty rate currently allowed by the SLB for any other reservoir under, or attributable to, that lease. To qualify for such reduced royalty, the deeper reservoir production cannot exceed 15 BOE per day per well (50 BOE for Gulf of Mexico properties), as shown by well tests and/or other appropriate data. If the deeper reservoir production exceeds 15 BOE per day per well (50 BOE for Gulf of Mexico properties), the royalty rate for such production is the rate specified in the lease. A royalty reduced under this subparagraph applies for one year from the month production from the deeper reservoir commences, after which the reduction terminates unless the operator by application seeks and obtains SLB approval for the reduction for that deeper reservoir.

(G) If the minimum annual royalty payment provided for in the lease exceeds the SLB-approved reduced royalty, the reduced royalty is the amount due from the lessee as the minimum annual royalty payment.

(H) If over a consecutive six-month period the average of the daily price of oil exceeds $25 per barrel, the SLB may terminate all previously granted royalty rate reductions upon 60 calendar days notice in writing to the operators of the leases for which royalty reduction has been granted.

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

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

TRD-9815190
Garry Mauro
Commissioner, General Land Office
General Land Office
Earliest possible date of adoption: November 8, 1998
For further information, please call: (512) 305–9129

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Chapter 15. Coastal Area Planning

Subchapter A. Management of the Beach/Dune System

31 TAC §15.11

The General Land Office (GLO) proposes an amendment to §15.11, concerning certification of local government dune protection and beach access plan (plans). The amendment is being proposed to certify the Nueces County Palms at Waters Edge master plan.

On December 27, 1996, the Nueces County Commissioners Court adopted by order the Palms at Waters Edge master plan, which is an amendment to the county's dune protection plan. In the amendment to §15.11(a)(12), the GLO certifies that the dune protection portion of the Palms at Waters Edge master plan is consistent with state law.

Caryn K. Cosper, deputy commissioner for the Resource Management Program, has determined that for the first five-year period the rule is in effect the fiscal implications for state or local government as a result of enforcing or administrating the rule will be a decrease in cost because all impacts to dunes and dune vegetation are considered at once, with no additional permit-by-permit review required.

Ms. Cosper 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 or administering the rule will be predictable, effective and economical administration of the development of the geographic area encompassed in the Palms at Waters Edge master plan. Ms. Cosper has further determined that there will be a decrease in cost to small and large businesses and individuals affected by the Palms at Waters Edge master plan because there will be no individual dune protection permits required for impacts to dune and dune vegetation. The state and Nueces County will benefit from the certification of the Palms at Waters Edge master plan because all impacts within the geographic scope of the master plan are considered at once, with no individual permits required.

Comments may be submitted in writing to Ms. Carol Milner, General Land Office, Legal Services Division, 1700 North Congress Avenue, Room 626, Austin, Texas, 78701-1495 (Fax: (512) 463-6311). Comments must be received no later than 5:00 p.m. October 23, 1998.

The amendment is proposed under Texas Natural Resources Code, §63.121, 61.011, and §61.015(b), which provides the GLO with the authority to identify and protect critical dune areas; preserve and enhance the public's right to use and have access to and from Texas' public beaches; protect the public easement from erosion and reduction caused by development or other activities on adjacent land; and other minimum measures needed to mitigate for any adverse effect on public access and dune areas.

The amendment is also proposed pursuant to Texas Natural Resources Code, §33.601, which provides the GLO with the authority to adopt rules on erosion, and Texas Water Code, §16.321, which provides the GLO with the authority to adopt rules on coastal flood protection.

Texas Natural Resources Code, Chapter 61, Subchapter B, §61.011, and §61.015(b), and Texas Natural Resources Code, Chapter 63, Subchapter E, §63.121, are affected by the proposed amendment.

§15.11. Certification of Local Government Dune Protection and Beach Access Plans.

(a) Certification of local government plans. The following local governments have submitted plans to the General Land Office which are consistent with state law:

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

(12) Nueces County

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

(C) Palms at Waters Edge master plan. The General Land Office certifies that the dune protection portion of the Palms at Waters Edge master plan adopted by the Nueces County commissioners court on December 27, 1996, is consistent with state law.

(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 September 28, 1998.

TRD-9815201
Garry Mauro
Commissioner General Land Office
General Land Office
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For further information, please call: (512) 305–9129

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TITLE 43. TRANSPORTATION

Part I. Texas Department of Transportation

Chapter 9. Contract Management

Subchapter A. General

43 TAC §9.2

The Texas Department of Transportation proposes amendment to §9.2, concerning Contract Claim Procedure.

EXPLANATION OF PROPOSED AMENDMENT

Senate Bill 370, 75th Legislature, 1997, codified Transportation Code, §201.112, which authorizes the commission, by rule, to establish procedures for the informal resolution of a claim arising out of a contract described by §22.018, Chapter 223, or Chapter 2254, Government Code. Section 201.112 provides for a right to an administrative hearing if a contractor is dissatisfied with the department's proposed resolution of a claim, and authorizes the executive director to change a finding of fact or conclusion of law made by the administrative law judge, or to vacate or modify an order issued by the administrative law judge, provided the executive director has a legal basis for doing so. The executive director's final order is subject to judicial review under the substantial evidence rule.

Section 9.2 is amended to comply with the requirements of Transportation Code, §201.112. Section 9.2 is also amended to prescribe requirements relating to the composition of the committee established by the department to hear contract claims. The executive director is authorized to name the members and chairman of the committee. In order to ensure that the committee includes members that are objective and experienced in the type of project or claim involved, the chairman of the committee may add members to the committee, including one or more district engineers chosen on a rotating basis, with a preference, if possible, for selecting district engineers of districts that do not have a current contractual relationship with the contractor. Section 9.2 is also amended to allow a contractor to file a contract claim at a location other than the district in which the contractor has a dispute. Section 9.2 is also amended to clarify that the commission must issue any final and binding orders concerning agreed dispositions of contract claims. In order to clarify that all proceedings before the department, including all oral communications of, and written documentation prepared by, department staff in connection with the analysis of a contract claim are part of an attempt to mutually resolve a contract claim without litigation, §9.2 is finally amended to specify that such communications and documentation are also not admissible for any purpose in a formal administrative hearing provided for in paragraph (5) of that subsection.

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 amendments. There are no anticipated economic costs for persons required to comply with the section as proposed.

Thomas Bohuslav, P.E., Director, Construction 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. There will be no effect on small businesses.

PUBLIC BENEFIT

Mr. Bohuslav 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 amendments will be to more expeditiously resolve any disputes between the department and its contractors, thereby ensuring the efficient development of department projects.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments may be submitted to Thomas Bohuslav, P.E., Director, Construction Division, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments will be 5:00 p.m. on Monday, November 9, 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, and, more specifically, Transportation Code, §201.112, which authorizes the commission by rule to establish procedures for the informal resolution of a claim arising out of a contract described by §22.018, Chapter 223, or Chapter 2254, Government Code.

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

§9.2. Contract Claim Procedure.

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

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

(3) Contract claim - A claim for additional compensation, time extension, or any other reason, arising out of a contract between the State of Texas, acting in its own capacity or as an agent of a local government, and a contractor, which is entered into and administered by the Texas Department of Transportation pursuant to Transportation Code, Section 22.018, [~~Chapter 21, 22, or~~] Chapter 223, or Government Code, Chapter 2254, Subchapters A and B.

(4) Contractor - An individual, partnership, corporation, or other business entity that is a party to a written contract with the State of Texas which is entered into and administered by the Texas Department of Transportation pursuant to Transportation Code, Section 22.018, [~~Chapter 21, 22, or~~] Chapter 223, or Government Code, Chapter 2254, Subchapters A and B.

(5) (No change.)

(6) Department office - The department district, division, or [special] office responsible for the administration of the contract.

(7) Department office director - The chief administrative officer of the responsible department office, such officer to be a district engineer, division director, or [special] office director.

(8)-(9) (No change.)

(b) Contract claim committee.

(1) The executive director will name the members and chairman of a contract claim committee or committees to serve at his or her pleasure. The chairman may add members to the committee, including one or more district engineers who will be assigned to the committee on a rotating basis, with a preference, if possible, for district engineers of districts that do not have a current contractual relationship with the contractor involved in the contract claim. It will be the responsibility of a committee to gather information, study, and meet informally with contractors, if requested, to resolve any disputes that may exist between the department office and the contractor, and which result in one or more contract claims.

(2) The commission stresses that, to every extent possible, disputes between a contractor and the engineer or other department employee in charge of a project should be resolved during the course of the contract. If, however, after completion of a contract, or when required for orderly performance prior to completion, resolution of a contract claim is not reached with the department office, the contractor may [should] file a detailed report and contract claim request with the department office director under whose administration the contract was or is being performed , the department's Construction Division, or the committee. Documents filed with the office director or the Construction Division [The filed documents] will be transmitted to the committee.

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

(5) The committee chairman will give written notice of the committee's proposed disposition of the claim to the contractor. If that disposition is acceptable, the contractor shall advise the committee chairman in writing within 20 days of the date such notice is received, and the chairman will forward to the commission an [the] agreed disposition involving payment to the contractor, [to the executive director] for a final and binding order on the claim. If the contractor is dissatisfied with the proposal of the committee, the contractor may petition the executive director for a formal administrative hearing to litigate the claim pursuant to the provisions of §§1.21 et seq. [§§1.21-1.61] of this title (relating to Contested Case Procedure).

(6) The administrative law judge's proposal for decision in a formal administrative hearing provided in paragraph (5) of this subsection shall be submitted to the executive director for adoption. The executive director may change a finding of fact or conclusion of law made by the administrative law judge or may vacate or modify an order issued by the administrative law judge. The executive director shall provide a written statement containing the reason and legal basis for any change.

(7) [(6)] Proceedings before the department office director or the committee are in the nature of an attempt to mutually resolve a contract claim without litigation and are not admissible for any purpose in a formal administrative hearing provided in paragraph (5) of this subsection. All oral communications, reports, or other written documentation prepared by department staff in connection with the analysis of a contract claim are part of the attempt to mutually resolve a contract claim without litigation, and are also not admissible for any purpose in a formal administrative hearing provided in paragraph (5) of this subsection.

(8) [(7)] If the contractor fails to submit the petition within 20 days after notice of the committee's recommendation is received, that recommendation will be final, and all further appeal by the contractor shall be barred.

This 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 September 28, 1998.

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Bob Jackson
Deputy General Counsel
Texas Department of Transportation
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For further information, please call: (512) 463–8630

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Chapter 25. Traffic Operations

Subchapter A. General

43 TAC §25.1

The Texas Department of Transportation proposes amendments to §25.1, concerning the Texas Manual on Uniform Traffic Control Devices (Texas MUTCD).

EXPLANATION OF PROPOSED AMENDMENT

This amendment is proposed to comply with House Bill 297, 75th Legislature, 1997, which added Transportation Code, §544.011 related to left lane for passing only signs. This section requires that anytime the department or a local authority places a sign on a highway that directs slower traffic to travel in a lane other than the farthest left lane, the sign must read, "left lane for passing only." House Bill 297 also requires the Texas Transportation Commission to amend the Texas MUTCD to conform with §544.011. House Bill 297 does not require the department or any local authority to change existing roadway signs; the bill allows "left lane for passing only" signs to be installed as the existing "slower traffic keep right" signs are replaced or repaired.

Although this change to the manual was distributed as an interim change notice, this amendment represents the formal change to the official copy of the printed Texas MUTCD.

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.

David T. Newbern, Director, Traffic Operations Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendment.

PUBLIC BENEFIT

Mr. Newbern 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 ensure that the Texas MUTCD is in full compliance with all applicable state laws. There will also be public benefit in aiding the smooth and efficient operation of roadways by keeping slower traffic from the farthest left lane of multi-lane roadways. There will be no effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendment may be submitted to David T. Newbern, Traffic Operations Division, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments will be 5:00 p.m. on November 9, 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 and §544.001 relating to left lane for passing only signs.

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

§25.1. Uniform Traffic Control Devices.

(a) The Texas Manual on Uniform Traffic Control Devices for Streets and Highways, 1980 edition, as amended by Revision Number 7 [~~6~~], which is filed with this section and hereby incorporated by reference, was prepared as required by law to govern standards and specifications for all such traffic control devices to be erected and maintained upon all highways within this state, including those under local jurisdiction. Copies of the manual may be obtained at the Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701, and are on file for public inspection with the Office of the Secretary of State, Texas Register Division, James Earl Rudder State Office Building, Room 245, Austin, Texas 78711.

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

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

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Bob Jackson
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Texas Department of Transportation
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Chapter 28. Oversize and Overweight Vehicles and Loads

The Texas Department of Transportation proposes amendments to §28.2, §28.10, §§28.14-28.15, §28.30, §28.80, and §28.82, and new §28.3, §§28.11-28.13, §§28.40-28.45, and §§28.60-28.64, concerning oversize and overweight vehicles and loads.

EXPLANATION OF PROPOSED AMENDMENTS AND NEW SECTIONS

The department has for several years conducted a continual rule review process independent of the process prescribed by Article IX, §167 of the General Appropriations Act. As part of this rule review process, the department certifies that existing rules, among other things, accurately reflect department policy and procedures, do not unreasonably burden regulated entities, are cost effective in accomplishing stated purposes, and adequately safeguard the public safety, consumers of regulated entities, and the state.

The existing rules in Chapter 28, concerning Oversize and Overweight Vehicles and Loads, are cumbersome and, at times, difficult to understand. The proposed amended and new sections are part of the department's overall strategy to modernize and streamline existing rules, while clarifying new and existing policies and procedures. The proposed amended and new sections in part replace existing sections that have been contemporaneously proposed for repeal. The proposed amended and new sections are necessary in order to reorganize, streamline, and consolidate requirements imposed on operators of oversize and overweight vehicles and loads. The proposed amended and new sections are also necessary in order to allow the department to more effectively and efficiently administer Transportation Code, Chapters 621, 622, and 623, allow the department to charge fees for services actually performed, increase the efficiency of the permit issuance process, clarify new and existing policies and procedures, reduce unnecessary burdens imposed on the motor carrier industry, and facilitate compliance with department rules by the motor carrier industry, which in turn will increase the safety of the traveling public.

Section 28.2, concerning Definitions, is amended to remove unnecessary and redundant definitions, add definitions for additional terms used in this chapter, and include additional information necessary to clarify the remaining definitions.

Section 28.10, concerning Purpose and Scope, is amended, in order to protect the state's investment in its transportation system, to clarify and prescribe permittee responsibilities for the safe movement of permitted vehicles and loads, and is also amended to remove references to surety bonds, which were moved to proposed new §28.3.

Section 28.14, concerning Manufactured Housing, and Industrialized Housing and Building Permits, is amended to move some provisions to new §28.11 for consolidation and organizational purposes, to specify, in order to reduce the amount of amendment requests received by the Motor Carrier Division, that permit amendments will only be made to change intermediate points between the origination and destination points listed on the permit, to specify when a permit is void, and to require that a permitted vehicle be routed over the most "practical" route rather than the most "direct" route, which will allow the department to consider all factors when routing a permitted load.

Section 28.15, concerning Portable Building Unit Permits, is amended to consolidate and reorganize information for purposes of clarity.

Section 28.30, concerning Permits for Over Axle and Over Gross Weight Tolerances, is amended to specify that permits will be voided when the applicant's copy of the permit does not contain the correct information, the applicant fails to retrieve a permit, or when requested by law enforcement in conjunction with the issuance of a citation. Section 28.30 is also amended to reflect the recodification of the Transportation Code.

Section 28.80, concerning Purpose, and Section 28.82, concerning Preparation of Contract, are amended to reflect the recodification of the Transportation Code.

New §28.3, concerning Surety Bonds for Ready-mix Concrete Trucks, Concrete Pump Trucks, Vehicles Transporting Recyclable Materials, and Solid Waste Vehicles, is proposed to replace §28.11, which was reorganized and moved for purposes of clarity.

New §28.11, concerning General Oversize/Overweight Permit Requirements and Procedures, is proposed to prescribe requirements relating to pre-requisites to obtaining an oversize/overweight permit, permit applications, maximum permit weight limits, permit issuance, payment of permit fees and refunds, amendments to permits, requirements for overwidth loads, requirements for overlength loads, requirements for overheight loads, escort vehicle requirements for permitted vehicles and loads, restrictions on movement of permitted vehicles, general provisions, and surety bonds. Changes between the proposed new §28.11 and existing §28.11 include: (1) reorganizing and consolidating all general permit information under this section, and eliminating any duplications throughout Chapter 28; (2) including additional information necessary to clarify current policies and procedures; (3) requiring that a permitted vehicle be routed over the most "practical" route rather than the most "direct" route, which will allow the department to consider all factors when routing a permitted load; (4) allowing a permitted vehicle return movement to the permitted vehicle's point of origin or the permittee's place of business, along with the transport of a non-divisible load of legal dimensions in the return trip, which will allow motor carriers to utilize their equipment more efficiently; (5) clarifying and specifying existing policy regarding when a permit will be voided; (6) specifying that personal and business checks will be accepted for payment of permit fees; (7) placing the responsibility for monitoring escrow account balances on the permittee; (8) specifying escort vehicle requirements and the department's authority to require escort vehicles; (9) prescribing permittee responsibilities regarding obstructions along the specified route; (10) placing the responsibility for determining whether or not conditions are hazardous on the permittee and law enforcement, with law enforcement making the final determination; (11) adding wind to the list of potential hazardous weather conditions; and (12) specifying that permitted vehicles may be operated in maintenance/constructions areas as long as the permitted vehicle's dimensions do not exceed posted restrictions.

New §28.12, concerning Single-trip Permits Issued Under Transportation Code, Chapter 523, Subchapter D, is proposed to prescribe requirements relating to overweight loads, permits for vehicles hauling drill pipe and drill collars in a pipe box, and permits for moving houses and storage tanks. Changes between the proposed new §28.12 and existing §28.12 include: (1) moving generic permit information to new §28.11 for organizational purposes; (2) expanding department policy to authorize the reduction of vehicle supervision fees for a permittee who moves identical loads over the same route within 30 days, rather than the previously allowed 5 days, in order to more accurately reflect industry practice and the amount of time MCD staff spends routing loads in these situations; (3) requiring an applicant for a superheavy permit to pay the vehicle supervision fee upon permit application, which will allow the department to collect fees for work actually performed (specifically bridge/pavement analysis) in those cases where a permit is applied for and then canceled after analysis has begun; and (4) providing for a refund of a vehicle supervision fee which has been paid in advance, when a refund request is received in writing prior to the department initiating bridge/pavement analysis.

New §28.13, concerning Time Permits, is proposed to prescribe requirements relating to general requirements, overwidth loads, overlength loads, and annual permits. Changes between the proposed §28.13 and existing §28.13 include: (1) consolidating and reorganizing information for purposes of clarity; (2) removing the restriction stating that travel under a 30, 60, or 90 day permit is limited to 8 districts and allowing travel on a statewide basis for those permits; (3) specifying that permitted vehicles may be operated in maintenance/construction areas as long as the permitted vehicle's dimensions do not exceed posted restrictions; (4) specifying when a permit will be voided; (5) specifying that time permits will only be amended in the case of permit officer error, with the exception of annual envelope vehicle permits; (6) allowing an overwidth time permit to be used in conjunction with an overlength time permit; and (7) allowing for the payment of permit fees by personal or business check.

New §28.40, concerning Purpose and Scope, is proposed to replace the existing §28.40 and include provisions reflecting the recodification of the Transportation Code.

New §28.41, concerning General Requirements for Permits Issued Under Transportation Code, Chapter 623, Subchapter G, is proposed to prescribe requirements relating to pre-requisites to obtaining an oversize/overweight permit, payment of permit fees, restrictions on permitted vehicles, void permits, transferability of permits, records retention by motor carriers, and escort requirements for permitted vehicles. Changes from existing rules concerning these requirements include: (1) reorganizing provisions for clarity and moving duplicate information to new §28.11; (2) placing responsibility for obtaining restrictions on the permittee; (3) specifying when a permit is void; (4) specifying permit amendment procedures; and (5) allowing permit fees to be paid by personal or business check.

New §28.42, concerning Single Trip Mileage Permits, is proposed to prescribe requirements relating to maximum permit weight limits, permit application and issuance, permit fees and refunds, and amendments to permits. Changes from existing rules concerning these requirements consist of consolidating provisions relating to single trip mileage permits, which is currently disseminated throughout Subchapter D, under one section.

New §28.43, concerning Quarterly Hubometer Permits, is proposed to prescribe requirements relating to maximum permit weight limits, initial permit application and issuance, permit renewals and closeouts, permit fees and refunds, and amendments to permits. Changes from existing rules concerning the issuance of quarterly hubometer permits include: (1) consolidating provisions relating to quarterly hubometer permits, which is currently disseminated throughout Subchapter D, under one section; (2) specifying amendment procedures; and (3) allowing a vehicle permitted with a quarterly hubometer permit to travel on a statewide basis, rather than limiting permittee travel to 12 districts.

New §28.44, concerning Annual Permits, is proposed to prescribe requirements relating to permit application and issuance. Changes from existing rules concerning the issuance of annual permits under Subchapter D include: (1) consolidating provisions relating to annual permits, which is currently disseminated

throughout Subchapter D, under one section; (2) specifying that a permit issued under this section may not be amended; and (3) allowing a vehicle permitted with an annual permit to travel on a statewide basis, rather than limiting permittee travel to 12 districts.

New §28.45, concerning Permits for Vehicles Transporting Liquid Products Related to Oil Well Production, is proposed to prescribe requirements relating to applications for permit, permit qualifications and requirements, amount of fees, and permit movement conditions. New §28.45 differs from the repealed §28.45 by allowing for payment of permit fees by personal or business check and by reflecting the recodification of the Transportation Code.

New §28.60, concerning Purpose and Scope, is proposed to describe and specify the department's authority to issue permits for oversize and overweight unladen lift equipment motor vehicles, and to prescribe the requirements and procedures applicable to those permits.

New §28.61, concerning General Requirements for Permits for Oversize and Overweight Unladen Lift Equipment Vehicles, is proposed to prescribe requirements relating to the payment of permit fees, restrictions on permitted vehicles, void permits, transferability of permits, records retention requirements for certain permitted vehicles, and escort requirements for permitted vehicles. Changes from existing rules under Subchapter E include: (1) reorganizing information for purposes of clarity, and moving duplicate information to proposed new §28.11; (2) placing responsibility for obtaining restrictions on the permittee; (3) specifying when a permit is void; and (4) allowing permit fees to be paid by personal or business check.

New §28.62, concerning Single Trip Mileage Permits, is proposed to prescribe requirements relating to maximum permit weight limits, permit application and issuance, permit fees and refunds, and amendments to permits. Changes from existing rules for the issuance of Single Trip Mileage Permits under Subchapter E consist of consolidating provisions relating to single trip mileage permits, which are currently disseminated throughout Subchapter E, under one section.

New §28.63, concerning Quarterly Hubometer Permits, is proposed to prescribe requirements relating to maximum permit weight limits, initial permit application and issuance, permit renewals and closeouts, and permit fees and refunds. Changes from existing rules concerning the issuance of quarterly hubometer permits under Subchapter E include: (1) consolidating all provisions relating to quarterly hubometer permits, which were previously disseminated throughout Subchapter E; (2) specifying when a permit may be amended; and (3) allowing a vehicle permitted with a quarterly hubometer permit to travel on a statewide basis, rather than limiting permittee travel to 12 districts.

New §28.64, concerning Annual Permits, is proposed to prescribe requirements relating to permit application and issuance. Changes from existing rules concerning the issuance of annual permits under Subchapter E include: (1) consolidating provisions relating to annual permits, which is currently disseminated throughout Subchapter E, under one section; and (2) specifying that a permit issued under this section may not be amended.

The majority of the changes in the proposed new and amended sections involve the reorganization of the rules in Chapter 28, and adding provisions necessary to clarify existing policies and procedures. Policy changes, and their anticipated fiscal impacts to the department and to those required to comply, are outlined below.

Requiring that a permitted vehicle be routed over the most "practical" route rather than the most "direct" route allows the department and the permittee to take additional factors, such as highway construction and traffic volumes, under consideration when routing a permitted vehicle and provides for a more efficient routing process. No fiscal impact to the state or the motor carrier industry is anticipated as a result of this change.

Allowing a permitted vehicle to return to its point of origin if transporting a non-divisible load of legal dimensions, as long as such transport is completed within the time period stated on the permit, will allow motor carriers to use their equipment more efficiently and effectively. This change is not expected to create a fiscal impact for the state, as carriers are not required to obtain a permit for the movement of non-divisible loads with legal dimensions.

Placing responsibility for determining whether or not conditions are hazardous on the permittee and law enforcement, with law enforcement officials making the final determination, will allow the operator and law enforcement personnel, the people who are actually on the road, to determine if conditions are safe to move a permitted load. No fiscal impacts to the department or to the motor carrier industry are anticipated as a result of this change.

Expanding department policy to reduce the vehicle supervision fee for a permittee who moves identical loads over the same route within 30 days, rather than the previously allowed five days, is a more accurate reflection of the amount of time department staff spends processing and routing such loads, as well as a reflection of motor carrier industry needs. The proposed change may also result in reduced paperwork and a minor savings in fees for the motor carrier industry. The department anticipates that this change may have minor fiscal impacts.

The vehicle supervision fee for loads requiring structural analysis is $800 when the analysis is conducted by the department, and $500 when the analysis is performed by a consulting engineer. Requiring that an applicant for a superheavy permit (permits to transport loads over 200,000 pounds) pay the vehicle supervision fee upon permit application will allow the department to recoup costs for actual work performed if the permit application is later canceled. The department requires that applicants for superheavy permits requiring structural analysis include a copy of the contract for transport with the application. Issuance of superheavy permits is extremely labor intensive and may include a detailed analysis of all structures along a proposed route. Issuance of a superheavy permit requiring structural analysis can take six to eight weeks. Even though the department requires a copy of the signed contract indicating that the permit applicant will be transporting the load, the department still experiences a large number of cancellations after department staff has invested a substantial amount of time and effort. The proposed rules will allow the department to recoup those costs from the vehicle supervision fee. The proposed rules also provide that the vehicle supervision fee will be refunded if the department receives a written cancellation notice prior to performing any work related to the actual analysis. The proposed change may have a positive fiscal impact for the department, in that the department will be able to recoup costs

for work actually performed. Requiring that an applicant for a superheavy permit fee to pay the vehicle supervision fee upon application may create fiscal and operational impacts for some motor carriers. This impact would only be related to default contracts and not as a result of a department action.

Removing the restriction stating that travel with a 30, 60, or 90 day ("time") permit is limited to eight districts will result in faster permit acquisition and a reduction in paperwork for the motor carrier industry. Currently, a permittee with a time permit is limited to travel in eight districts. For this reason, many permittees purchase single trip permits rather than time permits. As a result of the proposed rules, the department anticipates a small decrease in the number of single trip permits and a corresponding increase in time permits. As it costs the department an average of $6.04 per permit to process a permit, the department can expect minimal cost savings as a result. The department does not anticipate reductions in revenue, as any reduction in single trip permit fees collected will be offset by an increase in time permit fees collected.

Allowing an overwidth time permit to be used in conjunction with an overlength time permit may result in reduced paperwork for the motor carrier industry. The department does not anticipate any decrease in costs or revenue as a result of the proposed rule. There may be a slight increase in the number of time permits sold and, as such, the department may experience a minimal increase in revenue.

Allowing a rig-up truck permitted with an annual permit to pull a trailer will allow motor carriers to utilize their equipment more efficiently and effectively. The department does not anticipate any fiscal impacts as a result of the proposed rule.

Allowing a vehicle permitted with a quarterly hubometer permit or annual permit issued under Subchapters D and E to travel on a statewide basis, rather than limiting permittee travel to 12 districts, will also provide increased convenience for permittees. This change should have no fiscal impact to the department, as permittees pay a "per mile" fee.

FISCAL NOTE

Frank J. Smith, Director, Finance Division, has determined that for the first five-year period the proposed amendments and new sections are in effect, there will be fiscal implications for state and local government as a result of enforcing or administering the proposed amendments and new sections. However, the department has no method of determining the dollar value of any of the cost or revenue impacts described above. The amount of any fiscal impact cannot be determined as it will depend on the number and type of permits issued. The department anticipates that any fiscal impacts will be relatively insubstantial.

Lawrance R. Smith, Director, Motor Carrier 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 and new sections.

PUBLIC BENEFIT

Mr. Smith has also determined that for each year of the first five years the new and amended sections are in effect, the public benefit anticipated as a result of enforcing or administering the proposed amendments and new sections will be to facilitate compliance with requirements for oversize and overweight vehicles and loads, which will result in increased safety for the traveling public. The proposed amendments and new sections will also result in reduced paper work, decreased permit acquisition time, and increased convenience for the motor carrier industry. Other than the fiscal impacts outlined above for the motor carrier industry, there will be no effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments and new sections may be submitted to Lawrance R. Smith, Director, Motor Carrier Division, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments will be 5:00 p.m. on November 9, 1998.

Subchapter A. General Provisions

43 TAC §28.2

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 and, more specifically, Transportation Code, Chapters 621, 622, and 623 which authorize the department to carry out the provisions of the those laws governing the issuance of permits for oversize and overweight vehicles and loads.

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

§28.2. Definitions.

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

(1) Annual permit - A permit that authorizes movement of an overdimension load for one year commencing with the "movement to begin" date.

(2) Applicant - Any person, firm, or corporation requesting a permit.

[~~Application - Part I and paragraph C of Part II of Form 1700 as completed by the applicant prior to applying for permit.~~]

(3) Axle - The common axis of rotation of one or more wheels whether power-driven or freely rotating, and whether in one or more segments.

(4) Axle group - An assemblage of two or more consecutive axles, with two or more wheels per axle, spaced at least 40 inches from center of axle to center of axle, equipped with a weight-equalizing suspension system that will not allow more than a 10% weight difference between any two axles in the group.

(5) Cash collection office- An office [~~located in a district~~] that has been designated [~~by the district engineer~~] as the place where a permit applicant can apply [~~make application~~] for a permit [~~,~~] or pay for a permit with cash, cashier's check, personal or business check, or money order. [~~Central permit office (CPO) - The department office, within the Motor Carrier Division, located in the City of Austin that issues all permits.~~]

(6) Closeout - The procedure used by the MCD to terminate a permit, issued under Transportation Code, §623.142 or §623.192 that will not be renewed by the applicant.

(7) Commission - The Texas Transportation Commission.

(8) Complete identification number - A unique and distinguishing number assigned to equipment or a commodity for purposes of identification.

(9) Concrete pump truck - A self propelled vehicle designed to pump the concrete product from a ready mix truck to the point of construction.

(10) Crane - Any unladen lift equipment motor vehicle designed for the sole purpose of raising, shifting, or lowering heavy weights by means of a projecting, swinging mast with an engine for power on a chassis permanently constructed or assembled for such purpose.

(11) Credit card - A MasterCard or VISA credit card and a permit account card.

(12) Daylight - The period beginning one-half hour before sunrise and ending one-half hour after sunset, as defined by Transportation Code, §541.401(1).

(13) Department - The Texas Department of Transportation.

(14) Digital signature - An electronic identifier intended by the person using it to have the same force and effect as a manual signature. The digital signature shall be unique to the person using it.

(15) Director - The Executive Director of the Texas Department of Transportation.

(16) District - One of the 25 geographical areas, managed by a district engineer, in which the department conducts its primary work activities.

(17) District engineer - The chief executive officer in charge of a district of the department.

(18) Electronic identifier - A unique identifier which is distinctive to the person using it, is independently verifiable, is under the sole control of the person using it, and is transmitted in a manner that makes it infeasible to change the data in the communication or digital signature without invalidating the digital signature.

(19) Escort vehicle - A motor vehicle used to warn traffic of the presence of a permitted vehicle.

(20) Foreign commercial vehicle annual registration - An annual registration permit issued by the department to foreign commercial vehicles under authority of Transportation Code, §502,353.

~~[Form 439 - A form titled "Superheavy or Oversize Permit Bond."]~~

~~[Form 440 - A form titled "Permit Bond For Superheavy Loads Exceeding 250,000 Pounds Gross Weight."]~~

~~[Form 1382 - A form titled "Blanket Surety Bond For The Operation Of Vehicles Used Exclusively For The Transportation Of Ready-Mix Concrete or Concrete Pump Trucks."]~~

~~[Form 1383 - A form titled "Amendment To Blanket Surety Bond For Ready-Mix Concrete Vehicles or Concrete Pump Trucks."]~~

~~[Form 1575 - A form titled "Blanket Surety Bond For The Operation Of Vehicles Used Exclusively For The Transportation Of Solid Waste or Recyclable Materials."]~~

~~[Form 1576 - A form titled "Certification Of Surety Bond For The Transportation Of Solid Waste or Recyclable Materials."]~~

~~[Form 1577 - A form titled "Amendment To Blanket Surety Bond For Solid Waste Vehicles or Recyclable Materials."]~~

~~[Form 1700 - A form titled "Texas Self-Issue Application and Permit to Move Super Heavy or Oversize Equipment or Load Over State Highways and/or Temporary Registration."]~~

(21) Four-axle group - Any four consecutive axles, having at least 40 inches from center of axle to center of axle, whose extreme centers are not more than 192 inches apart and are individually attached to or articulated from, or both, to the vehicle by a weight equalizing suspension system.

(22) Gauge - The transverse spacing distance between tires on an axle, expressed in feet and measured to the nearest inch, from center-of-tire to center-of-tire on an axle equipped with only two tires, or measured to the nearest inch from the center of the dual wheels on one side of the axle to the center of the dual wheels on the opposite side of the axle.

(23) Gross weight - The unladen weight of a vehicle or combination of vehicles plus the weight of the load being transported.

(24) Height pole - A device made of a non-conductive material, used to measure the height of overhead obstructions.

(25) Highway maintenance fee - A fee established by Transportation Code, §623.077, based on gross weight, and paid by the permittee when the permit is issued.

(26) Highway use factor - A mileage reduction figure used in the calculation of a permit fee for a permit issued under Transportation Code, §623.142 and §623.192.

(27) Hubometer - A mechanical device attached to an axle on a unit or a crane for recording mileage traveled.

(28) HUD number - A unique number assigned to a manufactured home by the U.S. Department of Housing and Urban Development.

(29) Indirect cost share - A prorated share of administering department activities, other than the direct cost of the activities, including the cost of providing statewide support services.

(30) Load-restricted bridge - A bridge that is restricted by the commission, under the provisions of Transportation Code, §621.102, to a weight limit less than the maximum amount allowed by Transportation Code, §621.101.

(31) Load-restricted road - A road that is restricted by the commission, under the provisions of Transportation Code, §621.102, to a weight limit less than the maximum amount allowed by Transportation Code, §621.101.

(32) Machinery plate - A license plate issued under Transportation Code, §502.276.

(33) Manufactured home - Manufactured housing, as defined in Texas Civil Statutes, Article 5221f, and industrialized housing and buildings, as defined in Texas Civil Statutes, Article 5221f-1, and temporary chassis systems, and returnable undercarriages used for the transportation of manufactured housing and industrialized housing and buildings, and a transportable section which is transported on a chassis system or returnable undercarriage that is constructed so that it cannot, without dismantling or destruction, be transported within legal size limits for motor vehicles.

(34) Motor carrier - An individual, association, corporation, or other legal entity that controls, operates, or directs the operation of one or more vehicles that transport persons or cargo over a

road or highway in this state, as defined in §18.2 of this title, (relating to Definitions).

(35) Motor Carrier Division (MCD) - The Motor Carrier Division of the department.

(36) Motor carrier registration (MCR) - The registration issued by the department to motor carriers moving intrastate, under authority of Transportation Code, Chapter 643 as amended.

(37) Night - The period beginning one-half hour after sunset and ending one-half hour before sunrise, as defined by Transportation Code, §541.401.

(38) Oil field rig-up truck - An unladen vehicle with an overweight single steering axle, equipped with a winch and set of gin poles used for lifting, erecting, and moving oil well equipment and machinery.

(39) Oil well servicing unit - An oil well clean-out unit, oil well drilling unit, or oil well swabbing unit, which is mobile equipment, either self-propelled or trailer-mounted, constructed as a machine used solely for cleaning-out, drilling, servicing, or swabbing oil wells, and consisting in general of, but not limited to, a mast, an engine for power, a draw works, and a chassis permanently constructed or assembled for this purpose.

(40) One trip registration - Temporary vehicle registration issued [~~by the MCD on Form 1700,~~] under Transportation Code, §502.354 [~~, to an unladen vehicle authorizing its operation on a state highway from a specific origin to a specific destination, along such intermediate points as may be set forth on Form 1700, for a period not longer than 15 days~~].

(41) Overdimension load - A [~~crane, oil well servicing unit,~~] vehicle, [~~a~~] combination of vehicles, or vehicle and its load [~~, or combination of vehicles and load~~] that exceeds maximum legal width, height, length, overhang, or weight as set forth by Transportation Code, Chapter 621, Subchapters B and C.

(42) Overhang - The portion of a load extending beyond the front or rear of a vehicle or combination of vehicles.

(43) Overheight - An overdimension load that exceeds the maximum height specified in Transportation Code, §621.207.

(44) Overlength - An over dimension load that exceeds the maximum length specified in Transportation Code, §621.203, §621.204, §621.205, and §621.206.

(45) Overweight - An overdimension load that exceeds the maximum weight specified in Transportation Code, §621.101.

(46) Overwidth - An overdimension load that exceeds the maximum width specified in Transportation Code, §621.201.

(47) Permit - Authority for the movement of an overdimension load, issued by the MCD under Transportation Code, Chapter 623 [~~The totally completed Part I and Part II of the department's Form 1700, including the permit number issued by the MCD, that authorizes the movement of an over dimension load~~].

(48) Permit account card (PAC) - A debit card [~~,~~] that can only be used to purchase a permit or temporary registration and which is[~~,~~] issued by a financial institution that is under contract to the department and the Texas State Treasury.

(49) Permit officer - An employee of the MCD who is authorized to issue an oversize/overweight permit or temporary registration.

(50) Permit plate - A license plate issued under Transportation Code, §502.276, to a crane or an oil well servicing vehicle.

(51) Permitted vehicle - A [~~crane, oil well servicing unit,~~] vehicle, [~~a~~] combination of vehicles, or vehicle and its load [~~, or combination of vehicles and load,~~] operating under the provisions of a permit.

(52) Permittee - Any person, firm, or corporation that is issued an oversize/overweight permit or temporary registration by the MCD.

[~~Pilot car - An escort vehicle.~~]

(53) Pipe box - A container specifically constructed to safely transport and handle oil field drill pipe and drill collars.

(54) Portable building compatible cargo - Cargo, other than a portable building unit, that is manufactured, assembled, or distributed by a portable building unit manufacturer and is transported in combination with a portable building unit.

(55) Portable building unit - The pre-fabricated structural and other components incorporated and delivered by the manufacturer as a complete inspected unit with a distinct serial number whether in fully assembled, partially assembled, or kit (unassembled) configuration when loaded for transport.

(56) Principal - The person, firm, or corporation that is insured by a surety bond company.

(57) Recyclable materials - Material that has been recovered or diverted from the solid waste stream for purposes of reuse, recycling, or reclamation, a substantial portion of which is consistently used in the manufacture of products which may otherwise be produced using raw or virgin materials. Recycled material is not solid waste unless the material is deemed to be hazardous solid waste by the Administrator of the United States Environmental Protection Agency, whereupon it shall be regulated accordingly unless it is otherwise exempted in whole or in part from regulation under the federal Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 (42 U.S.C. Section 6901 et seq.), by Environmental Protection Agency regulation. However, recyclable material may become solid waste at such time, if any, as it is abandoned or disposed of rather than recycled, whereupon it will be solid waste with respect only to the party actually abandoning or disposing of the material.

(58) Registration reduction - A 25% reduction of the permit fee [~~figure~~] that applies to a crane or oil well servicing unit registered for maximum legal weight.

[~~Renewal application form - A form, supplied by the MCD to each permittee receiving a time permit issued under Transportation Code, §623.142 or §623.192, which must be completed and returned to the MCD whenever the permit is to be renewed or closed out.~~]

(59) Single axle - An assembly of two or more wheels whose centers are in one transverse vertical plane or may be included between two parallel transverse planes 40 inches apart extending across the full width of the vehicle.

(60) Single state registration (SSR) - Interstate registration authority issued to motor carriers under authority of 49 U.S.C. §11506 and Transportation Code, Chapter 645.

(61) Single-trip permit - A permit issued for an overdimension load for a single continuous movement over a specific route for an amount of time necessary to make the movement.

(62) State highway - A highway or road under the jurisdiction of the Texas Department of Transportation.

(63) State highway system - A network of roads and highways as defined by Transportation Code, §221.001.

(64) Surety bond - An agreement issued by a surety bond company to a principal that pledges to compensate the department for any damage that might be sustained to the highways and bridges by virtue of the operation of the equipment for which a permit was issued.

(65) Tare weight - The empty weight of any vehicle transporting an overdimension load.

(66) Temporary registration - A 72-hour temporary registration, 144-hour temporary registration, or one-trip registration, as defined by Transportation Code, §502.352.

(67) Three-axle group - Any three consecutive axles, having at least 40 inches from center of axle to center of axle, whose extreme centers are not more than 144 inches apart, and are individually attached to or articulated from, or both, to the vehicle by a weight equalizing suspension system.

(68) Time permit - A permit issued for a specified period of time under §28.13 of this chapter (relating to Time Permits issued under Transportation Code, Chapter 623, Subchapter D) and in accordance with Transportation Code, Chapter 623 [~~for either 30, 60, or 90 days, or one year, issued under Transportation Code, §623.076~~].

(69) Traffic control device - All traffic signals, signs, and markings, including their supports, used to regulate, warn, or control traffic.

(70) Trailer mounted unit - An oil well clean-out, drilling, servicing, or swabbing unit mounted on a trailer, constructed as a machine used for cleaning out, drilling, servicing, or swabbing oil wells, and consisting in general of, but not limited to, a mast, an engine for power, a draw works, and a chassis permanently constructed or assembled for this purpose.

(71) Trunnion axle - Two individual axles mounted in the same transverse plane, with either two or four tires on each axle, that are connected to a pivoting wrist pin that allows each individual axle to oscillate in a vertical plane to provide for constant and equal weight distribution on each individual axle at all times during movement.

(72) Trunnion axle group - Two or more consecutive trunnion axles [~~,~~] whose centers are at least 40 inches apart [~~,~~] and which are individually attached to or articulated from, or both, to the vehicle by a weight equalizing suspension system.

(73) Two-axle group - Any two consecutive axles whose centers are at least 40 inches but not more than 96 inches apart and are individually attached to or articulated from, or both, to the vehicle by a weight equalizing suspension system.

(74) Unit - Oil well clean-out unit, oil well drilling unit, oil well servicing unit, and/or oil well swabbing unit.

(75) Unladen lift equipment motor vehicle - A motor vehicle designed for use as lift equipment used solely to raise, shift, or lower heavy weights by means of a projecting, swinging mast with an engine for power on a chassis permanently constructed or assembled for such purpose.

(76) Variable load suspension axles - Axles, whose controls must be located outside of and be inaccessible from the driver's compartment, that can be regulated, through the use of hydraulic and air suspension systems, mechanical systems, or a combination of these systems, for the purpose of adding or decreasing the amount of weight to be carried by each axle during the movement of the vehicle.

(77) Vehicle - Every device in [~~,~~] or by which any person or property is or may be transported or drawn upon a public highway, except devices used exclusively upon stationary rails or tracks.

(78) Vehicle identification number - A unique and distinguishing number assigned to a vehicle by the manufacturer or by the department in accordance with §17.3(b) of this title (relating to Motor Vehicle Certificates of Title) for the purpose of identification.

(79) Vehicle supervision fee - A fee required by Transportation Code, §623.078, paid by the permittee to the department, designed to recover the direct cost of providing safe transportation of a permit load exceeding 200,000 pounds gross weight over a state highway, including the cost for bridge structural analysis, monitoring the progress of the trip, and moving and replacing traffic control devices.

(80) Water Well Drilling Machinery - Machinery used exclusively for the purpose of drilling water wells, including machinery that is a unit or a unit mounted on a conventional vehicle or chassis.

(81) Weight-equalizing suspension system - An arrangement of parts designed to attach two or more consecutive axles to the frame of a vehicle in a manner that will equalize the load between the axles.

(82) Windshield sticker - Identifying insignia indicating that an over axle/over gross weight tolerance permit has been issued in accordance with Subchapter C of this chapter (relating to Permits for Over Axle and Over Gross Weight Tolerances) and Transportation Code, §623.011.

(83) Year - A time period consisting of 12 consecutive months that commences with the "movement to begin" date stated in the permit.

(84) 72-hour temporary registration - Temporary registration issued by the MCD [~~on Form 1700 to a vehicle~~] authorizing a vehicle [~~it~~] to operate at maximum legal weight on a state highway for a period not longer than 72 consecutive hours, as prescribed by Transportation Code, §502.352.

(85) 144-hour temporary registration - Temporary registration issued by the MCD [~~on Form 1700 to a vehicle~~] authorizing a vehicle [~~it~~] to operate at maximum legal weight on a state highway for a period not longer than 144 consecutive hours, as prescribed by Transportation Code, §502.352.

This 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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Bob Jackson
Deputy General Counsel
Texas Department of Transportation
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For further information, please call: (512) 463–8630

♦ ♦ ♦

43 TAC §28.3

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, Chapters 621, 622, and 623 which authorize the department to carry out the provisions of the those laws governing the issuance of permits for oversize and overweight vehicles and loads.

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

§28.3. Surety Bonds For Ready-mix Concrete Trucks, Concrete Pump Trucks, Vehicles Transporting Recyclable Materials, And Solid Waste Vehicles.

(a) Surety bond required. A surety bond is required for:

(1) ready-mixed concrete trucks and concrete pump trucks operated under the provisions of Transportation Code, §622.013;

(2) vehicles used exclusively to transport recyclable materials operated under the provisions of Transportation Code, §622.134; and

(3) vehicles used exclusively to transport solid waste under the provisions of Transportation Code, §623.163.

(b) Surety bonds.

(1) Surety bonds filed under this section must:

(A) be in the amount of $1,000 per vehicle (for example, if 10 trucks are covered by the surety bond then the total amount of the surety bond would be $10,000);

(B) indicate the total amount of coverage; and

(C) be submitted in duplicate to the MCD on Form 1382 or Form 1575.

(2) Form 1382-A or Form 1576 must be completed in duplicate and submitted to the MCD for certification of each vehicle bonded under Forms 1382 or Form 1575.

(A) The MCD will certify and return to the principal, one copy of Form 1382 or Form 1575, and one copy of Form 1382-A or Form 1576.

(B) The original Form 1382-A or Form 1576 must be carried in the cab of the bonded vehicle.

(3) Form 1383 or Form 1577 must be used to add or delete a vehicle covered by Form 1382 or Form 1575, and must be completed in duplicate and submitted to the MCD for certification.

(A) The MCD will certify and return to the principal, one copy of Form 1383 or Form 1577 when a new vehicle is added to the surety bond. When a vehicle is dropped from the surety bond the MCD will make the necessary revision to the principal's file.

(B) Form 1383 or Form 1577 must be carried in the cab of the bonded vehicle.

(4) A facsimile copy of Forms 1382, 1382-A, 1383, 1575, 1576 or 1577 is not acceptable in lieu of the original surety bond.

This 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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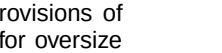

Subchapter B. General Permits

43 TAC §§28.10, 28.14, 28.15

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, Chapters 621, 622, and 623 which authorize the department to carry out the provisions of the those laws governing the issuance of permits for oversize and overweight vehicles and loads.

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

§28.10. Purpose and Scope.

(a) In accordance with Transportation Code, Chapters 621, 622, and 623, the department may issue permits for the operation of oversize and/or overweight vehicles for:

(1) the transportation of cargo that cannot be reasonably dismantled when the [~~gross~~] size or gross weight exceeds the limits allowed by law;

(2) the transportation of oversize portable building units [~~buildings~~] and portable building compatible cargo;

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

(b) The issuance of a permit for an oversize and/or overweight unit is not a guarantee by the department that the highways can safely accommodate such movement. The transporter of a unit is responsible for any damage caused to the state highway system or any of its structures or appurtenances by movement of the unit, whether the unit is permitted or not. [~~The department may certify surety bonds required for the operation of overweight ready-mix concrete vehicles and concrete pump trucks, vehicles transporting overweight loads of solid waste, and vehicles transporting recyclable materials that exceed maximum legal weight limits as set forth by Transportation Code, §621.101.~~]

(c) The following sections in this subchapter set forth the requirements and procedures applicable to those permits [~~and surety bonds~~].

§28.14. Manufactured Housing, and Industrialized Housing and Building Permits.

(a) General information.

(1) A manufactured home that exceeds size limits for motor vehicles as defined by Transportation Code, Chapter 621, Subchapters B and C, must obtain a permit from the department.

(2) Pursuant to Transportation Code, Chapter 623, Subchapter E, a permit may be issued to persons registered as manufacturers, installers, or retailers with the Texas Department of Housing and Community Affairs or motor carriers registered with the department under Transportation Code, Chapter 643 [~~or Texas Civil Statutes, Article 6675c~~].

(3) The department may issue a permit to the owner of a manufactured home provided that:

(A) the same owner is named on [~~ownership of the manufactured home and of the towing vehicle is shown to be the same person by~~] the title of [~~to~~] the manufactured home and [~~to the~~] towing vehicle; [~~,~~]

(B) or [~~that~~] the owner presents [~~has~~] a lease [~~,~~] showing that the owner of the manufactured home is [~~to be~~] the lessee of the towing vehicle.

[~~(4) The MCD is closed on Sunday, New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, and Christmas Day.~~]

[~~(5) A manufactured home that exceeds 20 feet overall width, or 16 feet overall height, or 110 feet overall length may not be permitted under Transportation Code, Chapter 623, Subchapter E; however, it may be permitted under Transportation Code, Chapter 623, Subchapter D.~~]

(b) Application for permit.

(1) The applicant must complete the application[~~,~~] and shall include the manufactured home's HUD label number, Texas seal number, or the complete identification number or serial number of the manufactured home, and the overall width, height, and length of the home and the towing vehicle in combination. If the manufactured home is being moved to or from a site in this state where it has been, or will be, occupied as a dwelling, the permit must also show the name of the owner of the home, the location from which the home is being moved, and the location to which the home is being delivered.

(2) Applications shall be submitted in accordance with §28.11(c) of this title (relating to General Oversize/Overweight Permit Requirements and Procedures). [~~An application can be submitted in person at a cash collection office, by facsimile to the MCD, or by telephone to the MCD. All applications made by telephone are recorded.~~]

[~~(3) When a permit request is made by telephone, the permit officer will request all information in the application for entry into the department's computer for record keeping purposes and generation of the permit number. The information will be verified and a route will be selected.~~]

[~~(4) A permit request made by mail or facsimile will be returned to the applicant by mail or facsimile.~~]

(c) Permit issuance.

(1) Permit issuance is subject to the requirements of §28.11(e)(4) and (5) [~~§28.11(b)(1)(A) and (B),~~] of this title (relating to General Oversize/Overweight Permit Requirements and Procedures) [~~Permit Issuance Requirements and Procedures~~].

(2) Amendments can only be made to change intermediate points between the origination and destination points listed on the permit. [~~The permit may be amended in the case of a breakdown of the towing vehicle.~~]

(d) Payment of permit fee.

[~~(1)~~] The cost of the permit is $20, payable in accordance with §28.11(f) of this title (relating to General Oversize/Overweight Permit Requirements and Procedures).

[~~(2) A permit ordered by telephone must be purchased in accordance with §28.11(c)(1)(A),(B), and (C), of this title (relating to Permit Issuance Requirements and Procedures).~~]

[~~(3) A permit ordered in person at a cash collection office, or by mail, or by facsimile must be purchased in accordance with §28.11(c)(1) and (2), of this title (relating to Permit Issuance Requirements and Procedures).~~]

[~~(4) A permit fee will not be refunded after the permit number has been issued; however, a refund may be made after permit issuance if it is necessary to correct an error made by the permit officer.~~]

[~~(e) Escrow accounts. A permit applicant may establish an escrow account with the department for the specific purpose of paying any fee that is related to the issuance of a permit for the transportation of a manufactured home.~~]

[~~(1) A permit applicant that desires to establish an escrow account shall complete and sign an escrow account agreement, and shall return the completed and signed agreement to the department with a check in the minimum amount of $305, which shall be deposited to the appropriate fund by the department in the State Treasury. In lieu of submitting a check for the initial deposit to an applicant's escrow account, the applicant may transfer funds to the department electronically. Five dollars per deposit will be charged as an escrow account administrative fee and shall be deposited in the state highway fund.~~]

[~~(2) When the permit applicant's escrow account balance has been reduced to $150, the department will notify the holder of the escrow account with instructions to submit a cashier's check or money order, payable to the department in the minimum amount of $305, which shall be used to replenish the escrow account. In lieu of a cashier's check, the escrow account holder may replenish an escrow account by transferring funds to the department electronically.~~]

[~~(3) Upon receipt of a replenishment check or electronic funds transfer, the department will charge $5.00 as an escrow account administrative fee, and will credit the remainder of the transmitted funds to the balance of the escrow account holder.~~]

[~~(4) An escrow account holder must submit a written request to the department to terminate the escrow account agreement. Any remaining balance will be returned to the escrow account holder.~~]

(e) [~~(f)~~] Permit provisions and conditions.

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

(5) Movement must be made during daylight hours only[~~,~~] and may be made on any day except New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, and Christmas Day.

(6)-(8) (No change.)

(9) The route for the transportation must be the most practical route as described in §28.11(e) of this title (relating to General Oversize/Overweight Permit Requirements and Procedures)[~~shortest distance, including divided and interstate systems~~], except where construction is in progress and the permitted vehicle's dimensions exceed the construction restrictions as published by the department, or where bridge or overpass width or height would create a safety hazard.

(10) (No change.)

(11) A permit is void when [~~an applicant~~]:

(A) an applicant gives false or incorrect information;

(B) an applicant does not comply with the restrictions or conditions stated in the permit; [~~or~~]

(C) the applicant's copy of the permit does not contain the correct information; [changes or alters the information on the applicant's copy of the permit]

(D) the applicant fails to retrieve a permit ordered through a cash collection office by the close of business on the same day the permit is requested; or

(E) requested by law enforcement in conjunction with the issuance of a citation.

(12) A permittee may not transport a manufactured home with a void permit; a new permit must be obtained.

(f) [(g)] Escort requirements.

(1) A manufactured home exceeding 12 feet in width must have a rotating amber beacon of not less than eight inches in diameter mounted somewhere on the roof at the rear of the manufactured home, or may have two five-inch flashing amber lights [may be] mounted approximately six feet from ground level at the rear corners of the manufactured home. The towing vehicle must have one rotating amber beacon of not less than eight inches in diameter mounted on top of the cab. These beacons or flashing lights must be operational and luminiferous during any permitted move over the highways, roads, and streets of this state.

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

(5) Two transportable sections of a multi-section manufactured home, or two single section manufactured homes, when towed together in convoy, may be considered one home for purposes of the escort vehicle requirements, provided the distance between the two units does not exceed 1,000 feet.

§28.15. Portable Building Unit Permits.

(a) General information.

(1) A vehicle or vehicle combination transporting one or more portable building units [buildings] and portable building compatible cargo that exceed legal length or width limits set forth by Transportation Code, Chapter 621, Subchapters B and C, may obtain a permit under Transportation Code, Chapter 623, Subchapter F.

(2) (No change.)

[(3) A vehicle or vehicle combination transporting one or more portable buildings and/or that exceed height or weight limits set forth by Transportation Code, Chapter 621, Subchapter B and C, or exceed 16 feet in width or 80 feet in overall length will not be permitted under Transportation Code, Chapter 623, Subchapter F; but may be permitted under provisions of Transportation Code, Chapter 623, Subchapter D.]

[(4) The MCD is closed on Sunday, New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, and Christmas Day.]

(b) Application for permit. Applications shall be made in accordance with §28.11(c) of this title (relating to General Oversize/ Overweight Permit Requirements and Procedures).

[(1) The applicant must complete the application and comply with the designated methods of payment in §28.11(c) of this title (relating to Permit Issuance Requirements and Procedures) prior to requesting a permit.]

[(2) An application can be made by telephone to the MCD. All applications made by telephone are recorded.]

[(3) The permit officer will request all information in the application for entry into the department's computer for record keeping purposes and generation of the permit number. The information will be verified and a route will be selected.]

[(4) An application may be made in person at a cash collection office, or submitted by facsimile or mail to the MCD.]

[(5) A permit request made by mail or facsimile will be returned to the applicant by mail or facsimile.]

(c) Permit issuance.

[(1)] Permit issuance is subject to the requirements of §28.11(b)(1)(A) and (B) of this title (relating to General Oversize/ Overweight Permit Requirements and Procedures), with the exception of §28.11(k) of this title, concerning escort requirements [Permit Issuance Requirements and Procedures)].

[(2) The permit may be amended in the case of a breakdown of the towing vehicle.]

[(d)] Payment of permit fee.

(1) The cost of the permit is $7.50, with all fees payable in accordance with §28.11(f) of this title (relating to General Oversize/ Overweight Permit Requirements and Procedures). All fees are non-refundable.

[(2) A permit ordered by telephone must be purchased in accordance with §28.11(c)(1)(A), (B), and (C) of this title (relating to Permit Issuance Requirements and Procedures).]

[(3) A permit ordered in person at a cash collection office, or ordered by mail or by facsimile must be purchased in accordance with §28.11(c)(1) and (2) of this title (relating to Permit Issuance Requirements and Procedures).]

[(4) A permit fee will not be refunded after the permit number has been issued; however, a refund may be made after permit issuance if it is necessary to correct an error made by the permit officer.]

[(e) Escrow accounts. A permit applicant may establish an escrow account with the department for the specific purpose of paying any fee that is related to the issuance of a permit for the transportation of a portable building.]

[(1) A permit applicant that desires to establish an escrow account shall complete and sign an escrow account agreement, and shall return the completed and signed agreement to the department with a check in the minimum amount of $305, which shall be deposited to the appropriate fund by the department in the State Treasury. In lieu of submitting a check for the initial deposit to an applicant's escrow account, the applicant may transfer funds to the department electronically. Five dollars per deposit will be charged as an escrow account administrative fee and shall be deposited in the state highway fund.]

[(2) When the permit applicant's escrow account balance has been reduced to $150, the department will notify the holder of the escrow account with instructions to submit a cashier's check or money order, payable to the department in the minimum amount of $305, which shall be used to replenish the escrow account. In lieu of a cashier's check, the escrow account holder may replenish an escrow account by transferring funds to the department electronically.]

[(3) Upon receipt of a replenishment check or electronic funds transfer, the department will charge $5.00 as an escrow account administrative fee, and will credit the remainder of the transmitted funds to the balance of the escrow account holder.]

[(4) An escrow account holder must submit a written request to the department to terminate the escrow account agreement. Any remaining balance will be returned to the escrow account holder.]

(e) [(f)] Permit provisions and conditions.

(1) A portable building unit may only be issued a single-trip permit.

(2) Portable building units [buildings] may be loaded end-to-end to create an overlength permit load, provided the overall length does not exceed 80 feet.

(3) Portable building units [buildings] must not be loaded side-by-side to create an overwidth load, or loaded one on top of another to create an overheight load.

(4) Portable [A portable] building units [or portable buildings] must be loaded in a manner that will create the narrowest width for permit purposes and provide for greater safety to the traveling public.

(5)-(6) (No change.)

[(7) A permitted vehicle must be routed over the most direct route, taking into consideration the size and weight of the permitted vehicle in relation to vertical clearances, width restrictions, weak or load restricted bridges, the geometric of the roadway, sections of highways restricted due to construction or maintenance, and weather conditions.]

[(8) A permit applicant desiring a route other than the most direct must obtain a permit for each segment.]

[(9) A permit is void when an applicant:]

[(A) gives false or incorrect information;]

[(B) does not comply with the restrictions or conditions stated in the permit; or]

(7) [(10)] A permittee may not transport [a] portable building units or portable building compatible cargo with a void permit; a new permit must be obtained.

(f) [(g)] Escort requirements.

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

(3) The escort vehicle must have:

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

(C) an amber light or lights, visible from both front and rear, mounted on top of the vehicle and which must be two simultaneously flashing lights or one rotating beacon of not less than eight inches in diameter.

(4) An escort vehicle must comply with the requirements in §28.11(k)(1) and (7) [§28.11(e)] of this title (relating to General Oversize/Overweight Permit Requirements and Procedures) [(relating to Permit Issuance Requirements and Procedures)].

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

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Bob Jackson
Deputy General Counsel
Texas Department of Transportation

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43 TAC §§28.11–28.13

STATUTORY AUTHORITY

The new 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 and, more specifically, Transportation Code, Chapters 621, 622, and 623 which authorize the department to carry out the provisions of the those laws governing the issuance of permits for oversize and overweight vehicles and loads.

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

§28.11. General Oversize/Overweight Permit Requirements and Procedures.

(a) Purpose and scope. This section contains general requirements relating to oversize/overweight permits, including single trip permits. Specific requirements for each type of specialty permit are provided for in this chapter.

(b) Prerequisites to obtaining an oversize/overweight permit. Unless exempted by law or this chapter, the following requirements must be met prior to the issuance of an oversize/overweight permit.

(1) Commercial motor carrier registration or surety bond. Prior to obtaining an oversize/overweight permit, an applicant permitted under the provisions of Transportation Code, Chapter 623, Subchapter D, must be registered as a commercial motor carrier under Chapter 18 of this title (relating to Motor Carriers) or, in lieu of commercial motor carrier registration, file a surety bond with the department as described in subsection (n) of this section.

(2) Vehicle registration. A vehicle registered with a permit plate will not be issued an oversize/overweight permit under this subchapter. A permitted vehicle operating under this subchapter must be registered with one of the following types of vehicle registration:

(A) current Texas license plates that indicate the permitted vehicle is registered for maximum legal gross weight or the maximum weight the vehicle can transport;

(B) Texas temporary registration;

(C) current out of state license plates that are apportioned for travel in Texas; or

(D) foreign commercial vehicles registered under Texas annual registration.

(c) Permit application.

(1) An application for a permit may be made to the MCD by telephone, by facsimile, electronically, or in person at a cash collection office. All applications shall be made on a form prescribed by the department, and all applicable information shall be provided by the applicant, including:

(A) name, address, and telephone number of applicant;

(B) applicant's customer identification number;

(C) applicant's motor carrier registration number or single state registration number, if applicable;

(D) complete load description, including maximum width, height, length, overhang, and gross weight;

(E) complete description of equipment, including truck make, license plate number and state of issuance, and vehicle identification number, if required;

(F) equipment axle and tire information including number of axles, distance between axles, axle weights, number of tires, and tire size for overweight permit applications; and

(G) any other information required by law.

(2) Applications transmitted electronically are considered signed if a digital signature is transmitted with the application and intended by the applicant to authenticate the application.

(A) The department may only accept a digital signature used to authenticate an application under procedures that comply with any applicable rules adopted by the Department of Information Resources regarding department use or acceptance of a digital signature.

(B) The department may only accept a digital signature to authenticate an application if the digital signature is:

(i) unique to the person using it;

(ii) capable of independent verification;

(iii) under the sole control of the person using it; and

(iv) transmitted in a manner that will make it infeasible to change the data in the communication or digital signature without invalidating the digital signature.

(3) All permit applications shall be accompanied by the appropriate fees described in this paragraph, in a payment method described in subsection (f) of this section.

(A) The fee for a single trip (not exceeding 80,000 pounds) permit is $30. Fees for other types of permits are indicated in the appropriate subchapters of this chapter.

(B) Highway maintenance fees are as indicated in the following table, and are in addition to the permit fee.
Figure 1: 43 TAC §28.11(c)(3)(B)

(C) Vehicle supervision fees are as indicated in the following table, and are in addition to the permit fee and the highway maintenance fee.
Figure 2: 43 TAC §28.11(c)(3)(C)

(4) The MCD is closed on Sundays, New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, and Christmas Day. The MCD may also be closed at other times, such as in the case of emergency weather conditions, as deemed necessary by the department's administration.

(5) The MCD shall be open for the issuance of permits from 6:00 a.m. until 6:00 p.m. (Central Standard Time) Monday through Friday, and from 6:00 a.m. until 2:00 p.m. (Central Standard Time) on Saturdays.

(d) Maximum permit weight limits.

(1) General. An overweight permitted vehicle will not be routed over a load restricted bridge when exceeding the posted capacity of the bridge, unless a special exception is granted by the MCD, based on an analysis of the bridge.

(A) An axle group must have a minimum spacing of four feet, measured from center of axle to center of axle, between each axle in the group to achieve the maximum permit weight for the group.

(B) The maximum permit weight for an axle group with spacings of five or more feet between each axle will be based on an engineering study conducted by the MCD.

(C) A permitted vehicle will be allowed to have air suspension, hydraulic suspension and mechanical suspension axles in a common weight equalizing suspension system for any axle group.

(D) Two or more consecutive axle groups must have an axle spacing of 12 feet or greater, measured from the center of the last axle of the preceding group to the center of the first axle of the following group, in order for each group to be permitted for maximum permit weight. When two or more consecutive axle groups have an axle spacing of less than 12 feet, measured from the center of the last axle of the preceding group to the center of the first axle of the following group, the department will grant reduced permit weights for each axle group based on the number of axles in the group and the spacing between the groups as shown in the following Appendix A, which is titled "Maximum Permit Weight For Axle Groups Spaced Less Than 12 Feet."
Figure 3: 43 TAC §28.11(d)(1)(D)

(E) The MCD may permit axle weights greater than those specified in this section, for a specific individual permit request, based on an engineering study of the route and hauling equipment.

(F) An overdimensional load may not exceed the manufacturer's rated tire carrying capacity.

(2) Maximum axle weight limits. Maximum permit weight for an axle or axle group is based on 650 pounds per inch of tire width or the following axle or axle group weights, whichever is the lesser amount:

(A) single axle– 25,000 pounds;

(B) two axle group – 46,000 pounds;

(C) three axle group– 60,000 pounds;

(D) four axle group – 70,000 pounds;

(E) five axle group – 81,400 pounds; and

(F) axle group with six or more axles – determined by the MCD based on an engineering study of the equipment, which will include the type of steering system used, the type of axle suspension, the spacing distance between each axle, the number of tires per axle, and the tire size on each axle.

(3) Weight limits for load restricted roads. Maximum permit weight for an axle or axle group, when traveling on a load restricted road, will be based on 650 pounds per inch of tire width or the following axle or axle group weights, whichever is the lesser amount:

(A) single axle– 22,500 pounds;

(B) two axle group – 41,400 pounds;

(C) three axle group– 54,000 pounds;

(D) four axle group – 63,000 pounds;

(E) five axle group – 73,260 pounds;

(F) axle group with six or more axles – determined by the MCD based on an engineering study of the equipment, which will

include the type of steering system used, the type of axle suspension, the spacing distance between each axle, the number of tires per axle, and the tire size on each axle; and

(G) two or more consecutive axle groups having an axle spacing of less than 12 feet, measured from the center of the last axle of the preceding group to the center of the first axle of the following group will be reduced by 2.5% for each foot less than 12 feet.

(e) Permit issuance.

(1) General. Upon receiving an application, the MCD will review the permit application for the appropriate information and will then determine the most practical route. After a route is selected and a permit number is assigned by the MCD, an applicant requesting a permit by telephone must legibly enter all necessary information on the permit application, including the approved route and permit number. Permit requests made by methods other than telephone will be returned via facsimile, mail, or electronically.

(2) Routing.

(A) A permitted vehicle will be routed over the most practical route available taking into consideration:

(i) the size and weight of the overdimension load in relation to vertical clearances, width restrictions, steep grades, and weak or load restricted bridges;

(ii) the geometrics of the roadway in comparison to the overdimension load;

(iii) sections of highways restricted to specific load sizes and weights due to construction, maintenance, and hazardous conditions;

(iv) traffic conditions, including traffic volume;

(v) route designations by municipalities in accordance with Transportation Code, §623.072; and

(vi) other considerations for the safe transportation of the load.

(B) When a permit applicant desires a route other than the most practical, more than one permit will be required for the trip unless an exception is granted by the MCD.

(3) Return movements. A permitted vehicle will be allowed return movement of oversize and overweight hauling equipment to the permitted vehicle's point of origin or the permittee's place of business, and may transport a non-divisible load of legal dimensions in the return trip, provided the transport is completed within the time period stated on the permit.

(4) Records retention.

(A) The original permit, a facsimile copy of the permit, or a MCD computer generated permit must be kept in the permitted vehicle until the day after the date the permit expires.

(B) All telephone requests for permits are recorded and retained for future reference.

(C) Permit information shall be stored in the department's mainframe computer located in Austin, which shall constitute the official permit record.

(5) Void permits. A permittee may not transport an overdimensional load with a void permit. Fees for void permits will not be refunded. A permit is void when:

(A) the applicant gives false or incorrect information;

(B) the applicant does not comply with the restrictions or conditions stated on the permit;

(C) the applicant's copy of the permit does not contain the correct information;

(D) the applicant fails to retrieve a permit ordered through a cash collection office by the close of business on the same day the permit is requested; or

(E) requested by law enforcement in conjunction with the issuance of a citation.

(f) Payment of permit fees, refunds.

(1) Payment methods. All permit applications must be accompanied by the proper fee, which shall be payable as described in this subsection.

(A) Credit card. A permit may be purchased with a valid credit card approved by the department. Credit card payments are subject to a $1 fee per transaction in addition to the applicable permit fee.

(B) Permit Account Card (PAC)

(i) Application for a PAC should be made directly to the issuing institution. A PAC must be established and maintained according to the contract provisions stipulated between the PAC holder and the financial institution under contract to the department and the Comptroller of Public Accounts.

(ii) An applicant purchasing a permit with a PAC is subject to a $1.00 fee per transaction in addition to the applicable permit fee.

(C) Checks, money orders, cashier's checks, or cash. Checks, money orders, cashier's checks, and cash are acceptable forms of payment for a permit. When ordering a permit by telephone, facsimile, or electronically, such payments shall be made at a cash collection office prior to obtaining the permit. Checks, money orders, and cashier's checks may also accompany applications made by mail.

(D) Escrow accounts. A permit applicant may establish an escrow account with the department for the specific purpose of paying any fee that is related to the issuance of a permit under this subchapter. An escrow account may also be utilized to pay fees related to the issuance of a vehicle storage facility license or a motor carrier registration issued under Chapter 18 of this title (relating to Motor Carriers).

(i) A permit applicant who desires to establish an escrow account shall complete and sign an escrow account agreement, and shall return the completed and signed agreement to the department with a check in the minimum amount of $305, which shall be deposited to the appropriate fund by the department with the Comptroller of Public Accounts. In lieu of submitting a check for the initial deposit to an applicant's escrow account, the applicant may transfer funds to the department electronically.

(ii) Upon initial deposit, and each subsequent deposit made by the escrow account holder, $5.00 will be charged as an escrow account administrative fee and shall be deposited in the state highway fund.

(iii) The escrow account holder is responsible for monitoring of the escrow account balance.

(iv) An escrow account holder must submit a written request to the department to terminate the escrow account agree-

ment. Any remaining balance will be returned to the escrow account holder.

(2) Refunds. A permit fee will not be refunded after the permit number has been issued unless such refund is necessary to correct an error made by the permit officer.

(g) Amendments. A permit may be amended for the following reasons:

(1) vehicle breakdown;

(2) changing the intermediate points in an approved permit route;

(3) extending the expiration date due to conditions which would cause the move to be delayed;

(4) changing route origin, route destination, or vehicle size limits, provided the permit has not begun;

(5) correcting any mistake that is made due to permit officer error.

(h) Requirements for overwidth loads.

(1) An overwidth load must travel in the outside traffic lane on multi-lane highways, when the width of the load exceeds 12 feet.

(2) Overwidth loads are subject to the escort requirements of subsection (k) of this section.

(3) A permitted vehicle exceeding 16 feet in width will not be routed on the main lanes of a controlled access highway, unless an exception is granted by the MCD, based on a route and traffic study. The load may be permitted on the frontage roads when available, if the movement will not pose a safety hazard to other highway users.

(4) An applicant requesting a permit to move a load exceeding 20 feet wide will be furnished with a proposed route, which the applicant must physically inspect to determine if the over dimension load can safely negotiate the proposed route, unless an exception is granted based on a route and traffic study conducted by the MCD.

(A) The applicant must notify the MCD in writing whether the over dimension load can or cannot safely negotiate the proposed route.

(B) If any section of the proposed route is unacceptable, the applicant shall provide the MCD with an alternate route around the unacceptable section.

(C) Once a route is decided upon and a permit issued, the permit may not be amended unless an exception is granted by the MCD.

(i) Requirements for overlength loads.

(1) Overlength loads are subject to the escort requirements stated in subsection (k) of this section.

(2) A single vehicle, such as a motor crane, that has a permanently mounted boom is not considered as having either front or rear overhang as a result of the boom because the boom is an integral part of the vehicle.

(3) When a single vehicle with a permanently attached boom exceeds the maximum legal length of 45 feet, a permit will not be issued if the boom projects more than 25 feet beyond the front bumper of the vehicle, or when the boom projects more than 30 feet beyond the rear bumper of the vehicle, unless an exception is granted by the MCD, based on a route and traffic study.

(4) Maximum permit length for a single vehicle is 75 feet.

(5) A load extending more than 20 feet beyond the front or rearmost portion of the load carrying surface of the permitted vehicle must have a rear escort, unless an exception is granted by the MCD, based on a route and traffic study.

(6) A permit will not be issued for an over dimension load with:

(A) more than 25 feet front overhang; or

(B) more than 30 feet rear overhang, unless an exception is granted by the MCD, based on a route and traffic study.

(7) An applicant requesting a permit to move an over dimension load exceeding 125 feet overall length will be furnished with a proposed route, which the applicant must physically inspect to determine if the over dimension load can safely negotiate the proposed route, unless an exception is granted based on a route and traffic study conducted by the MCD.

(A) The applicant must notify the MCD in writing whether the over dimension load can or cannot safely negotiate the proposed route.

(B) If any section of the proposed route is unacceptable, the applicant shall provide the MCD with an alternate route around the unacceptable section.

(C) Once a route is decided upon and a permit issued, the permit may not be amended unless an exception is granted by the MCD.

(8) A permitted vehicle that is not overwidth or overheight, and does not exceed 150 feet overall length, may be moved in a convoy consisting of not more than four overlength permitted vehicles. A permitted vehicle that is not overwidth or overheight that exceeds 150 feet, but does not exceed 180 feet overall length, may be moved in a convoy consisting of not more than two overlength permitted vehicles. Convoys are subject to the requirements of subsection (k) of this section. Each permitted vehicle in the convoy must:

(A) be spaced at least 1,000 feet, but not more than 2,000 feet, from any other permitted vehicle in the convoy; and

(B) have a rotating amber beacon or an amber pulsating light, not less than eight inches in diameter, mounted at the rear top of the load being transported.

(j) Requirements for overheight loads.

(1) Overheight loads are subject to the escort requirements stated in subsection (k) of this section.

(2) An applicant requesting a permit to move an over dimension load with an overall height of 19 feet or greater will be furnished with a proposed route, which the applicant must physically inspect to determine if the over dimension load can safely negotiate the proposed route, unless an exception is granted based on a route and traffic study conducted by the MCD.

(A) The applicant must notify the MCD in writing whether the over dimension load can or cannot safely negotiate the proposed route.

(B) If any section of the proposed route is unacceptable, the applicant shall provide the MCD with an alternate route around the unacceptable section.

(C) Once a route is decided upon and a permit issued, the permit may not be amended unless an exception is granted by the MCD.

(k) Escort vehicle requirements. Escort vehicle requirements are provided to facilitate the safe movement of permitted vehicles and to protect the traveling public during the movement of permitted vehicles. A permittee must provide for escort vehicles and police assistance when required by the MCD. The requirements in this subsection do not apply to the movement of manufactured housing, portable building units, or portable building compatible cargo. Escort vehicle requirements for the movement of manufactured housing are described in §28.14 of this title (relating to Manufactured Housing and Industrialized Housing and Building Permits). Escort vehicle requirements for the movement of portable building units and portable building compatible cargo are described in §28.15 of this title (relating to Portable Building Unit Permits).

(1) General.

(A) Applicability. The operator of an escort vehicle shall, consistent with applicable law, warn the traveling public when:

(i) a permitted vehicle must travel over the center line of a narrow bridge or roadway;

(ii) a permitted vehicle makes any turning movement that will require the permitted vehicle to travel in the opposing traffic lanes;

(iii) a permitted vehicle reduces speed to cross under a low overhead obstruction or over a bridge;

(iv) a permitted vehicle creates an abnormal and unusual traffic flow pattern; or

(v) in the opinion of MCD, warning is required to ensure the safety of the traveling public or safe movement of the permitted vehicle.

(B) Police assistance. Police assistance may be required by the MCD to control traffic when a permitted vehicle is being moved within the corporate limits of a city, or at such times when police assistance would provide for the safe movement of the permitted vehicle and the traveling public.

(C) Obstructions. It is the responsibility of the permittee to contact utility companies, telephone companies, television cable companies, or other entities as they may require, when it is necessary to raise or lower any overhead wire, traffic signal, street light, television cable, sign, or other overhead obstruction. The permittee is responsible for providing the appropriate advance notice as required by each entity.

(2) Escort requirements for overwidth loads. Unless an exception is granted by the MCD, based on a route and traffic study, an overwidth load must:

(A) have a front escort vehicle if the width of the load exceeds 14 feet, but does not exceed 16 feet, when traveling on a two lane roadway;

(B) have a rear escort vehicle if the width of the load exceeds 14 feet, but does not exceed 16 feet, when traveling on a roadway of four or more lanes; and

(C) have a front and a rear escort vehicle for all roads, when the width of the load exceeds 16 feet.

(3) Escort requirements for overlength loads. Unless an exception is granted by the MCD, based on a route and traffic study, overlength loads must have:

(A) a front escort vehicle when traveling on a two lane roadway if the vehicle exceeds 110 feet overall length, but does not exceed 125 feet overall length;

(B) a rear escort vehicle when traveling on a multi-lane highway if the vehicle exceeds 110 feet overall length, but does not exceed 125 feet overall length; and

(C) a front and rear escort vehicle at all times if the permitted vehicle exceeds 125 feet overall length.

(4) Escort requirements for overheight loads. Unless an exception is granted by the MCD, based on a route and traffic study, overheight loads must have:

(A) a front escort vehicle equipped with a height pole to accurately measure overhead obstructions for any permitted vehicle that exceeds 17 feet in height; and

(B) a front and rear escort vehicle for any permitted vehicle exceeding 18 feet in height.

(5) Escort requirements for permitted vehicles exceeding legal limits in more than one dimension. When a load exceeds more than one dimension that requires an escort under this subsection, front and rear escorts will be required unless an exception is granted by the MCD. For example, under this subsection one escort is required for a load exceeding 14 feet in width, and one escort is required for a load exceeding 110 feet in length. In the case of a permitted vehicle that exceeds both 14 feet in width and 110 feet in length, both front and rear escorts are required.

(6) Escort requirements for convoys. Convoys must have a front escort vehicle and a rear escort vehicle on all highways at all times.

(7) General equipment requirements. The following special equipment requirements apply to permitted vehicles and escort vehicles that are not motorcycles.

(A) An escort vehicle must be equipped with two flashing amber lights or one rotating amber beacon of not less than eight inches in diameter, affixed to the roof of the escort vehicle, which must be visible to the front, sides, and rear of the escort vehicle while actively engaged in escort duties for the permitted vehicle.

(B) An escort vehicle must display a sign, on either the roof of the vehicle, or the front or rear of the vehicle, with the words "OVERSIZE LOAD." The sign must meet the following specifications:

(i) at least five feet, but not more than seven feet in length, and at least 12 inches, but not more than 18 inches in height;

(ii) the sign must have a yellow background with black lettering;

(iii) letters must be at least eight inches, but not more than 10 inches high with a brush stroke at least 1.41 inches wide; and

(iv) the sign must be visible from the front or rear of the vehicle while escorting the permitted vehicle, and the signs must not be used at any other time.

(C) An escort vehicle must maintain two-way radio communications with the permitted vehicle and other escort vehicles involved with the movement of the permitted vehicle.

(D) Warning flags must be either red or orange fluorescent material, at least 18 inches square, securely mounted on a staff or securely fastened by at least one corner to the widest extremities of an overwidth permitted vehicle, and at the rear of an overlength permitted vehicle or a permitted vehicle with a rear overhang in excess of four feet.

(8) Equipment requirements for motorcycles.

(A) An official law enforcement motorcycle may be used as a primary escort vehicle for a permitted vehicle traveling within the limits of an incorporated city, if the motorcycle is operated by a highway patrol officer, sheriff, or duly authorized deputy, or municipal police officer. A motorized bicycle or motorized quadricycle may not be used as an escort vehicle for a permitted vehicle traveling on the state highway system.

(B) An escort vehicle must maintain two-way radio communications with the permitted vehicle and other escort vehicles involved with the movement of the permitted vehicle.

(l) Restrictions.

(1) Restrictions pertaining to road conditions. Movement of a permitted vehicle is prohibited when road conditions are hazardous based upon the judgement of the operator and law enforcement officials. Law enforcement officials shall make the final determination regarding whether or not conditions are hazardous. Conditions that should be considered hazardous include, but are not limited to:

(A) visibility of less than 2/10 of one mile; or

(B) weather conditions such as wind, rain, ice, sleet, or snow.

(2) Daylight and night movement restrictions.

(A) A permitted vehicle that is overwidth, overheight, or overlength may be moved only during daylight unless the permitted vehicle is traveling on interstate highways and is 10 feet wide or less, or 100 feet long or less.

(B) An exception may be granted allowing night movement, based on a route and traffic study conducted by the MCD. Escorts may be required when an exception allowing night movement is granted.

(3) Weekend and holiday restrictions. The maximum size limits for a permit issued under Transportation Code, Chapter 622, Subchapter E and Chapter 623, Subchapters D and E, for weekend or holiday movement is 14 feet wide, 16 feet high, and 110 feet long, unless an exception is granted by the MCD based on a route and traffic study.

(4) Curfew restrictions. The operator of a permitted vehicle must observe the curfew movement restrictions of any city in which the vehicle is operated.

(m) General provisions.

(1) Multiple commodities.

(A) Except as provided in subparagraph (B) of this paragraph, when a permitted commodity creates a single over dimension, two or more commodities may be hauled as one permit load, provided legal axle weight and gross weight are not exceeded, and provided no illegal dimension of width, length or height is created or made greater by the additional commodities. For example, a permit issued for the movement of a 12 foot wide storage tank may also include a 10 foot wide storage tank loaded behind the 12 foot wide tank provided that the addition of the 10 foot wide tank does not create an illegal axle or gross weight, or an illegal length, or an illegal height.

(B) When the transport of more than one commodity in a single load creates or makes greater an illegal dimension of length, width, or height the department may issue an oversize permit for such load subject to each of the following conditions.

(i) The permit applicant or the shipper of the commodities files with the department a written certification by the Texas Department of Commerce, approved by the Office of the Governor, attesting that issuing the permit will have a significant positive impact on the economy of Texas and that the proposed load of multiple commodities therefore cannot be reasonably dismantled. As used in this clause the term significant positive impact means the creation of not less than 100 new full-time jobs, the preservation of not less than 100 existing full-time jobs, that would otherwise be eliminated if the permit is not issued, or creates or retains not less than one percent of the employment base in the affected economic sector identified in the certification.

(ii) Transport of the commodities does not exceed legal axle and gross load limits.

(iii) The permit is issued in the same manner and under the same provisions as would be applicable to the transport of a single oversize commodity under this section; provided, however, that the shipper and the permittee also must indemnify and hold harmless the department, its commissioners, officers, and employees from any and all liability for damages or claims of damages including court costs and attorney fees, if any, which may arise from the transport of an oversized load under a permit issued pursuant to this subparagraph.

(iv) The shipper and the permittee must file with the department a certificate of insurance on a form prescribed by the department, or otherwise acceptable to the department, naming the department, its commissioners, officers, and employees as named or additional insurers on its comprehensive general liability insurance policy for coverage in the amount of $5 million per occurrence, including court costs and attorney fees, if any, which may arise from the transport of an oversized load under a permit issued pursuant to this subparagraph. The insurance policy is to be procured from a company licensed to transact insurance business in the State of Texas.

(v) The shipper and the permittee must file with the department, in addition to all insurance provided in clause (iv) of this subparagraph, a certificate of insurance on a form prescribed by the department, or otherwise acceptable to the department, naming the department, its commissioners, officers, and employees as insurers under an auto liability insurance policy for the benefit of said insurers in an amount of $5 million per accident. The insurance policy is to be procured from a company licensed to transact insurance business in the State of Texas. If the shipper or the permittee is self-insured with regard to automobile liability then that party must take all steps and perform all acts necessary under the law to indemnify the department, its commissioners, officers, and employees as if the party had contracted for insurance pursuant to, and in the amount set forth in, the preceding sentence and shall agree to so indemnify the department, its commissioners, officers, and employees in a manner acceptable to the department.

(vi) Issuance of the permit is approved by written order of the commission which written order may be, among other things, specific as to duration and routes.

(C) An applicant requesting a permit to haul a dozer and its detached blade may be issued a permit, as a non-dismantable

load, if removal of the blade will decrease the overall width of the load, thereby reducing the hazard to the traveling public.

(2) Oversize hauling equipment. A vehicle that exceeds the legal size limits, as set forth by Transportation Code, Chapter 621, Subchapter C, may only haul a load that exceeds legal size limits unless otherwise noted in this subchapter, but such vehicle may haul an overweight load that does not exceed legal size limits, except for the special exception granted in §28.13(b)(4) of this title (relating to Time Permits issued under Transportation Code, Chapter 623, Subchapter D).

(n) Surety bonds.

(1) General. The following conditions apply to surety bonds specified in Transportation Code, §623.075.

(A) The surety bond must:

(i) be made payable to the department with the condition that the applicant will pay the department for any damage caused to the highway by the operation of the equipment covered by the surety bond;

(ii) be issued on an annual basis with an expiration date of August 31;

(iii) include the complete mailing address and zip code of the principal;

(iv) be filed with the MCD and have an original signature of the principal;

(v) have a single entity as principal with no other principal names listed; and

(vi) be countersigned by a Texas resident agent of the surety company issuing the surety bond, if it is not issued in the State of Texas.

(B) A certificate of continuation will not be accepted.

(C) The owner of a vehicle bonded under Transportation Code, §622.013, §623.075, and §623.163, that damages the state highway system as a result of the permitted vehicle's movement will be notified by certified mail of the amount of damage and will be given 30 days to submit payment for such damage. Failure to make payment within 30 days will result in the department's placing the claim with the attorney general for collection.

(D) The venue of any suit for a claim against a surety bond for the movement of a vehicle permitted under the provisions of Transportation Code, Chapter 623, Subchapter D, will be any court of competent jurisdiction in Travis County.

(2) Permit surety bonds.

(A) A surety bond required under the provisions of Transportation Code, Chapter 623, Subchapter D, must be submitted on the department's standard surety bond form in the amount of $10,000.

(B) A facsimile copy of the surety bond is acceptable in lieu of the original surety bond, for a period not to exceed ten days from the date of its receipt in the MCD. If the original surety bond has not arrived in the MCD by the end of the 10 days, the applicant will not be issued a permit until the original surety bond has been received in the MCD.

(C) The surety bond requirement does apply to the delivery of farm equipment to a farm equipment dealer.

(D) A surety bond is required when a dealer or transporter of farm equipment or a manufacturer of farm equipment obtains a permit.

(E) The surety bond requirement does not apply to driving or transporting farm equipment which is being used for agricultural purposes if it is driven or transported by or under the authority of the owner of the equipment.

(F) The surety bond requirement does not apply to a vehicle or equipment operated by a motor carrier registered with the department under Transportation Code, Chapters 643 or 645 as amended.

§28.12. Single-Trip Permits Issued Under Transportation Code, Chapter 623, Subchapter D.

(a) General. The information in this section applies to single trip permits issued under Transportation Code, Chapter 623, Subchapter D. The department will issue permits under this section in accordance with the requirements of §28.11 of this title (relating to General Oversize/Overweight Permit Requirements and Procedures).

(b) Overweight loads.

(1) The maximum weight limits for an overweight permit are specified in §28.11(d) of this title.

(2) The applicant shall pay, in addition to the single-trip permit fee of $30, the applicable highway maintenance fee described in §28.11(c)(3)(B) of this title.

(3) A permit issued for an over dimension load exceeding 200,000 pounds gross weight will have a total permit fee that includes the single-trip permit fee, the highway maintenance fee, and the applicable vehicle supervision fee (VSF) described in §28.11(c)(3)(C) of this title.

(A) When a permit is issued under this subsection, and the permittee has additional identical loads that are to be moved over the same route within 30 days of the movement date of the original permit, a reduced vehicle supervision fee of $35 will be charged in lieu of the full vehicle supervision fee.

(B) An applicant for a permit issued under paragraph (8) of this subsection must pay the vehicle supervision fee at the time of permit application in order to offset department costs for analyses performed in advance of issuing the permit. The department will make a return of the vehicle supervision fee when an applicant cancels the application in writing, if the cancellation is received by the department prior to initiating an analysis based upon the permit application.

(4) An applicant applying for a permit to move a load that is required for the fulfillment of a fixed price public works contract that was entered into prior to the effective date of this section, and administered by federal, state, or local governmental entities, will not be required to pay the vehicle supervision fee, provided the applicant presents proof of the contract to the MCD prior to permit issuance.

(5) An applicant may elect to provide written certification from a registered professional engineer stating that the bridges and culverts on the proposed travel route are capable of sustaining the movement of an over dimension load exceeding 200,000 pounds gross weight; however, such certification must be approved by the department.

(6) When the department has determined that a permit can be issued for an over dimension load exceeding 200,000 pounds gross weight, all unpaid fees are due at the time the permit is issued.

(7) The department will not charge an analysis fee for single and multiple box culverts.

(8) An applicant requesting a permit to move an over dimension load that exceeds 254,300 pounds gross weight, or the weight limits described in §28.11(d) of this title, must submit the following items to the MCD to determine if the permit can be issued:

(A) a detailed loading diagram which indicates the number of axles, the number of tires on each axle, the tire size on each axle, the distance between each axle, the tare and gross weight on each axle, the transverse spacing of each set of dual wheels, the distance between each set of dual wheels, the load's center of gravity, the distance from the center of gravity to the center of the front bolster, the distance from the center of gravity to the center of the rear bolster, the distance from the center of the front bolster to the center of the fifth wheel of the truck, the distance from the center of the rear bolster to the center of the closest axle, and any other measurements as may be needed to verify that the weight of the over dimension load is adequately distributed among the various axle groups in the amounts indicated by the loading diagram;

(B) a map indicating the exact beginning and ending points relative to a state highway;

(C) a copy of the signed contract indicating that the applicant has been retained to transport the shipment; and

(D) the vehicle supervision fee as specified in paragraph (3) of this subsection.

(9) The MCD will select a tentative route based on the physical size of the over dimension load excluding the weight. The tentative route must be investigated by the applicant, and the MCD must be advised, in writing, that the route is capable of accommodating the over dimension load.

(10) Upon receipt of the applicant's written notification, the department will conduct a detailed structural analysis of the bridges on the proposed route based on the applicant's proposed loading diagram, or the applicant may elect to provide written certification from a registered professional engineer stating that the bridges on the proposed travel route are capable of sustaining the movement of the over dimension load. The certification must be approved by the department before the permit will be issued.

(11) A permit may be issued for the movement of oversize and overweight self-propelled off road equipment under the following guidelines.

(A) The weight per inch of tire width must not exceed 650 pounds.

(B) The rim diameter of each wheel must be a minimum of 25 inches.

(C) The maximum weight per axle must not exceed 45,000 pounds.

(D) The minimum spacing between axles, measured from center of axle to center of axle, must not be less than 12 feet.

(E) The equipment must be moved empty.

(F) The equipment must be licensed with a machinery license plate or a one trip registration.

(G) The route will not include any controlled access highway, unless an exception is granted based on a route and traffic study conducted by the MCD.

(c) Drill pipe and drill collars hauled in a pipe box.

(1) A vehicle or combination of vehicles may be issued a permit under Transportation Code, §623.071, to haul drill pipe and drill collars in a pipe box.

(2) The maximum width must not exceed nine feet.

(3) The axle weight limits must not exceed the maximum weight limits as specified in §28.11(d)(3) of this title.

(4) The height and length must not exceed the legal limits specified in Transportation Code, Chapter 621, Subchapter B.

(5) The permit will be issued for a single-trip only, and the fee will be $30. For loads over 80,000 pounds, a highway maintenance fee will be charged as specified in §28.11(c)(3)(B) of this title.

(6) The permit is valid only for travel on any farm-to-market and ranch-to-market road, and such road will be specified on the permit; however, the permitted vehicle will not be allowed to cross any load restricted bridge when exceeding the posted capacity of the bridge.

(7) Movement will be restricted to daylight hours only.

(d) Houses and storage tanks.

(1) Unless an exception is granted by the MCD, approval for the issuance of a permit for a house or storage tank exceeding 20 feet in width will reside with each district engineer, or the district engineer's designee, along the proposed route.

(2) The issuance of a permit for a house or storage tank exceeding 20 feet in width will be based on:

(A) the amount of inconvenience and hazard to the traveling public, based on traffic volume;

(B) highway geometric and time of movement; and

(C) the overall width, measured to the nearest inch, of the house, including the eaves or porches.

(3) A storage tank must be empty.

(4) The proposed route must include the beginning and ending points on a state highway.

(5) A permit will not be issued for a newly constructed house or storage tank that exceeds 32 feet overall width.

(6) A permit will not be issued for the relocation of an existing house or storage tank that exceeds 40 feet overall width, unless an exception is granted by the MCD based on a route and traffic study.

(7) A permit may be issued for the movement of an overweight house provided:

(A) the applicant completes and submits to the MCD a copy of a diagram for moving overweight houses, as shown in Appendix B of this section;

(B) each support beam, parallel to the centerline of the highway, is equipped with an identical number of two axle groups which may be placed directly in line and across from the other corresponding two axle group or may be placed in a staggered offset arrangement to provide for proper weight distribution;

(C) that, when a support beam is equipped with two or more two axle groups, each two axle group is connected to a common mechanical or hydraulic system to ensure that each two axle group shares equally in the weight distribution at all times during the movement; and when the spacing between the two axle groups,

measured from the center of the last axle of the front group to the center of the first axle of the following group, is eight feet or more, the front two axle group is equipped for self-steering in a manner that will guide or direct the axle group in turning movements without tire scrubbing or pavement scuffing; and

(D) the department conducts a detailed analysis of each structure on the proposed route and determines the load can be moved without damaging the roads and bridges.

(8) The MCD may waive the requirement that a loading diagram be submitted for the movement of an overweight house if the total weight of all axle groups located in the same transverse plane across the house does not exceed the maximum weight limits specified in §28.11(d)(2) of this title.

(e) Diagram for moving overweight houses. The following Appendix B indicates the type of diagram that is to be completed by the permit applicant for moving an overweight house. All measurements must be stated to the nearest inch.
Figure 1: 43 TAC §28.12(e)

§28.13. Time Permits.

(a) Applications for time permits issued under Transportation Code, Chapter 623, and this section shall be made in accordance with §28.11(c) of this title (relating to General Oversize/Overweight Permit Requirements and Procedures). Permits issued under this section are governed by the requirements of §28.11(e)(1), (4) and (5) of this title.

(b) The following conditions apply to time permits issued for overwidth or overlength loads, or overlength vehicles, under this section.

(1) Fees. The fee for a 30-day permit is $60; the fee for a 60-day permit is $90; and the fee for a 90-day permit is $120. All fees are payable in accordance with §28.11(f) of this title. All fees are non-refundable.

(2) Validity of Permit. Time permits are valid for a period of 30, 60, or 90 calendar days, based on the request of the applicant, and will begin with the "movement to begin" date stated on the permit.

(3) Weight/height limits. The permitted vehicle may not exceed the weight or height limits set forth by Transportation Code, Chapter 621, Subchapters B and C.

(4) Registration requirements for permitted vehicles. The permitted vehicle must be registered in accordance with Transportation Code, Chapter 502, for maximum weight for the vehicle or vehicle combination as set forth by Transportation Code, §502.151. Time permits will not be issued to a vehicle or vehicle combination that is registered with temporary registration.

(5) Vehicle indicated on permit. The permit will indicate only the truck or truck-tractor transporting the load; however, any properly registered trailer or semi-trailer is covered by the permit.

(6) Permit routes. The permit will allow travel on a statewide basis.

(7) Restrictions.

(A) The permitted vehicle must not cross a load restricted bridge or load restricted road when exceeding the posted capacity of the road or bridge.

(B) The permitted vehicle may travel through highway construction or maintenance areas if the dimensions do not exceed the construction restrictions as published by the department.

(C) The permitted vehicle is subject to the restrictions specified in §28.11(l) of this title, and the permittee is responsible for obtaining from the department information concerning current restrictions.

(8) Escort requirements. Permitted vehicles are subject to the escort requirements specified in §28.11(k) of this title.

(9) Transfer of time permits. Time permits issued under this subsection are non-transferable between permittees or vehicles.

(10) Amendments. With the exception of time permits issued under subsection (e)(4) of this section, time permits issued under this subsection will not be amended except in the case of permit officer error.

(11) Void permits. A permit is void when:

(A) an applicant gives false or incorrect information;

(B) an applicant does not comply with the restrictions or conditions stated on the permit;

(C) the applicant's copy of the permit does not contain the correct information;

(D) the applicant fails to retrieve a permit ordered through a cash collection office by the close of business on the same day the permit is requested; or

(E) requested by law enforcement in conjunction with the issuance of a citation.

(c) Overwidth loads. An overwidth time permit may be issued for the movement of any non-divisible load or overwidth trailer, subject to subsection (a) of this section and the following conditions.

(1) Width requirements. A time permit will not be issued for a vehicle with a width exceeding 13 feet.

(2) Weight, height, and length requirements. The permitted vehicle shall not exceed legal weight, height, or length according to Transportation Code, Chapter 621, Subchapters B and C. When multiple items are hauled at the same time, the items may not be loaded in a manner that creates:

(A) a width greater than the width of the widest item being hauled;

(B) a height greater than 14 feet;

(C) an overlength load; or

(D) a gross weight exceeding the legal gross or axle weight of the vehicle hauling the load.

(3) Movement of overwidth loads. When the permitted vehicle is an overwidth trailer, it will be permitted to:

(A) move empty to and from the job site; and

(B) return from the job site to the permittee's place of business with a legal nondivisible load.

(4) An overwidth time permit may be used in conjunction with an overlength time permit.

(d) Overlength loads. An overlength time permit may be issued for the transportation of overlength loads or the movement of an overlength self-propelled vehicle, subject to subsection (a) of this section and the following conditions.

(1) Length requirements. The maximum overall length for the permitted vehicle may not exceed 110 feet.

(2) Weight, height and width requirements. The permitted vehicle may not exceed legal weight, height, or width according to Transportation Code, Chapter 621, Subchapters B and C.

(A) The maximum length for a single permitted vehicle may not exceed 75 feet.

(B) A permit will not be issued when the load has more than 25 feet front overhang, or more than 30 feet rear overhang, unless an exception is granted by the department's Motor Carrier Division, based on a route and traffic study.

(3) An overlength time permit may be used in conjunction with an overwidth time permit.

(4) Emergency movement. A permitted vehicle transporting utility poles will be allowed emergency night movement for restoring electrical utility service, provided the permitted vehicle has a front and a rear escort vehicle.

(e) Annual permits.

(1) General information. All permits issued under this subsection are subject to the following conditions.

(A) Fees for permits issued under this subsection are payable as described in §28.11(f) of this title.

(B) Permits issued under this subsection are not transferrable.

(C) Vehicles permitted under this subsection shall be operated according to the restrictions described in §28.11(l) of this title. The permittee is responsible for obtaining information concerning current restrictions from the department.

(D) Vehicles permitted under this subsection may not travel over a load restricted bridge or load restricted road when exceeding the posted capacity of the road or bridge.

(E) Vehicles permitted under this subsection may travel through any highway construction or maintenance area provided the dimensions do not exceed the construction restrictions as published by the department.

(F) With the exception of permits issued under paragraph (5) of this subsection, vehicles permitted under this subsection shall be operated according to the escort requirements described in §28.11(k)of this title.

(G) A permit is void when:

(i) an applicant gives false or incorrect information;

(ii) an applicant does not comply with the restrictions or conditions stated in the permit;

(iii) the applicant's copy of the permit does not contain the correct information;

(iv) the applicant fails to retrieve a permit ordered through a cash collection office by the close of business on the same day the permit is requested; or

(v) requested by law enforcement in conjunction with the issuance of a citation.

(2) Implements of husbandry. An annual permit may be issued for an implement of husbandry being moved by a dealer in those implements, and for harvesting equipment being moved as part of an agricultural operation. Permits issued under this paragraph are subject to the conditions described in paragraph (1) of this subsection.

(A) The fee for a permit issued under this paragraph is $135, plus the highway maintenance fee specified in Transportation Code, §623.077 and §28.11(c)(3)(B) of this title.

(B) The time period will be for one year and will start with the "movement to begin" date stated on the permit.

(C) The maximum width may not exceed 16 feet; maximum height may not exceed 16 feet; maximum length may not exceed 110 feet; and maximum weight may not exceed the limits stated in §28.11(d) of this title.

(D) The permitted vehicle must travel in the outside traffic lane on multi-lane highways, when the width of the load exceeds 12 feet.

(E) The permitted vehicle must be registered in accordance with Transportation Code, Chapter 502, for maximum weight for the vehicle or vehicle combination, as set forth by Transportation Code, Chapter 621.

(3) Water well drilling machinery. The department may issue annual permits under Transportation Code, §623.071, for water well drilling machinery and equipment that cannot be reasonably dismantled. Permits issued under this paragraph are subject to the conditions described in paragraph (1) of this subsection.

(A) The fee for a permit issued under this paragraph is $135, plus the highway maintenance fee specified in Transportation Code, §623.077, and §28.11(c)(3)(B) of this title, for an overweight load.

(B) A water well drilling machinery permit is valid for one year from the "movement to begin" date stated on the permit.

(C) The maximum dimensions may not exceed 16 feet wide, 14 feet 6 inches high, 110 feet long, and maximum weight may not exceed the limits stated in §28.11(d) of this title.

(D) The permitted vehicle must be registered in accordance with Transportation Code, Chapter 502, for the maximum weight of the vehicle, as set forth by Transportation Code, Chapter 621.

(E) A permit issued under this section authorizes a permitted vehicle to operate only on the state highway system.

(4) Envelope vehicle permit. The department may issue an annual permit under Transportation Code, §623.071(3), for the movement of superheavy or oversize equipment that cannot reasonably be dismantled. Unless otherwise noted, permits issued under this paragraph are subject to the conditions described in paragraph (1) of this subsection.

(A) Superheavy or oversize equipment operating under an annual envelope vehicle permit may not exceed:

(i) 12 feet in width;

(ii) 14 feet in height;

(iii) 110 feet in length; or

(iv) 120,000 pounds gross weight.

(B) Superheavy or oversize equipment operating under an annual envelope vehicle may not transport a load that has more than 25 feet front overhang, or more than 30 feet rear overhang.

(C) The fee for an annual envelope vehicle permit is $2,000, and is non-refundable.

(D) The time period will be for one year and will start with the "movement to begin" date stated on the permit.

(E) This permit authorizes operation of the permitted vehicle only on the state highway system.

(F) The permitted vehicle must comply with §28.11(d)(2) and (3) of this title.

(G) The permitted vehicle or vehicle combination must be registered in accordance with Transportation Code, Chapter 502, for maximum weight as set forth by Transportation Code, Chapter 621.

(H) A permit issued under this paragraph is non-transferable between permittees.

(I) A permit issued under this paragraph may be transferred from one vehicle to another vehicle in the permittee's fleet provided:

(i) the permitted vehicle is destroyed or otherwise becomes permanently inoperable, to an extent that it will no longer be utilized, and the permittee presents proof that the negotiable certificate of title or other qualifying documentation has been surrendered to the department; or

(ii) the certificate of title to the permitted vehicle is transferred to someone other than the permittee, and the permittee presents proof that the negotiable certificate of title or other qualifying documentation has been transferred from the permittee.

(J) A single trip permit, as described in §28.12 of this title (relating to Single Trip Permits Issued Under Transportation Code, Chapter 623, Subchapter D), may be used in conjunction with an annual permit issued under this paragraph for the movement of vehicles or loads exceeding the height or width limits established in subparagraph (A) of this paragraph. The department will indicate the annual permit number on any single trip permit to be used in conjunction with a permit issued under this paragraph, and permittees will be assessed a fee of $30 for the single trip permit.

(5) Annual manufactured housing permit. The department may issue an annual permit for the transportation of new manufactured homes from a manufacturing facility to a temporary storage location, not to exceed 20 miles from the point of manufacture, in accordance with Transportation Code, §623.094. Permits issued under this paragraph are subject to the requirements of paragraph (1), subparagraphs (A), (B), (C), (D), (E), and (G), of this subsection.

(A) A permit shall contain the name of the company or person authorized to be issued permits by Transportation Code, Chapter 623, Subchapter E.

(B) The fee for a permit issued under this paragraph is $1,500. Fees are non-refundable, and shall be paid in accordance with §28.11(f) of this title.

(C) The time period will be for one year from the "movement to begin" date stated on the permit.

(D) A copy of the permit must be carried in the vehicle transporting a manufactured home.

(E) The permitted vehicle must travel in the outside traffic lane on multi-lane highways when the width of the load exceeds 12 feet.

(F) The permitted vehicle must be registered in accordance with Transportation Code, Chapter 502.

(G) Authorized movement for a vehicle permitted under this section shall be valid during daylight hours only as defined by Transportation Code, §541.401.

(H) The permitted vehicle must be operated in accordance with the escort requirements described in §28.14(f) of this title (relating to Manufactured Housing, and Industrialized Housing and Building Permits).

(I) Permits issued under this section are non-transferable between permittees.

(6) Power line poles. An annual permit will be issued under Transportation Code, Chapter 622, Subchapter E, for the movement of poles required for the maintenance of electric power transmission and distribution lines. Permits issued under this paragraph are subject to the conditions described in paragraph (1) of this subsection.

(A) The fee for the permit is $120.

(B) The time period will be for one year and will start with the "movement to begin" date stated on the permit.

(C) The maximum length of the permitted vehicle may not exceed 75 feet.

(D) The width, height and gross weight of the permitted vehicle may not exceed the limits set forth by Transportation Code, Chapter 621.

(E) The permitted vehicle must be registered in accordance with Transportation Code, Chapter 502, for maximum weight as set forth by Transportation Code, Chapter 621.

(F) Movement will be between the hours of sunrise and sunset; however, the limitation on hours of operation does not apply to a vehicle being operated to prevent interruption or impairment of electric service, or to restore electric service that has been interrupted.

(G) The speed of the permitted vehicle may not exceed 50 miles per hour.

(H) There must at all times be displayed at the extreme rear end of the permitted vehicle a red flag or cloth of not less than 12 inches square and so hung that the entire area is visible to the driver of a vehicle approaching from the rear.

(7) Cylindrically shaped bales of hay. An annual permit may be issued under Transportation Code, §621.017, for the movement of vehicles transporting cylindrically shaped bales of hay. Permits issued under this paragraph are subject to the conditions described in paragraph (1) of this subsection.

(A) The permit fee is $10.

(B) The time period will be for one year, and will start with the "movement to begin" date stated on the permit.

(C) The maximum width of the permitted vehicle may not exceed 12 feet.

(D) The length, height, and gross weight of the permitted vehicle may not exceed the limits set forth by Transportation Code, Chapter 621.

(E) Movement is restricted to daylight hours only.

(F) The permitted vehicle must be registered in accordance with Transportation Code, Chapter 502, for maximum weight, as set forth by Transportation Code, Chapter 621.

This 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 September 28, 1998.

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Bob Jackson
Deputy General Counsel
Texas Department of Transportation
Earliest possible date of adoption: November 8, 1998
For further information, please call: (512) 463–8630

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Subchapter C. Permits for Over Axle and Over Gross Weight Tolerance.

43 TAC §28.30

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 and, more specifically, Transportation Code, Chapters 621, 622, and 623 which authorize the department to carry out the provisions of the those laws governing the issuance of permits for oversize and overweight vehicles and loads.

No statutes, articles, or codes are affected by the proposed amendments and new sections.

§28.30. Permit for Over Axle and Over Gross Weight Tolerances.

(a) Purpose. In accordance with Transportation Code, §623.011 [~~Texas Civil Statutes, Article 6701d-11, Section 5B~~], the department is authorized under certain conditions to issue an annual permit for the operation of a vehicle within certain tolerances above legal axle and gross weight limits, as provided in Transportation Code, Chapter 621 [~~Texas Civil Statutes, Article 6701d-11, Sec. 5~~]. The sections under this subchapter set forth the requirements and procedures to be used in issuing an annual permit.

(b) Scope. An applicant that desires to operate a vehicle that exceeds the legal axle weight by a tolerance of 10% and the legal gross weight by a tolerance of 5.0% on any county road and on any road in the state highway system, excluding the national system of interstate and defense highways, must obtain a permit issued under Transportation Code, §623.011 [~~Texas Civil Statutes, Article 6701d-11, Section 5B~~]. These tolerance allowances shall also apply to any vehicle operated on a road subject to Transportation Code, §621.102 [~~Texas Civil Statutes, Article 6701d-11, Sec. 5 1/2; however, operation of permitted vehicles over load zoned bridges will be limited to 5.0% over the posted limits~~].

(c) Eligibility. To be eligible for a permit under this section, a vehicle must be registered under Transportation Code, Chapter 502 [~~Texas Civil Statutes, Article 6675a-1, et seq~~], for the maximum gross weight applicable to the vehicle under Transportation Code, §621.101 [~~Texas Civil Statutes, Article 6701d-11, Sec. 5~~], not to exceed 80,000 pounds in total gross weight.

(d) Security.

(1) Before a permit may be issued under this section, an applicant, other than an applicant who intends to operate a vehicle that is loaded with timber or pulp wood, wood chips, cotton, or agricultural products in their natural state, must have on file with the department one of the following forms of security in the amount of $15,000, conditioned that payment will be made to the department for any damages to the state highway system and to any county for damages to a road or bridge of such county caused by the operation of any vehicle for which a permit is issued under this section and which has an axle weight or gross weight that exceeds the weights authorized in Transportation Code, Chapter 621 [~~Texas Civil Statutes, Article 6701d-11, Sec. 5 and Sec. 5 1/2~~]:

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

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

(e) Application for permit.

(1) A person who desires to permit a vehicle as provided in this section, must submit a written application to the MCD [~~CPO~~].

(2) The application shall be in a form prescribed by the MCD [~~CPO~~] and at a minimum will require the following:

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

(3) The application shall be accompanied by the following documents or information:

(A) a copy of the current registration receipt of the power unit showing that the vehicle is currently registered for the maximum amount allowable for such vehicles;

(B) a base fee of $75 and an administration fee of $5.00; and

(C) an original bond or letter of credit as required in subsection (d) of this section, unless previously filed by the applicant.

(4) An applicant shall remit the total fees, which are nonrefundable, in the form of a check, cashier's check, or money order made payable to the State Highway Fund. In addition to the fees listed in paragraph (3) of this subsection, the applicant must also include an additional fee based on the following schedule:
Figure 1: 43 TAC §28.30(e)(4)

(f) (No change.)

(g) Issuance of a credit. Upon written application on a form prescribed by the MCD [~~CPO~~], a prorated credit for the remaining time on the permit may be issued for a vehicle that is destroyed or otherwise becomes permanently inoperable [~~,~~] to an extent that it will no longer be utilized. The date for computing a credit will be based on the date of receipt of the credit request. The fee for a credit will be $25, and will be issued on condition that the applicant provides to the department:

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

(h)-(i) (No change.)

(j) Semi-trailer registration. Transportation Code, §502.167 [~~Texas Civil Statutes, Article 6675-6 1/2~~], provides that the owner of a semi-trailer registered with either a Texas token trailer license plate or a Texas apportioned trailer license plate operated in combination with a permitted vehicle, shall pay a $15 fee to the county where the semi-trailer is registered.

(k) (No change.)

(l) Void permit. A permit is void when [~~an applicant~~]:

(1) an applicant gives false or incorrect information;

(2) an applicant does not comply with the restrictions or conditions stated in the permit; [~~or~~]

(3) the applicant's copy of the permit does not contain the correct information; [~~changes or alters the information on the applicant's copy of the permit~~]

(4) the applicant fails to retrieve a permit ordered through a cash collection office by the close of business on the same day the permit is requested; or

(5) requested by law enforcement in conjunction with the issuance of a citation.

(m) (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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Bob Jackson
Deputy General Counsel
Texas Department of Transportation
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Subchapter D. Permits for Oversize and Overweight Oil Well Related Vehicles

43 TAC §§28.40–28.45

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, Chapters 621, 622, and 623 which authorize the department to carry out the provisions of the those laws governing the issuance of permits for oversize and overweight vehicles and loads.

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

§28.40. Purpose and Scope.

In accordance with Transportation Code, Chapter 623, Subchapter G, the department may issue a permit for the operation of an oil well clean-out, drilling, servicing, or swabbing unit, which is a piece of fixed-load mobile machinery or equipment used for the purpose of cleaning out, drilling, servicing or swabbing oil wells, when the unit cannot comply with one or more of the restrictions set out in Transportation Code, §621.101. The sections in this subchapter set forth the requirements and procedures applicable to those permits.

§28.41. General Requirements.

(a) General information.

(1) Permits issued under this subchapter, with the exception of permits issued under §28.45 of this title (relating to Permits for Vehicles Transporting Liquid Products Related Oil Well Production), are subject to the requirements of this section.

(2) Oil well related vehicles are eligible for:

(A) single-trip mileage permits;

(B) quarterly hubometer permits; and

(C) annual permits.

(b) Pre-requisites to obtaining an oversize/overweight permit.

(1) Registration requirements. A unit permitted under this subchapter must be licensed with:

(A) a permit plate;

(B) 72-hour or 144-hour temporary registration; or

(C) a truck license as specified in Transportation Code, Chapter 502.

(2) Trailer-mounted units. A trailer-mounted unit must be towed by a truck-tractor licensed in accordance with Transportation Code, Chapter 502.

(c) Payment of permit fees. Fees for permits issued under this subchapter are payable as described in §28.11(f) of this title (relating to General Oversize/Overweight Permit Requirements and Procedures).

(d) Restrictions.

(1) A vehicle permitted under this subchapter is subject to the restrictions specified in §28.11(l) of this title, and the permittee is responsible for obtaining information concerning current restrictions from the department.

(2) Vehicles permitted under this subchapter may not cross a load restricted bridge when exceeding the posted capacity of such. Vehicles permitted under this subchapter may travel on a load restricted road unless otherwise noted.

(3) A vehicle permitted under this subchapter may travel through highway construction or maintenance areas provided the dimensions do not exceed the construction restrictions as published by the department.

(4) A unit exceeding nine feet in width, 14 feet in height, or 65 feet in length is restricted to daylight movement only.

(e) Void permits. A permit is void when:

(1) an applicant gives false or incorrect information;

(2) an applicant does not comply with the restrictions or conditions stated in the permit;

(3) the applicant's copy of the permit does not contain the correct information;

(4) the applicant fails to retrieve a permit ordered through a cash collection office by the close of business on the same day the permit is requested; or

(5) requested by law enforcement in conjunction with the issuance of a citation.

(f) Transferability. Unless otherwise noted, a permit issued under this subchapter may not be transferred between units or permittees.

(g) Records retention. A unit permitted under this section must keep the permit and any attachments to the permit in the unit until the day after the date the permit expires.

(h) Escort requirements. In addition to any other escort requirements specified in this subchapter, vehicles permitted under this subchapter are subject to the escort requirements specified in §28.11(k) of this title.

§28.42. Single Trip Mileage Permits.

(a) General information.

(1) Permits issued under this section are subject to the requirements of §28.41 of this title (relating to General Requirements).

(2) A single-trip mileage permit:

(A) is limited to a maximum of seven consecutive days;

(B) is routed from the point of origin to the point of destination and has the route listed on the permit; and

(C) allows the unit to be returned to the point of origin on the same permit, provided the return trip is made within the time period stated in the permit.

(3) A unit exceeding 175,000 pounds gross weight must:

(A) have front and rear escort vehicles to prevent traffic from traveling beside the unit as it crosses a bridge;

(B) cross all multi-lane bridges by centering the unit on a lane line;

(C) cross all two-lane bridges in the center of the bridge; and

(D) cross each bridge at a speed not greater than 20 miles per hour.

(4) A unit exceeding 12 feet in width must be centered in the outside traffic lane of any highway that has paved shoulders.

(b) Maximum permit weight limits.

(1) The maximum permit weight for any single axle, not connected to another axle by a weight equalizing suspension system, must not exceed 30,000 pounds or 850 pounds per inch of tire width, whichever is less.

(2) The maximum permit weight for any group of axles on a unit will be determined by calculating the "W" weight for the group, using the formulas shown in Appendix B, titled "Maximum Permit Weight Formulas," and comparing the calculated "W" weight with the corresponding "W" weight that is established in Appendix A, titled "Maximum Permit Weight Table," both as shown in subsection (f) of this section.

(3) The maximum permit weight per inch of tire width for axles that are steerable must not exceed 950 pounds, and the maximum permit weight per inch of tire width for axles that are not steerable must not exceed 850 pounds.

(4) A unit that does not have any group of axles that exceeds the limits established in Appendix A, "Maximum Permit Weight Table," and Appendix B, "Maximum Permit Weight Formulas," as shown in subsection (f) of this section, will be permitted with a single-trip mileage or quarterly hubometer permit for travel on any route that does not include a load restricted bridge.

(5) A unit that has any group of axles that exceeds the limits established by Appendix A, "Maximum Permit Weight Table," and Appendix B, "Maximum Permit Weight Formulas," as shown in subsection (f) of this section, will be eligible, on an individual case by case basis, for a single-trip mileage permit only; permit approval or denial will be based on a detailed route study and an analysis of each bridge on the proposed travel route to determine if the route and bridges are capable of sustaining the movement.

(6) A bridge that has been analyzed and determined to be incapable of sustaining the unit will be excluded from the permit route.

(c) Permit application and issuance.

(1) Application for single-trip mileage permit.

(A) The applicant must submit the completed application to the MCD by telephone or facsimile. The application shall include, at a minimum, the following information:

(i) name and address of applicant;

(ii) origin and destination points of the unit;

(iii) make and model of the unit;

(iv) vehicle identification number of the unit;

(v) license plate number of the unit;

(vi) size and weight dimensions; and

(vii) any other information required by law.

(B) Upon receipt of the application, the MCD will review and verify unit size and weight information, check route and mileage to be traveled, compute the permit fee, and advise the applicant of the permit fee.

(2) Issuance of single-trip mileage permit. Upon receipt of the permit fee, the MCD will advise the applicant of the permit number, and will fax a copy of the permit to the applicant if requested to do so.

(d) Permit fees and refunds.

(1) Minimum fee. The minimum fee for a single-trip mileage permit is either the calculated permit fee or $31, whichever is the greater amount.

(2) Permit fee calculation. The fee for a single-trip mileage permit is calculated by the following formula. Figure 1: 43 TAC §28.42(d)(2)

(A) Highway use factor. The highway use factor for a single trip mileage permit is 0.6.

(B) Total rate per mile. The total rate per mile is the combined mileage rates for width, height, and weight for the unit.

(i) The mileage rate for width is $ .06 per mile for each foot (or fraction thereof) above legal width.

(ii) The mileage rate for height is $ .04 per mile for each foot (or fraction thereof) above legal height.

(iii) The mileage rate for a single axle or any axle within a group that exceeds 20,000 pounds, but is less than or equal to 25,000 pounds, is calculated by multiplying $ .045 times the amount by which the axle or axle group weight exceeds the legal weight for the axle or axle group and dividing the resultant figure by 1,000 pounds.

(iv) The mileage rate for a single axle or any axle within a group that exceeds 25,000 pounds, but is less than or equal to 30,000 pounds, is calculated by multiplying $ .055 times the amount by which the axle or axle group weight exceeds the legal weight for the axle or axle group and dividing the resultant figure by 1,000 pounds.

(C) Registration reduction.

(i) A unit licensed for maximum legal weight will receive a reduction of 25% in the computation of the permit fee.

(ii) A unit licensed with a permit plate or 72/144 hour temporary registration will not receive a registration reduction in the computation of the permit fee.

(D) Indirect cost share. The indirect cost share is a prorated share of administering department activities, other than the direct cost of the activities, including the cost of providing statewide support services. The indirect cost share factor is based upon the previous year's expenditures.

(3) Permit fees for trailer mounted units.

(A) The permit fee for a trailer mounted unit is based on the overall width, overall height, and all axle weights, including the truck-tractor axles.

(B) A unit with two or more axle groups that do not have a spacing of at least 12 feet between the closest axles of the opposing groups must have the permit fee calculated by the following method.

(i) The axle group with the lowest weight will have the axle closest to the next axle group temporarily disregarded from its group in order to create a spacing of at least 12 feet between the two groups for fee calculation purposes.

(ii) An axle group will not have more than one axle disregarded.

(iii) The permit fee for the axle group with the temporarily disregarded axle must be based on the actual weight of the entire axle group minus the legal weight for the remaining axles of the group.

(4) Refunds. Fees for permits issued under this section are non-refundable.

(e) Amendments. A single-trip mileage permit may not be amended unless an exception is granted by the MCD.

(f) Appendices. The following table entitled "Maximum Permit Weight Table" is Appendix A, and the list of formulas entitled, "Maximum Permit Weight Formulas," is Appendix B.
Figure 2: 43 TAC §28.42(f)

§28.43. Quarterly Hubometer Permits.

(a) General information.

(1) Permits issued under this section are subject to the requirements of §28.41 of this title (relating to General Requirements).

(2) A quarterly hubometer permit:

(A) is effective for three consecutive months (for example, a permit issued with a beginning date of January 15 will terminate on April 14, or a permit issued with a beginning date of July 1 will terminate on September 30);

(B) allows the unit to travel on all state-maintained highways; and

(C) allows the unit to travel on a state-wide basis.

(3) A unit permitted under this subsection must not exceed any of the following dimensions:

(A) 12 feet in width;

(B) 14 feet, 6 inches in height; and

(C) 95 feet in length.

(4) With the exception of units that are overlength only, a unit operated with a permit issued under this section must be equipped with a hubometer. The permittee must maintain the hubometer in good working condition.

(5) A unit exceeding 175,000 pounds gross weight must:

(A) have front and rear escort vehicles to prevent traffic from traveling beside the unit as it crosses a bridge;

(B) cross all multi-lane bridges by centering the unit on a lane line;

(C) cross all two-lane bridges in the center of the bridge; and

(D) cross each bridge at a speed not greater than 20 miles per hour.

(6) A unit exceeding 12 feet in width must be centered in the outside traffic lane of any highway that has paved shoulders.

(b) Maximum permit weight limits.

(1) The maximum permit weight for any single axle, not connected to another axle by a weight equalizing suspension system, must not exceed 30,000 pounds or 850 pounds per inch of tire width, whichever is less.

(2) The maximum permit weight for any group of axles on a unit will be determined by calculating the "W" weight for the group, using the formulas in Appendix B, "Maximum Permit Weight Formulas", and comparing the calculated "W" weight with the corresponding "W" weight that is established in Appendix A, "Maximum Permit Weight Table," both as shown in §28.42(f) of this title (relating to Single Trip Mileage Permits).

(3) The maximum permit weight per inch of tire width for axles that are steerable must not exceed 950 pounds, and the maximum permit weight per inch of tire width for axles that are not steerable must not exceed 850 pounds.

(4) A unit that does not have any group of axles that exceeds the limits established in Appendix A, "Maximum Permit Weight Table," and Appendix B, "Maximum Permit Weight Formulas," as shown in §28.42(f) of this title, will be permitted with a single-trip mileage or quarterly hubometer permit for travel on any route that does not include a load restricted bridge.

(5) A unit that has any group of axles that exceeds the limits established by Appendix A, "Maximum Permit Weight Table," and Appendix B, "Maximum Permit Weight Formulas," as shown in §28.42(f) of this title, will be eligible, on an individual case by case basis, for a single-trip mileage permit only; permit approval or denial will be based on a detailed route study and an analysis of each bridge on the proposed travel route to determine if the route and bridges are capable of sustaining the movement.

(6) A bridge that has been analyzed and determined to be incapable of sustaining the unit will be excluded from the permit route.

(c) Initial permit application and issuance.

(1) Initial permit application.

(A) The applicant for an initial quarterly hubometer permit must submit a completed application by telephone, facsimile, or mail. The application shall include, at a minimum, the following information:

(i) name and address of applicant;

(ii) make and model of the unit;

(iii) vehicle identification number of the unit;

(iv) license plate number of the unit;

(v) size and weight dimensions; and

(vi) any other information required by law.

(B) Upon receipt of the initial quarterly hubometer permit application, the MCD will verify unit information, calculate the permit fee, and advise the applicant of the permit fee.

(2) Issuance of initial quarterly hubometer permit. Upon receipt of the permit fee, the MCD will fax the permit to the applicant if requested, and will mail the permit and a renewal application form to the applicant.

(d) Permit renewals and closeouts.

(1) The applicant must complete and mail a renewal application form to the MCD for each permit that is to be renewed or closed out.

(2) Upon receipt of the renewal application, the MCD will verify unit information, check mileage traveled on last permit, calculate the new permit fee, and advise the applicant of permit fee.

(e) Permit fees and refunds.

(1) Minimum fee. The minimum fee for a quarterly hubometer permit is either the calculated permit fee or $31, whichever is the greater amount.

(2) Fees for overlength units. A unit that is overlength only must obtain a quarterly hubometer permit with a fee of $31, but is not required to have a hubometer.

(3) Quarterly hubometer permit fee calculation. The permit fee for a quarterly hubometer permit is calculated by the following formula.
Figure 1: 43 TAC §28.43(e)(3)

(A) Hubometer mileage. Hubometer mileage for a quarterly hubometer permit is determined by an amount estimated by the applicant for the first quarterly hubometer permit, or from the unit's hubometer mileage reading from the previous quarterly hubometer permit.

(i) An applicant requesting a permit for a unit that has traveled in excess of the mileage stated in the previous quarterly hubometer permit must pay for the excess mileage traveled, in addition to the fee for the renewed quarterly hubometer permit.

(ii) An applicant requesting a permit for a unit that has traveled less than the mileage stated on the previous quarterly hubometer permit will receive a credit on the purchase price of the renewed quarterly hubometer permit for that unit or another unit.

(B) Highway use factor. The highway use factor for a quarterly hubometer permit is 0.3.

(C) Total rate per mile. The total rate per mile is the combined mileage rates for width, height, and weight for the unit.

(i) The mileage rate for width is $ .06 per mile for each foot (or fraction thereof) above legal width.

(ii) The mileage rate for height is $ .04 per mile for each foot (or fraction thereof) above legal height.

(iii) The mileage rate for a single axle or any axle within a group that exceeds 20,000 pounds, but is less than or equal to 25,000 pounds, is calculated by multiplying $ .045 times the amount by which the axle or axle group weight exceeds the legal weight for the axle or axle group and dividing the resultant figure by 1,000 pounds.

(iv) The mileage rate for a single axle or any axle within a group that exceeds 25,000 pounds, but is less than or equal to 30,000 pounds, is calculated by multiplying $ .055 times the amount by which the axle or axle group weight exceeds the legal weight for the axle or axle group and dividing the resultant figure by 1,000 pounds.

(D) Registration reduction.

(i) A unit licensed for maximum legal weight will receive a reduction of 25% in the computation of the permit fee.

(ii) A unit licensed with a permit plate or a 72/144 hour temporary registration does not receive a registration reduction in the computation of the permit fee.

(E) Indirect cost share. The indirect cost share is a prorated share of administering department activities, other than the direct cost of the activities, including the cost of providing statewide support services. The indirect cost share factor is based upon the previous year's expenditures.

(4) Permit fees for trailer mounted units.

(A) The permit fee for a trailer mounted unit is based on the overall width, overall height, and all axle weights, including the truck-tractor axles.

(B) A unit with two or more axle groups that does not have a spacing of at least 12 feet between the closest axles of the opposing groups must have the permit fee calculated by the following method.

(i) The axle group with the lowest weight will have the axle closest to the next axle group temporarily disregarded from its group in order to create a spacing of at least 12 feet between the two groups for fee calculation purposes.

(ii) An axle group will not have more than one axle disregarded.

(iii) The permit fee for the axle group with the temporarily disregarded axle must be based on the actual weight of the entire axle group minus the legal weight for the remaining axles of the group.

(5) Refunds. A refund is made to the applicant when the quarterly hubometer permit process is stopped for all units listed in the applicant's account, provided the amount of the refund exceeds $25.

(f) Amendments. A quarterly hubometer permit may be amended only to indicate:

(1) a new hubometer serial number; or

(2) a new license plate number.

§28.44. Annual Permits.

(a) General information. Permits issued under this section are subject to the requirements of §28.41 of this title (relating to General Requirements).

(1) Annual self-propelled oil well servicing unit permits.

(A) A unit that does not exceed legal size and weight limits and is licensed with a permit plate must purchase an annual permit issued under this section.

(B) The fee for an annual self-propelled oil well servicing unit permit is $52 per axle. The indirect cost share is included in this fee.

(2) Annual oil field rig-up truck permits.

(A) An oil field rig-up truck permitted under this section must not exceed:

(i) legal height or length limits, as provided in Transportation Code, Chapter 623, Subchapter C;

(ii) 850 pounds per inch of tire width on the front axle;

(iii) 25,000 pounds on the front axle; or

(iv) legal weight on all other axles.

(B) An oil field rig-up truck, operating under an annual permit, must be licensed in accordance with Transportation Code, Chapter 502.

(C) The annual permit fee for an oil field rig-up truck is $52. The indirect cost share is included in this fee.

(D) An annual permit for an oil field rig-up truck allows the unit to travel at night, provided the unit does not exceed nine feet in width.

(3) A permit issued under this section may not be amended.

(4) A permit issued under this section allows travel on a state-wide basis and on all state maintained highways.

(b) Permit application and issuance.

(1) Initial permit application. An applicant for an annual permit under this section must submit a completed application by telephone, facsimile, or mail. The application shall include, at a minimum, the following information:

(A) name and address of applicant;

(B) make and model of the unit;

(C) vehicle identification number of the unit;

(D) license plate number of the unit;

(E) size and weight dimensions; and

(F) any other information required by law.

(2) Permit issuance. Upon receipt of the application and the appropriate fees, the MCD will fax the permit to the applicant if requested, and will mail the permit and a renewal application form to the applicant.

§28.45. Permits for Vehicles Transporting Liquid Products Related to Oil Well Production.

(a) General provisions. This section applies to the following vehicles which may secure an annual permit issued under provisions of Transportation Code, Chapter 623, Subchapter G, to haul liquid loads over all state-maintained highways.

(1) A vehicle combination consisting of a truck-tractor and semi-trailer specifically designed with a tank and pump unit for transporting:

(A) liquid fracing products, liquid oil well waste products, or unrefined liquid petroleum products to an oil well; or

(B) unrefined liquid petroleum products or liquid oil well waste product from an oil well not connected to a pipeline.

(2) A permit issued under this section is effective for one year beginning on the "movement to begin" date.

(b) Application for permit.

(1) A request for an annual permit issued under Transportation Code, Chapter 623, Subchapter G, and this section, must be submitted to the MCD by mail.

(2) The permit request must be received by the MCD not more than 14 days prior to the date that the permit is to begin.

(c) Permit qualifications and requirements.

(1) The semi-trailer must be of legal size and weight.

(2) The semi-trailer must be registered for the maximum legal gross weight.

(3) Only one semi-trailer will be listed on a permit.

(4) The permit may be transferred from an existing trailer being removed from service and placed on a new trailer being added to the permittee's fleet, if the permittee supplies the MCD with:

(A) the existing valid permit number;

(B) the make and model of the new trailer;

(C) the license number of the new trailer; and

(D) a transfer fee of $31 per permit to cover administrative costs.

(d) Fees. All fees associated with permits issued under this section are payable as described in §28.11(f) of this title (relating to General Oversize/Overweight Permit Requirements and Procedures).

(1) The permit fee is based on the axles of the semi-trailer and the drive axles of the truck-tractor. The fee for the permit, which includes the indirect cost share, is determined as follows:

(A) $52 per axle - to haul liquid oil well waste products or unrefined liquid petroleum products from oil wells not connected by a pipeline and return empty;

(B) $52 per axle - to haul liquid products related to oil well production to an oil well and return empty; and

(C) $104 per axle - to haul liquid products related to oil well production to an oil well and return with liquid oil well waste products or unrefined liquid petroleum products from an oil well not connected to a pipeline.

(2) Each permittee will be charged a $20 issuance fee in addition to the permit fee.

(e) Permit movement conditions. The permit load must not cross any load restricted bridge when exceeding the posted capacity of such.

This 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 September 28, 1998.

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Bob Jackson
Deputy General Counsel
Texas Department of Transportation
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For further information, please call: (512) 463–8630

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Subchapter E. Permits for Oversize and Overweight Unladen Lift Equipment Motor Vehicles

43 TAC §§28.60–28.64

STATUTORY AUTHORITY

The new 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 and, more specifically, Transportation Code, Chapters 621, 622, and 623 which authorize the department to carry out the provisions of the those laws governing the issuance of permits for oversize and overweight vehicles and loads.

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

§28.60. Purpose and Scope.

In accordance with Transportation Code, Chapter 623, Subchapters I and J, the department may issue a permit for the operation of an oversize or overweight crane which is designed for use as lift equipment when the crane cannot comply with one or more of the restrictions set out in Transportation Code, Chapter 623, Subchapter C, and §621.101. The following sections in this subchapter set forth the requirements and procedures applicable to those permits.

§28.61. General Requirements for Permits for Oversize and Overweight Unladen Lift Equipment Motor Vehicles.

(a) General Information. Unless otherwise noted, permits issued under this subchapter are subject to the requirements of this section. Unladen lift equipment motor vehicles (cranes) permitted under this subchapter are eligible for:

(1) permit weight limits above those established by §28.11(d)(2) of this title (relating to General Oversize/Overweight Permit Requirements and Procedures);

(2) single-trip mileage permits;

(3) quarterly hubometer permits; and

(4) annual permits.

(b) Payment of permit fees. Fees for permits issued under this subchapter are payable as described in §28.11(f) of this title.

(c) Restrictions.

(1) A vehicle permitted under this subchapter is subject to the restrictions specified in §28.11(l) of this title, and the permittee is responsible for obtaining information concerning current restrictions from the department.

(2) A vehicle permitted under this subchapter may travel through highway construction or maintenance areas provided the dimensions do not exceed the construction restrictions as published by the department.

(d) Void permits. A permit is void when:

(1) an applicant gives false or incorrect information;

(2) an applicant does not comply with the restrictions or conditions stated in the permit;

(3) the applicant's copy of the permit does not contain the correct information;

(4) the applicant fails to retrieve a permit ordered through a cash collection office by the close of business on the same day the permit is requested; or

(5) requested by law enforcement in conjunction with the issuance of a citation.

(e) Transferability. Unless otherwise noted, a permit issued under this subchapter may not be transferred between cranes or between permittees.

(f) Records retention. A crane permitted under this section must keep the permit and any attachments to the permit in the crane until the day after the date the permit expires.

(g) Escort requirements. In addition to any other escort requirements specified in this subchapter, cranes permitted under this subchapter are subject to the escort requirements specified in §28.11(k) of this title.

§28.62. Single Trip Mileage Permits.

(a) General information.

(1) Permits issued under this section are subject to the requirements of §28.61 of this title (relating to General Requirements for Permits for Oversize and Overweight Unladen Lift Equipment Motor Vehicles).

(2) A single trip mileage permit:

(A) is limited to a maximum of seven consecutive days;

(B) is routed from the point of origin to the point of destination and has the route listed on the permit; and

(C) allows the crane to be returned to the point of origin on the same permit, provided the return trip is made within the time period stated in the permit.

(3) A crane permitted under Transportation Code, Chapter 623, Subchapter J, must be licensed with either:

(A) a permit plate;

(B) a 72-hour or 144-hour temporary registration; or

(C) a truck license as specified in Transportation Code, Chapter 502.

(4) A crane exceeding 175,000 pounds gross weight must:

(A) have front and rear escort vehicles to prevent traffic from traveling beside the crane as it crosses a bridge;

(B) cross all multi-lane bridges by centering the crane on a lane line;

(C) cross all two-lane bridges in the center of the bridge; and

(D) cross each bridge at a speed not greater than 20 miles per hour.

(5) A crane exceeding 12 feet in width must be centered in the outside traffic lane of any highway that has paved shoulders.

(6) The permitted vehicle must not cross a load restricted bridge when exceeding the posted capacity of such.

(b) Maximum permit weight limits.

(1) The maximum permit weight for any single axle, not connected to another axle by a weight equalizing suspension system, must not exceed 30,000 pounds or 850 pounds per inch of tire width, whichever is less.

(2) The maximum permit weight for any group of axles on a crane is determined by calculating the "W" weight for the group, using the formulas shown in Appendix B, "Maximum Permit Weight Formulas," and comparing the calculated "W" weight with the corresponding "W" weight that is established in Appendix A,

"Maximum Permit Weight Table," both as shown in subsection (f) of this section.

(3) The maximum permit weight per inch of tire width for axles that are steerable must not exceed 950 pounds, and the maximum permit weight per inch of tire width for axles that are not steerable must not exceed 850 pounds.

(4) A crane that does not have any group of axles that exceeds the limits established in Appendix A, "Maximum Permit Weight Table," and Appendix B, "Maximum Permit Weight Formulas," both shown in subsection (f) of this section, will be permitted with a single-trip mileage permit or a quarterly hubometer permit for travel on any route that does not include a load restricted bridge.

(5) A crane that has any group of axles that exceeds the limits established by Appendix A, "Maximum Permit Weight Table," and Appendix B, "Maximum Permit Weight Formulas," shown in subsection (f) of this section, will be eligible, on an individual case by case basis, for a single-trip mileage permit only. Permit approval or denial will be based on a detailed route study and an analysis of each bridge on the proposed travel route to determine if the route and bridges are capable of sustaining the movement.

(6) A bridge that has been analyzed and determined to be incapable of sustaining the crane will be excluded from the permit route.

(c) Permit application and issuance.

(1) Application for single-trip mileage permit.

(A) The applicant must submit the completed application to the MCD by mail or facsimile. The application shall include, at a minimum, the following information:

(i) name and address of applicant;

(ii) origin and destination points of the crane;

(iii) make and model of the crane;

(iv) vehicle identification number of the crane;

(v) license plate number of the crane;

(vi) size and weight dimensions; and

(vii) any other information required by law.

(B) Upon receipt of the application, the MCD will review and verify size and weight information, check the route and mileage to be traveled, compute the permit fee, and advise the applicant of the permit fee.

(2) Issuance of single-trip mileage permit. Upon receipt of the permit fee, the MCD will advise the applicant of the permit number, and will fax a copy of the permit to the applicant if requested to do so.

(d) Permit fees and refunds.

(1) Minimum fee. The minimum fee for a single-trip permit is either the calculated permit fee or $31, whichever is the greater amount.

(2) Permit fee calculation. The permit fee for a single-trip mileage permit is calculated by the following formula:
Figure 1: 43 TAC §28.62(d)(2)

(A) Highway use factor. The highway use factor for a single trip mileage permit is 0.6.

(B) Total rate per mile. The total rate per mile is the combined mileage rates for width, height, and weight for the unit.

(i) The mileage rate for width is $ .06 per mile for each foot (or fraction thereof) above legal width.

(ii) The mileage rate for height is $ .04 per mile for each foot (or fraction thereof) above legal height.

(iii) The mileage rate for a single axle or any axle within a group that exceeds 20,000 pounds, but is less than or equal to 25,000 pounds, is calculated by multiplying $ .045 times the amount by which the axle or axle group weight exceeds the legal weight for the axle or axle group and dividing the resultant figure by 1,000 pounds.

(iv) The mileage rate for a single axle or any axle within a group that exceeds 25,000 pounds, but is less than or equal to 30,000 pounds, is calculated by multiplying $ .055 times the amount by which the axle or axle group weight exceeds the legal weight for the axle or axle group and dividing the resultant figure by 1,000 pounds.

(C) Registration reduction.

(i) A crane licensed for maximum legal weight will receive a reduction of 25% in the computation of the permit fee.

(ii) A crane licensed with a permit plate or 72/144-hour temporary registration does not receive a registration reduction in the computation of the permit fee.

(D) Indirect cost share. The indirect cost share is a prorated share of administering department activities, other than the direct cost of the activities, including the cost of providing statewide support services. The indirect cost share factor is based upon the previous year's expenditures.

(3) Exceptions to fee computations. A crane with two or more axle groups that does not have a spacing of at least 12 feet between the closest axles of the opposing groups must have the permit fee calculated by the following method.

(A) The axle group with the lowest weight will have the axle closest to the next axle group temporarily disregarded from its group in order to create a spacing of at least 12 feet between the two groups for fee calculation purposes.

(B) An axle group will not have more than one axle disregarded.

(C) The permit fee for the axle group with the temporarily disregarded axle must be based on the actual weight of the entire axle group minus the legal weight for the remaining axles of the group.

(4) Refunds. Fees for permits issued under this section are non-refundable.

(e) Amendments. A single-trip mileage permit issued under this section may not be amended unless an exception is granted by the MCD.

(f) Appendices. The following table entitled "Maximum Permit Weight Table" is Appendix A, and the list of formulas entitled "Maximum Permit Weight Formulas," is Appendix B.
Figure 2: 43 TAC §28.62(f)

§28.63. Quarterly Hubometer Permits.

(a) General information.

(1) Permits issued under this section are subject to the requirements of §28.61 of this subchapter (relating to General Requirements for Permits for Oversize and Overweight Unladen Lift Equipment Motor Vehicles).

(2) A quarterly hubometer permit:

(A) is effective for three consecutive months (for example, a permit issued with a beginning date of January 15 will terminate on April 14, or a permit issued with a beginning date of July 1 will terminate on September 30);

(B) allows the vehicle to travel on all state-maintained highways; and

(C) allows the unit to travel on a state-wide basis.

(3) A crane permitted under this section must not exceed any of the following dimensions:

(A) 12 feet in width;

(B) 14 feet, 6 inches in height; or

(C) 95 feet in length.

(4) A crane permitted under this section must be licensed with either:

(A) a permit plate;

(B) 72-hour or 144-hour temporary registration; or

(C) a truck license as specified in Transportation Code, Chapter 502.

(5) With the exception of cranes that are overlength only, cranes operated with a quarterly hubometer permit must be equipped with a hubometer. The permittee must maintain the hubometer in good working condition.

(6) A crane exceeding 175,000 pounds gross weight must:

(A) have front and rear escort vehicles to prevent traffic from traveling beside the crane as it crosses a bridge;

(B) cross all multi-lane bridges by centering the crane on a lane line;

(C) cross all two-lane bridges in the center of the bridge; and

(D) cross each bridge at a speed not greater than 20 miles per hour.

(7) A crane exceeding 12 feet in width must be centered in the outside traffic lane of any highway that has paved shoulders.

(8) A crane will be permitted for night movement provided that it does not exceed 10 feet 6 inches in width, 14 feet in height, or 95 feet in length. A crane moving at night must be accompanied by a front and rear escort vehicle.

(9) The permitted vehicle must not cross a load restricted bridge when exceeding the posted capacity of such.

(10) The permit may be amended only to indicate:

(A) a new hubometer serial number; or

(B) a new license plate number.

(b) Maximum permit weight limits.

(1) The maximum permit weight for any single axle, not connected to another axle by a weight equalizing suspension system, must not exceed 30,000 pounds or 850 pounds per inch of tire width, whichever is less.

(2) The maximum permit weight for any group of axles on a crane will be determined by calculating the "W" weight for the group, using the formulas in Appendix B, "Maximum Permit Weight Formulas," and comparing the calculated "W" weight with the corresponding "W" weight that is established in Appendix A, "Maximum Permit Weight Table," as shown in §28.62(f) of this title (relating to Single Trip Mileage Permits).

(3) The maximum permit weight per inch of tire width for axles that are steerable must not exceed 950 pounds, and the maximum permit weight per inch of tire width for axles that are not steerable must not exceed 850 pounds.

(4) A crane that does not have any group of axles that exceeds the limits established in Appendix A, "Maximum Permit Weight Table," and Appendix B, "Maximum Permit Weight Formulas," as shown in §28.62(f) of this title, will be permitted with a single-trip mileage permit or a quarterly hubometer permit for travel on any route that does not include a load restricted bridge.

(5) A crane that has any group of axles that exceeds the limits established by Appendix A, "Maximum Permit Weight Table," and Appendix B, "Maximum Permit Weight Formulas," shown in §28.62(f) of this title, will be eligible, on an individual case by case basis, for a single-trip mileage permit only; permit approval or denial will be based on a detailed route study and an analysis of each bridge on the proposed travel route to determine if the route and bridges are capable of sustaining the movement.

(6) A bridge that has been analyzed and determined to be incapable of sustaining the crane will be excluded from the permit route.

(c) Initial permit application and issuance.

(1) Initial permit application.

(A) A completed application for an initial quarterly hubometer permit must be submitted to the MCD by telephone, facsimile, or mail. The application shall include, at a minimum, the following information:

(i) name and address of applicant;

(ii) make and model;

(iii) the vehicle identification number;

(iv) license plate number of the vehicle;

(v) size and weight dimensions; and

(vi) any other information required by law.

(B) Upon receipt of the initial quarterly hubometer permit application, the MCD will verify vehicle information, calculate the permit fee, and advise the applicant of the permit fee.

(2) Issuance of initial quarterly hubometer permit. Upon receipt of the permit fee, the MCD will fax the permit to the applicant upon request, and will mail the permit and a renewal application form to the applicant.

(d) Permit renewals and closeouts.

(1) Application for renewal or closeout of quarterly hubometer permit.

(A) The applicant must complete and mail a renewal application form to the MCD for each permit that is to be renewed or closed out.

(i) The renewal application form must be submitted not more than 14 days prior to the expiration date of the original permit.

(ii) An applicant with two or more permits that expire on the same day must renew each permit that is expiring or close out each permit that is not being renewed.

(B) Upon receipt of the renewal application, the MCD will verify crane information, check mileage traveled on last permit, calculate the new permit fee, and advise the applicant of the permit fee.

(2) Issuance of renewed quarterly hubometer permit. Upon receipt of the permit fee, the MCD will fax the renewed permit to the applicant if requested, and will mail the permit and a renewal application form to the applicant.

(e) Permit fees and refunds.

(1) Minimum fee. The minimum fee for a single-trip permit or time permit is either the calculated permit fee or $31, whichever is the greater amount.

(2) Fees for overlength units. A crane that is overlength only must obtain a quarterly hubometer permit with a fee of $31, and is not required to have a hubometer.

(3) Quarterly hubometer permit fee calculation. The permit fee for a quarterly hubometer permit is calculated by the following formula:
Figure 1: 43 TAC §28.63(e)(3)

(A) Hubometer mileage. Mileage for a quarterly hubometer permit is determined by an amount estimated by the applicant for the first quarterly hubometer permit, or from the crane's hubometer mileage reading from the previous quarterly hubometer permit.

(i) An applicant requesting a permit for a crane that has traveled in excess of the mileage stated in the previous quarterly hubometer permit must pay for the excess mileage traveled, in addition to the fee for the renewed quarterly hubometer permit.

(ii) An applicant requesting a permit for a crane that has traveled less than the mileage stated on the previous quarterly hubometer permit will receive a credit on the purchase price of the renewed quarterly hubometer permit for that crane or another crane.

(B) Highway use factor. The highway use factor for a time permit is 0.3.

(C) Total rate per mile. The total rate per mile is the combined mileage rates for width, height, and weight for the crane.

(i) The mileage rate for width is $ .06 per mile for each foot (or fraction thereof) above legal width.

(ii) The mileage rate for height is $ .04 per mile for each foot (or fraction thereof) above legal height.

(iii) The mileage rate for a single axle or any axle within a group that exceeds 20,000 pounds, but is less than or equal to 25,000 pounds, is calculated by multiplying $ .045 times the amount by which the axle or axle group weight exceeds the legal weight for the axle or axle group and dividing the resultant figure by 1,000 pounds.

(iv) The mileage rate for a single axle or any axle within a group that exceeds 25,000 pounds, but is less than or equal to 30,000 pounds, is calculated by multiplying $ .055 times the amount by which the axle or axle group weight exceeds the legal weight for the axle or axle group and dividing the resultant figure by 1,000 pounds.

(D) Registration reduction.

(i) A crane licensed for maximum legal weight will receive a reduction of 25% in the computation of the permit fee.

(ii) A crane licensed with a permit plate or a 72/144-hour temporary registration does not receive a registration reduction in the computation of the permit fee.

(E) Indirect cost share. The indirect cost share is a prorated share of administering department activities, other than the direct cost of the activities, including the cost of providing statewide support services. The indirect cost share factor is based upon the previous year's expenditures.

(4) Special fee provisions. A crane with two or more axle groups that do not have a spacing of at least 12 feet between the closest axles of the opposing groups must have the permit fee calculated by the following method.

(A) The axle group with the lowest weight will have the axle closest to the next axle group temporarily disregarded from its group in order to create a spacing of at least 12 feet between the two groups for fee calculation purposes.

(B) An axle group will not have more than one axle disregarded.

(C) The permit fee for the axle group with the temporarily disregarded axle must be based on the actual weight of the entire axle group minus the legal weight for the remaining axles of the group.

(5) Refunds. The MCD will refund fees for permits issued under this section when the quarterly hubometer permit process is stopped for all cranes listed in the applicant's account, provided the amount of the refund exceeds $25.

§28.64. Annual Permits.

(a) General information. Permits issued under this section are subject to the requirements of §28.61 of this title (relating to General Requirements for Permits for Oversize and Overweight Unladen Lift Equipment Motor Vehicles).

(1) A crane permitted under this section must not exceed:

(A) the weight limits established in §28.11(d)(1), (2) and (3) of this title (relating to General Oversize/Overweight Permit Requirements and Procedures);

(B) a gross weight of 120,000 pounds;

(C) legal length and height limits as specified in Transportation Code, §621.203 and §621.207; and

(D) 10 feet in width.

(2) A permit issued under this section may not be amended.

(3) A crane permitted under this section must not cross a load restricted bridge or a load restricted road when exceeding the posted capacity of such.

(4) A crane permitted under this section may travel at night with front and rear escort vehicles.

(5) The fee for an annual permit issued under this section is $50.

(b) Permit application and issuance.

(1) Initial permit application. An applicant for an annual permit under this section must submit a completed application and the appropriate fees by telephone, facsimile, or mail. The application shall include, at a minimum, the following information:

(A) name and address of applicant;

(B) make and model of the crane;

(C) vehicle identification number;

(D) license plate number;

(E) size and weight dimensions; and

(F) any other information required by law.

(2) Permit issuance. Upon receipt of the application and the appropriate permit fee, the MCD will verify the application information, fax the permit to the applicant if requested, and will mail the permit and a renewal application form to the applicant.

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

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

TRD-9815152
Bob Jackson
Deputy General Counsel
Texas Department of Transportation
Earliest possible date of adoption: November 8, 1998
For further information, please call: (512) 463–8630

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Subchapter F. Highway Crossings By Oversize and Overweight Vehicles and Loads

43 TAC §28.80, §28.82

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, Chapters 621, 622, and 623 which authorize the department to carry out the provisions of the those laws governing the issuance of permits for oversize and overweight vehicles and loads.

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

§28.80. Purpose.

In accordance with Transportation Code, Chapter 623, Subchapter C [~~Texas Civil Statutes, Article 6701d-11, §5-2/3~~], a person, firm, or corporation may request authorization to operate a vehicle [~~,~~] that does not comply with one or more of the restrictions of Transportation Code, Chapter 621 [~~Texas Civil Statutes, Article 6701d-11, §3 and §5~~], across the width of any road in the state highway system, other than a controlled-access highway as defined in Transportation Code, §223.001 [~~Texas Civil Statutes, Article 6674w~~], from private property to other private property provided that the commission has contracted with the requester to indemnify the department for the cost of repair and maintenance to the portion of such highway crossed by such vehicles.

§28.82. Preparation of Contract.

(a) The department will contract with the requester to indemnify the state for the cost of maintenance or repair to that portion of the highway crossed by vehicles which cannot comply with one or more restrictions of Transportation Code, Chapter 621 [~~Texas Civil Statutes, Article 6701d-11, §3 and §5~~].

(b) (No change.)

(c) If the proposed vehicle crossing requires initial upgrading or reconstruction to safely and adequately accommodate the vehicles which will be using the highway crossing, the requester will bear the entire cost of such work. Construction plans, specifications, traffic control plans, and any other related work will be provided by the requester at no cost to the state. At the sole option of the department, it may elect to do this work or provide for this work by separate contract, with the requester bearing the entire cost.

(d) The requester will be responsible for furnishing, installing, maintaining, and removing when no longer required all traffic control devices which are required at the crossing to insure the safety of the traveling public. At the sole option of the department, it may elect to do this work or provide for this work by separate contract, with the requester bearing the entire cost. All traffic-control devices and flaggers, if required, shall be in accordance with the Texas Manual on Uniform Traffic Control Devices.

(e) The requester shall indemnify the department for the cost of maintenance and repair to the vehicle crossing. The requester shall, at the entire expense of the requester, provide and keep in force a surety bond in an amount determined by the state to cover the cost of such maintenance and repair. The bond will require approval by the attorney general and comptroller of public accounts [~~state treasurer~~].

(f)-(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 September 28, 1998.

TRD-9815148
Bob Jackson
Deputy General Counsel
Texas Department of Transportation
Earliest possible date of adoption: November 8, 1998
For further information, please call: (512) 463–8630

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Chapter 28. Oversize and Overweight Vehicles and Loads

The Texas Department of Transportation proposes the repeal of §§28.11-28.13, §§28.40-28.47, and §§28.60-28.66, concerning oversize and overweight vehicles and loads.

EXPLANATION OF THE PROPOSED REPEALS

The department has for several years conducted a continual rule review process independent of the process prescribed by Article IX, Section 167 of the General Appropriations Act. As part of this rule review process, the department certifies that existing rules, among other things, accurately reflect department

policy and procedures, do not unreasonably burden regulated entities, are cost effective in accomplishing stated purposes, and adequately safeguard the public safety, consumers of regulated entities, and the state.

The existing rules in Chapter 28, concerning Oversize and Overweight Vehicles and Loads, are cumbersome and, at times, difficult to understand. The proposed repealed sections are part of the department's overall strategy to modernize and streamline existing rules, while clarifying new and existing policies and procedures. The proposed repealed sections have been replaced with new sections contemporaneously proposed with this proposal. The proposed repeals are necessary in order to reorganize, streamline, and consolidate requirements imposed on operators of oversize and overweight vehicles and loads. The proposed repeals are also necessary in order to allow the department to more effectively and efficiently administer Transportation Code, Chapters 621, 622, and 623, reduce unnecessary burdens imposed on the motor carrier industry, and facilitate compliance with department rules by the motor carrier industry, which in turn will increase the safety of the traveling public.

Existing sections in Chapter 28 that have been proposed for repeal are as follows:

Proposed repeal of existing §28.11, concerning Permit Issuance Requirements and Procedures, which is being replaced by proposed new §28.11, concerning General Oversize/Overweight Permit Requirements and Procedures.

Proposed repeal of existing §28.12, concerning Single-Trip Permits Issued under Texas Civil Statutes, Article 6701a, which is being replaced by new §28.12, concerning Single-Trip Permits Issued Under Transportation Code, Chapter 623, Subchapter D.

Proposed repeal of §28.13, concerning Time Permits, which is being replaced by new §28.13, concerning Time Permits.

Proposed repeal of existing §28.40, concerning Purpose, which is being replaced with new §28.40, concerning Purpose and Scope.

Proposed repeal of existing §28.41, concerning Application for Permit, which is being replaced with new §28.41, concerning General Requirements.

Proposed repeal of existing §28.42, concerning Permit Qualifications and Requirements, which is being replaced with new §28.42, concerning Single Trip Mileage Permits.

Proposed repeal of existing §28.43, concerning Registration Requirements, which is being replaced with new §28.43, concerning Quarterly Hubometer Permits.

Proposed repeal of existing §28.44, concerning Maximum Permit Weight Limits, which is being replaced by new §28.44, concerning Annual Permits.

Proposed repeal of §28.45, concerning Permit Fee Calculations, which is being replaced with new §28.45, concerning Permits for Vehicles Transporting Liquid Products Related to Oil Well Production.

Proposed repeal of §28.46, concerning Permit Movement Conditions. The rules contained in this section have been moved to proposed new §§28.40-28.44.

Proposed repeal of existing §28.47, concerning Permits for Vehicles Transporting Liquid Products Related to Oil Well Production, which is being moved to new §28.45.

Proposed repeal of existing §28.60, concerning Purpose, which is being replaced by new §28.60, concerning Purpose and Scope.

Proposed repeal of existing §28.61, concerning Application for Permit, which is being replaced with new §28.61, concerning General Requirements for Permits for Oversize and Overweight Unladen Lift Equipment Motor Vehicles.

Proposed repeal of existing §28.62, concerning Permit Qualifications and Requirements, which is being replaced with new §28.62, concerning Single Trip Mileage Permits.

Proposed repeal of existing §28.63, concerning Registration Requirements, which is being replaced with new §28.63, concerning Quarterly Hubometer Permits.

Proposed repeal of existing §28.64, concerning Maximum Permit Weight Limits, which is being replaced with new §28.64, concerning Annual Permits.

Proposed repeal of existing §28.65, concerning Permit Fee Calculations, and repeal of existing §28.66, concerning Permit Movement Conditions. The rules contained in these sections have been moved to new §§28.60-28.64.

FISCAL NOTE Frank J. Smith, Director, Finance Division, has determined that for the first five-year period the repeals are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the repeals. There are no anticipated economic costs for persons required to comply with the repealed sections as proposed.

Lawrance R. Smith, Director, Motor Carrier Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the repeals.

PUBLIC BENEFIT Mr. Smith has also determined that for each year of the first five years the repeals are in effect, the public benefit anticipated as a result of enforcing or administering the repeals will be to facilitate compliance with regulations governing the issuance of permits for oversize and overweight vehicles and loads, resulting in increased safety for the traveling public. Other benefits include increased convenience and decreased paperwork for the motor carrier industry. There will be no effect on small businesses.

SUBMITTAL OF COMMENTS Written comments on the proposed repeals may be submitted to Lawrance R. Smith, Director, Motor Carrier Division, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments will be 5:00 p.m. on November 9, 1998.

Subchapter B. General Permits

43 TAC §§28.11–28.13

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

STATUTORY AUTHORITY The repeals 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, Chapters 621, 622, and 623, which authorizes the department to administer the provisions of the laws governing the issuance of permits for the movement of oversize and overweight vehicles and loads.

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

§28.11. Permit Issuance Requirements and Procedures.

§28.12. Single-Trip Permits Issued under Transportation Code, Chapter 623, Subchapter D.

§28.13. Time 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 September 28, 1998.

TRD-9815142
Bob Jackson
Deputy General Counsel
Texas Department of Transportation
Earliest possible date of adoption: November 8, 1998
For further information, please call: (512) 463–8630

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Subchapter D. Permits for Oversize and Overweight Oil Well Related Vehicles

43 TAC §§28.40–28.47

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

STATUTORY AUTHORITY

The repeals 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, Chapters 621, 622, and 623, which authorizes the department to administer the provisions of the laws governing the issuance of permits for the movement of oversize and overweight vehicles and loads.

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

§28.40. Purpose.

§28.41. Application for Permit.

§28.42. Permit Qualifications and Requirements.

§28.43. Registration Requirements.

§28.44. Maximum Permit Weight Limits.

§28.45. Permit Fee Calculations.

§28.46. Permit Movement Conditions.

§28.47. Permits for Vehicles Transporting Liquid Products Related to Oil Well Production.

This 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 September 28, 1998.

TRD-9815143
Bob Jackson
Deputy General Counsel
Texas Department of Transportation
Earliest possible date of adoption: November 8, 1998
For further information, please call: (512) 463–8630

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Subchapter E. Permits for Oversize and Overweight Unladen Lift Equipment Motor Vehicles

43 TAC §§28.60–28.66

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

STATUTORY AUTHORITY

The repeals 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, Chapters 621, 622, and 623, which authorizes the department to administer the provisions of the laws governing the issuance of permits for the movement of oversize and overweight vehicles and loads.

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

§28.60. Purpose.

§28.61. Application for Permit.

§28.62. Permit Qualifications and Requirements.

§28.63. Registration Requirements.

§28.64. Maximum Permit Weight Limits.

§28.65. Permit Fee Calculations.

§28.66. Permit Movement Conditions.

This 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 September 28, 1998.

TRD-9815144
Bob Jackson
Deputy General Counsel
Texas Department of Transportation
Earliest possible date of adoption: November 8, 1998
For further information, please call: (512) 463–8630

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ADOPTED RULES

An agency may take final action on a section 30 days after a proposal has been published in the ***Texas Register***. The section becomes effective 20 days after the agency files the correct document with the ***Texas Register***, unless a later date is specified or unless a federal statute or regulation requires implementation of the action on shorter notice.

If an agency adopts the section without any changes to the proposed text, only the preamble of the notice and statement of legal authority will be published. If an agency adopts the section with changes to the proposed text, the proposal will be republished with the changes.

TITLE 1. ADMINISTRATION

Part IV. Office of the Secretary of State

Chapter 97. Business Opportunity

Subchapter B. Fees and General Information

1 TAC §97.21

The Office of the Secretary of State adopts the amendment to §97.21 concerning the regulation of business opportunities without changes to the proposed text as published in the August 21, 1998 issue of the *Texas Register* (23 TexReg 8598). The amendment is necessary to update and clarify the fees charged for copies of public information contained in a business opportunity filing.

The amendment revises §97.21 by adding a reference to §71.8 of this title for the determination of such cost. In addition, the amendment deletes specific costs that were, prior to the amendment, included in §97.21(c).

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Texas Government Code §2001.004(1) and Texas Business and Commerce Code §41.006, which provide the Secretary of State with the authority to adopt rules of formal and informal procedures and administer the Business Opportunity 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 September 28, 1998.

TRD-9815188
Clark Kent Ervin
Assistant Secretary of State
Office of the Secretary of State
Effective date: October 18, 1998
Proposal publication date: August 21, 1998
For further information, please call: (512) 463–3081

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TITLE 16. ECONOMIC REGULATION

Part I. Railroad Commission of Texas

Chapter 3. Oil and Gas Division

16 TAC §3.28

The Railroad Commission of Texas adopts amendments to §3.28, concerning testing of certain gas wells, without changes to the proposed text as published in the July 31, 1998, issue of the *Texas Register* (23 TexReg 7682). The amendments eliminate testing requirements for non-commingled wells with deliverabilities greater than 100 and less than 250 MCF a day in all types of gas fields with no special rules. Commission rules regarding testing of wells with deliverabilities greater than 250 MCF a day, or in fields with special field rules, remain unchanged.

Currently 816 wells would be exempt from semi-annual testing. The amendments also reduce the regulatory burden on operators of exempted wells without compromising the integrity of Commission records.

The Commission received no comments on the proposal.

The Commission adopts the amendments pursuant to Texas Natural Resources Code §§85.042(b), 85.202(b), 86.041, 86.042(1) which authorize the Commission to prevent waste of oil and gas and to protect correlative rights.

The Texas Natural Resources Code §§86.141, 86.142, 86.143 and 86.144 are affected by the adopted amendments.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 22, 1998.

TRD-9814972
Mary Ross McDonald
Deputy General Counsel
Railroad Commission of Texas
Effective date: October 12, 1998
Proposal publication date: July 31, 1998
For further information, please call: (512) 463–7008

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Part VIII. Texas Racing Commission

Chapter 305. Licenses for Pari-mutuel Racing

Subchapter A. General Provisions

16 TAC §305.4

The Texas Racing Commission adopts an amendment to §305.4, concerning the application site of pari-mutuel licenses. This amendment is adopted without changes to the proposed text as published in the August 14, 1998 issue of the *Texas Register* (23 TexReg 8331). The amendment is adopted to add the option for certain occupational license applicants to file the appropriate application form and related documents by mail to the main commission office in Austin. This will decrease the burden to applicants.

No comments were received regarding the adoption of the proposal.

The amendment is adopted under the Texas Civil Statutes, Article 179e, §3.02, which authorize the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing 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 September 28, 1998.

TRD-9815127
Roselyn Marcus
General Counsel
Texas Racing Commission
Effective date: November 1, 1998
Proposal publication date: August 14, 1998
For further information, please call: (512) 833–6699

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16 TAC §305.7

The Texas Racing Commission adopts an amendment to §305.7, concerning the duration of pari-mutuel licenses. This amendment is adopted without changes to the proposed text as published in the August 14, 1998, issue of the *Texas Register* (23 TexReg 8332). The Texas Racing Act allows licenses to be valid for up to 36 months. This amendment is adopted to implement this provision by providing that certain occupational licenses, upon election by the applicant, may be valid for one, two or three years. This will decrease the burden to applicants and reduce the time of the agency licensing staff.

No comments were received regarding the adoption of the proposal.

The amendment is adopted under the Texas Civil Statutes, Article 179e, §3.02, which authorize the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act; and §7.07, which authorize the Commission to set a time period in which a license will be valid, not to exceed 36 months.

This agency 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 September 28, 1998.

TRD-9815130
Roselyn Marcus
General Counsel
Texas Racing Commission
Effective date: November 1, 1998
Proposal publication date: August 14, 1998
For further information, please call: (512) 833–6699

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Subchapter B. Individual Licenses

Division 1. General Provisions

16 TAC §305.35

The Texas Racing Commission adopts an amendment to §305.35, concerning occupational licensing categories and fees. This amendment is adopted without changes to the proposed text as published in the August 14, 1998, issue of the *Texas Register* (23 TexReg 8333). The amendment as adopted reduces the fees for a one year license and establishes the fees for multi-year licenses which are proposed in the amendment to §305.7.

No comments were received regarding the adoption of the proposal.

The amendment is adopted under the Texas Civil Statutes, Article 179e, §3.02, which authorize the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act; §5.01, which authorizes the commission to prescribe reasonable license fees for each category of license; and §7.02, which authorizes the commission to adopt categories of occupational licenses and to establish the criteria for those licenses.

The proposed amendment implements Texas Civil Statutes, Article 179e.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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

TRD-9815129
Roselyn Marcus
General Counsel
Texas Racing Commission
Effective date: November 1, 1998
Proposal publication date: August 14, 1998
For further information, please call: (512) 833–6699

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Chapter 309. Operation of Racetracks

Subchapter B. Horse Racetracks

Division 4. Operations

16 TAC §309.200

The Texas Racing Commission adopts an amendment to §309.200, concerning stakes and other prepayment races. This amendment is adopted without changes to the proposed text as published in the August 14, 1998, issue of the *Texas Register* (23 TexReg 8333). Since the horsemen's bookkeeper is no longer responsible for the funds received from stakes and other prepayment races, the amendment is adopted to fill the void by providing for the associations to designate the official who will be responsible for these activities.

No comments were received regarding the adoption of the proposal.

The amendment is adopted under the Texas Civil Statutes, Article 179e, §3.02, which authorize the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act; and §6.06, which authorize the Commission to adopt rules on all matters relating to the operation of racetracks.

This agency 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 September 28, 1998.

TRD-9815128
Roselyn Marcus
General Counsel
Texas Racing Commission
Effective date: November 1, 1998
Proposal publication date: August 14, 1998
For further information, please call: (512) 833–6699

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TITLE 30. ENVIRONMENTAL QUALITY

Part I. Texas Natural Resource Conservation Commission

Chapter 213. Edwards Aquifer

The Texas Natural Resource Conservation Commission (commission) adopts amendments to §§213.3-213.10 and new §§213.20-213.28, concerning the Edwards Aquifer Rules. Sections 213.3, 213.4, 213.5, 213.7, 213.8, 213.9, 213.20, 213.21, 213.23, 213.24, 213.26, 216.27, and 213.28 are adopted with changes to the proposed text as published in the March 27, 1998, issue of the *Texas Register* (23 TexReg 3192). Sections 213.6, 213.10, and 213.25 are adopted without changes and will not be republished.

EXPLANATION OF ADOPTED RULE

This chapter regulates certain activities having the potential to adversely affect the water quality of the Edwards Aquifer and hydrologically-connected surface water in order to protect existing and potential beneficial uses of groundwater. The activities addressed are those that pose a threat to water quality in the recharge, transition and contributing zones to the Edwards Aquifer. The effective date of amendments to §213.3-213.10 and new §213.20-213.28 is June 1, 1999.

Subchapter A:

Subchapter A, concerning the Edwards Aquifer in Medina, Bexar, Comal, Kinney, Uvalde, Hays, Travis and Williamson counties applies to all regulated developments within the recharge zone and to certain activities within the transition zone and to point source wastewater discharges in the recharge zone and up to ten miles upstream of the recharge zone within the aquifer's contributory watersheds. Regulated development includes all sites where new construction is to commence.

As a result of comments received on the proposed changes to Subchapter A, revisions have been made to the rule. Rather than using the proposed performance standards for best management practices (BMPs) during construction on the recharge zone to control the quality of contaminated stormwater runoff to hydrologically connected surface streams, the commission adopts applicable technical requirements provided under EPA's NPDES general permits for Storm Water Discharges from Construction Activities (Dated July 6, 1998). This will provide consistency between state and federal stormwater pollution control requirements and avoid unnecessary confusion and expense for the regulated community. Providing consistency with the related federal program has resulted in changes to definitions for "commencement of construction", "temporary BMP", and "permanent BMPs" under §213.3; in changes to the requirements for a site location map under §§ 213.5(b)(2)(C)(v) through (x), and in changes to the requirements for the technical report under §§213.5(b)(4)(A)(iii) and (v) through (vii). Similar changes were also made to §§213.5(b)(4)(B), 213.(b)(4)(B)(ix) through (xii), and 213.5(b)(4)(D)(I) related to temporary best management practices. However, EPA's general permit does not specifically address post development BMPs.

For permanent, i.e., post development, BMPs, the performance standard under §213.5(b)(4)(D)(ii) was changed to a design requirement for the removal of at least 80 percent of the incremental increase in the annual mass loading of total suspended solids to hydrologically connected surface water that is caused by the regulated activity. This is the same standard required for Subchapter B covering regulated activities in the contributing zone. This performance standard provides flexibility to the applicant in choosing the most cost effective BMPs to meet this standard. Both United States Geological Survey (USGS) and the National Urban Runoff Program (NURP) studies indicate a significant pollution potential from post-construction sites.

The commission's rule does not dictate the density of development or the type of permanent BMPs or measures to be used. The 80 percent removal requirement for permanent BMPs is essentially the same standard that has been used historically in the agency's Edwards Aquifer Protection Program through the use of referenced guidance documents, and application forms. This standard has also been adopted by other jurisdictions, e.g., EPA/NOAA in the §6217 Coastal Zone Management Act "g-Measure" guidance, Lower Colorado River Authority, North Carolina, and Florida.

Under §213.5(h), the commission has revised the list of regulated activities that are exempt from the Edwards Aquifer protection plan application requirements to include activities which have little or no potential for long-term water quality impacts. An individual land owner who seeks to construct his/her own single-family residence or associated residential structures on the site in the recharge zone is exempted from the Edwards Aquifer protection plan application requirements under this section (that requires a plan to be submitted and a fee paid), provided that the person does not exceed 20 percent impervious cover on the site. This percentage of impervious cover has been used by local jurisdictions for water quality protection ordinances and is based on such studies as NURP and the Center for Watershed Protection, 1994. Temporary erosion and sedimentation controls are still required to be used if necessary to prevent contaminated stormwater runoff into hydrologically connected surface streams (and no additional permanent BMPs are required). A definition for impervious cover was also added to §213.3 in order to implement this change.

Similarly, under §213.5(b)(4)(D)(ii) the commission has also revised the requirements relating to permanent BMPs and mea-

sures to be used on the Recharge Zone. To encourage lower density development, the rules provide that where a site is used for low density single-family residential development and has 20 percent or less impervious cover, other permanent BMPs are not required. However, a plan is still required to be submitted and approved and must contain the temporary erosion and sedimentation controls to be used. This exemption based upon impervious cover is required to be recorded in the county deed records, with a notice that if the percent impervious cover increases above 20 percent, the exemption of the whole site may no longer apply and the property owner must notify the appropriate regional office of this change. The executive director may waive the requirement for other permanent BMPs for multi-family residential development, schools, or small business sites where 20 percent or less impervious cover is used at the site. The same deed recording requirements are also provided.

The commission also added provisions to clarify whether the new rules apply to activities in progress on the effective date of the rule under §213.4(a)(4). For areas designated as recharge zone or transition zone on official maps prior to the effective date of this rule, and for which this designation did not change on the effective date of this rule, all Edwards Aquifer protection plans submitted to the executive director, on or after the effective date of the rule, will be reviewed under all the provisions of the subchapter in effect on the date the plan is submitted. For areas not designated as recharge zone on official maps prior to the effective date of this rule, regulated activities will be considered to have commenced construction and will not be subject to this subchapter if, on the effective date of the rule, all federal, state, and local approvals or permits required to begin physical construction have been obtained, and if either on-site construction directly related to the development has begun or construction commences within six months of the effective date of the rule. Regulated activities in areas designated as transition zone on official maps prior to the effective date of this rule and designated as recharge zone on the effective date of this rule will be regulated as transition zone activities if, on the effective date of the rule, all federal, state, and local approvals or permits required to begin physical construction have been obtained, and if either on-site construction directly related to the development has begun or construction commences within six months of the effective date of the rule.

The commission has added provisions to avoid state duplication of local water programs that are equal to or more stringent than the commission's rules. In the proposal preamble the commission announced that it had developed a model cooperative agreement to allow for delegation of approval and enforcement authority under the Edwards Aquifer Protection Program to certain local agencies that have sufficient jurisdiction and resources to implement the review, approval, inspection, and enforcement process. Under new §213.4(a)(5) under Subchapter A and §213.21(g) for Subchapter B, the commission has provided the specific criteria for the assumption of the program by a local government. A local governmental entity may review and either approve or deny Edwards Aquifer protection plan applications within its boundaries and monitor and enforce compliance with plans if the local government obtains certification from the executive director. In order to obtain certification, the local government must demonstrate: it has a water quality protection program equal to or more stringent than the rules contained in this chapter, including but not limited to a program that regulates activities covered under this chapter and has performance standards equal to or more protective of water quality; it has adopted ordinances or has other enforceable means sufficient to enforce the program throughout the local governmental entities jurisdiction; and it has adequate resources to implement and enforce the program.

Upon approval of a request for certification under this section, the executive director shall enter into an agreement with the local governmental entity to provide for the terms and conditions of the program assumption, including executive director oversight. Nothing in a certification or agreement shall affect the commission's ability to enforce its water quality protection rules or applicable state law. An agreement under these provisions may not provide for the payment of fees required by this chapter to the local entity; rather, fees shall be paid to the commission for continued oversight and enforcement. Nor shall such agreement provide for partial assumption of the program unless expressly authorized by the commission. Certification shall be for a term not to exceed five years, subject to renewal. Upon written notice, certification may be revoked or suspended by the executive director if the local entity does not meet the terms and conditions of the agreement or fails to meet the criteria for certification. A decision by the executive director under this section is not subject to appeal to the commission.

Proper maintenance of BMPs remains a significant problem for continued the protection of the aquifer. The maintenance of best management practices is paramount to the continued performance and efficiency of any proposed pollution control device. The current record of maintenance for these structures is questionable. During 1994 - 1997, the agency performed 427 inspections at 166 structural stormwater best management practices in south Austin over the Edwards Aquifer recharge zone. A total of 53 percent of the inspections found that best management practices had problems functioning or did not completely function due to maintenance and repair problems. The rules addressed this problem. The commission has clarified language under §213.5(b)(5) for Subchapter A and clarified the responsibility for the maintenance under §213.23(k) for Subchapter B. Specifically, the applicant is responsible for maintaining the BMPs after construction until such time as the maintenance obligation is either assumed in writing by another entity or ownership of the property is transferred to another entity. Such entity shall then be responsible until another assumes obligation in writing or ownership transfers. A copy of the transfer must be filed with the executive director within 30 days of assumption or transfer. This maintenance provision applies to multiple single-family residential developments, multi-family residential developments, and non-residential developments such as commercial, industrial, institutional, schools, and other sites were regulated activities occurred.

Section 213.21(c) provides for areas identified as contributing zone within the transition zone to be subject to both requirements of Subchapter B and to the provisions of Subchapter A related to the transition zone. These areas are identified on Appendix A1 and A2, which illustrate changes to the mapped recharge zone in Bexar County.

Additionally, throughout Subchapter A, ambiguous language is clarified and typographical errors are corrected. Other changes are discussed in the response to comments, such as the lowering of the fee related to requests for exceptions from $500 to $250.

Subchapter B:

Subchapter B concerning the Contributing Zone to the Edwards Aquifer in Medina, Bexar, Comal, Kinney, Uvalde, Hays, Travis and Williamson Counties regulates activities in the contributing zone to the Edwards Aquifer having the potential for polluting surface streams which provide a significant volume of water to the Edwards Aquifer where the streams enter the recharge zone. The area of regulation, including areas that have been revised to be contributing zones within the transition zone is illustrated Figures 1a and 1b.

USGS hydrogeologic studies show that, on average, 80 to 85 percent of the recharge to the aquifer takes place in the stream beds that cross the recharge zone. The regulation of activities that can affect the quality of water flowing into the recharge zone will protect the quality of the groundwater in the Edwards Aquifer, thus protecting the existing and potential uses of these water resources. The new subchapter focuses on the regulation of nonpoint source pollution activities such as stormwater runoff from construction sites and post-construction industrial and residential sites. A regulated activity includes, but is not limited to, the construction or installation of buildings, utility stations, utility lines, underground and aboveground storage tank systems, roads, highways, or railroads.

As a result of comments received on the proposed version of Subchapter B, several changes have been made to the rule. The rules have been changed to apply only to regulated activities disturbing at least five acres, or regulated activities disturbing less than five acres which are part of a larger common plan of development or sale with the potential to disturb cumulatively five or more acres. This avoids regulation of smaller activities not anticipated to have potential, long-term water quality impacts.

Rather than the proposed performance standards for temporary BMPs during construction, the commission has decided to provide for the more flexible technical requirements provided under EPA's NPDES general permits for Storm Water Discharges from Construction Activities (Dated July 6, 1998) during construction on the Contributing Zone. This provides consistency with applicable EPA stormwater pollution control requirements during construction, and will result in no additional costs to the applicant to provide for these controls.

Consistency with applicable EPA technical requirements has also resulted in modifications to §213.20 related to Purpose and §213.21 related to Applicability and Person or Entity Required to Apply. New definitions under §213.22 have also been added for "best management practices", "contributing zone" "transition zone", "EPA National Pollutant Discharge Elimination System general permits for storm water discharges for construction activities (EPA NPDES general permits) and", "NOI" (notice of intent). Changes to the requirements under §213.24 related to Technical Report were made to reflect this shift to the EPA NPDES general stormwater permit requirements, including changes to §§213.24(1), (3), (4), and (5). The site description, controls, maintenance, and inspections requirements for the storm water pollution prevention plan development under the EPA NPDES general permits for storm water discharges may be submitted to fulfill the requirements of paragraphs §213.24 (1) through (5).

The NOI and related Stormwater Pollution Prevention Plan (SWPPP) can be filed as part of the technical report which must be filed with the applicable regional office not later than the date the NOI is filed with the EPA under §213.23(a)(2). The plan must be certified by a registered professional engineer as meeting the applicable technical requirements. Because it has been certified, the plan would be subject to an abbreviated review and approval by the executive director within 15 days of receipt. Under §213.23(e), if the executive director fails within 16 days after receipt of the application to issue a letter approving or denying the application, the application will be deemed to be granted. However under 213.23(f), upon inspection, the executive director may require the applicant to take additional measures if the activities do not conform to an approved plan or the plan did not address all potential sources of pollution as required by the rules.

Under the definition of regulated activity, construction of single-family residences on lots that are larger than five acres, where no more than one single-family residence is located on each lot, are not regulated under the subchapter. These sites pose little or no potential for long-term water quality impacts because of limited construction on a relatively large lot. Under §213.24(11), if a single family residence is part of a common plan of development or sale with the potential to disturb cumulatively five or more acres, an individual land owner who seeks to construct his/her own single-family residence or associated residential structures on the site is exempted from the contributing zone plan application requirements under this section (that requires a plan to be submitted and a fee paid), provided that he/she does not exceed 20 percent impervious cover on the site. Temporary erosion and sedimentation controls are required to be used and no additional permanent BMPs are required. This same exemption from having to submit a plan or pay a fee has been extended to the installation of underground utilities and the installation of underground tanks for the storage of static hydrocarbon and hazardous substance; however temporary erosion and sedimentation controls are required to be used during construction.

Because there is a cross reference to the permanent BMP requirements in Subchapter A under §213.24(5), the same 20 percent or less provisions are available under Subchapter B for low density single-family residential development. A contributing zone plan and a NOI are required to be submitted and approved and temporary erosion and sedimentation controls are required to be used. This exemption is required to be recorded in the county deed records, with a notice that if the percent impervious cover increases above 20 percent or land use changes, the exemption of the whole site may no longer apply and the property owner must notify the appropriate regional office of these changes. Again, because there is a cross reference to the permanent BMP requirements under Subchapter A, the executive director may waive the requirement for other permanent BMPs for multi-family residential development, schools, or small business sites where 20 percent or less impervious cover is used at the site. The same deed recording requirements are provided. A contributing zone plan and a NOI are required to be submitted and approved and temporary erosion and sedimentation controls are required to be used.

The commission also added provisions to clarify the regulation of activities in progress on the effective date of the rule under §213.21(a)(f). Regulated activities will be considered to have commenced construction and will not be subject to this subchapter if, on the effective date of the rule, all federal, state, and local approvals or permits required to begin physical construction have been obtained, and if either on-site construction directly related to the development has begun or

construction commences within six months of the effective date of the rule. Section 213.21(c) provides that areas identified as contributing zone with the transition zone are subject to both the requirements of Subchapter B and to the provisions of Subchapter A related to the transition zone.

Additionally, throughout Subchapter B, ambiguous language was clarified and typographical errors were corrected. Other changes are discussed in the response to comments such as the lowering of the fee related to applications and exceptions from $500 to $250 and reducing the fees related to requests for contributing zone plan approval extension from $500 to $100. Processes and procedures contained within the rules were streamlined to facilitate a new expedited plan review process to allow available resources to be directed to monitoring and inspection of regulated activities covered by this chapter.

These amendments to Subchapter A and new Subchapter B are intended to be proactive to protect public health by preventing the degradation of the Edwards Aquifer and its recharge waters, rather than reactive, responding to pollution after the aquifer has become contaminated. At the same time, through these regulations, the commission seeks to impose only what is reasonably necessary for this purpose. Currently, over 1.7 million people in eleven counties rely upon the aquifer to meet their water supply needs. The Texas Water Development Board estimates that by the year 2000, almost 2.7 million people will reside within the regulated counties (almost a 30 percent increase from 1990). By 2010, more than 3.3 million people will have moved into the area, with their associated residences and businesses. Most of this growth will be concentrated in Bexar, Comal, Hays, Travis and Williamson counties. Many of these people will be living and conducting business over the recharge zone and contributing zone of the Edwards Aquifer.

The potential contamination from urbanization and associated impervious cover has been documented by many researchers. For example: the United States Geological Survey (USGS) study titled "Relation Between Urbanization and Water Quality of Streams in the Austin Area" found that selected streams in the Austin area have higher levels of suspended solids (pollutants) in areas of development. The study determined that concentrations of total suspended solids were much higher at the beginning of a rain event than toward the end of the event. Rain-event-created stormwater runoff washes nonpoint source pollution from developed lands into the downgradient surface waters. The USGS study also shows that the variability of pollution concentrations generally increases with the increase of impervious cover. Therefore, in areas of greater development activities, the average pollution concentration was significantly larger than background (undeveloped) levels. The study noted that impervious cover prevents rain from seeping into the ground and thereby reduces natural soil filtration. As the amounts of impervious cover increases from future developments resulting from the projected population growth, there will be an increase in polluted stormwater runoff into urban streams and a reduction of natural soil filtration, unless some methods to compensate for the loss of natural filtration are used.

These rules also respond to public comment received during hearings held pursuant to Texas Water Code, §26.046. Section 26.046 requires the agency to hold annual public comment hearings to receive evidence from the public on actions the commission should take to protect the Edwards Aquifer from pollution. The agency has responded to these public comments through both programmatic and rule changes. Many of the issues and changes contained in this chapter were initially proposed by the public in three public hearings held in 1994. The executive director analyzed these comments and summarized the agency responses in a report titled *Edwards Aquifer Water Quality Protection Program, DRAFT 1994 Public Comment Report.* The report contained recommended commission actions on the program and was distributed to the public and the subject of two hearings held in 1995 and one held in 1996. The commission proceeded with the first phase of revisions to the rules, which were proposed in the July 16, 1996 *Texas Register*. Two annual public comment hearings with simultaneous hearings on the proposed rules were held in September 1996. The rule and public hearing announcement was published in the July 16, 1996 *Texas Register*. The comment period closed September 16, 1996. Fifty-one commenters provided both general and specific comments on the overall proposal and the program. The Phase I adoption preamble, published in the December 17, 1996 *Texas Register* identified several issues needing additional study, such as contributing zone regulation, performance standards for BMPs, and responsibility for maintenance of permanent BMPs. Work on this rule package (Phase II) began in January 1997 and this second phase of rulemaking addresses topics identified in that adoption preamble. Many of the proposed changes to Subchapter A and new Subchapter B reflect comments received at these hearings requesting an action that was reasonable, necessary, and the most cost-effective way to directly address specific demonstrated water quality threats and to avoid duplication or unnecessary conflict with local regulations.

Finally, the rules were reviewed as mandated by the General Appropriations Act, Article IX, Section 167. This review included an assessment that the reason for the rules continues to exist. Subchapter A is being readopted as required by this Act.

Subchapters A and B rules do not regulate activities in a totally independent manner from other commission rules. They build upon and expand the protection measures found in other existing commission rules under Title 30 of the Texas Administrative Code which govern various permitting, licensing, and spill response programs that address surface and groundwater pollution prevention from storage, transportation, and disposal of waste, hazardous substances, and wastewater. Some of these chapters are cross-referenced within Chapter 213 and some of these chapters have special cross-references to the Edwards Aquifer or are otherwise made applicable to the Edwards by referencing their applicability to a sole source aquifer as designated under the federal Safe Drinking Water Act.

Specific cross-references in the rule relate to on-site wastewater treatment which are contained in Chapter 285 of this title (relating to On-Site Sewage Facilities). These rules contain specific and more stringent provisions for on-site sewerage facilities (including septic tanks) in the recharge zone having the potential to cause pollution of the Edwards Aquifer. While there are specific requirements for organized sewage collection systems contained in the rule, the general design, design plans, and specifications must also comply with Chapter 317 of this title relating to Design Criteria for Sewerage Systems. To insure proper design and installation, underground storage tank systems (USTs) are required to be installed by a person registered under Chapter 334 of this title (relating to Underground and Aboveground Storage Tanks). More stringent requirements for the design, installation, monitoring, and containment of USTs are provided in Chapter 213. The design of wastewater treatment plants must

be in accordance with Chapter 317 of this title and attain the effluent discharge standards contained in Chapter 309 of this title (relating to Effluent Limitations) and Chapter 311 of this title (relating to Watershed Protection) where applicable. Such effluent criteria are the most stringent in the state and require a 97.5 percent pollutant removal. The agency also regulates nonpoint source pollution from certain developments in certain parts of the contributing, recharge and transition zones of the aquifer under Chapter 216 of this title (relating to Water Quality Performance Standards for Urban Development).

Although not specifically referenced in Chapter 213, additional water quality protection from oil and hazardous substances spills is provided by staff in the Regional Offices and through the Emergency Response Center. As specified under Chapter 327 of this title (relating to Spill Prevention and Control), the commission is the state's lead agency for response to all hazardous substance discharges or spills, and discharges or spills of other substances and certain inland oil discharges or spills which may cause pollution of the aquifer. This authority is derived from §26.039 and §§26.261 - 26.268 of the Texas Water Code and through the Texas Hazardous Substances Spill Prevention and Control Act. Pursuant to Texas Water Code, §26.039(b), whenever an accidental discharge or spill occurs, the individual operating or responsible for the activity or facility must notify the agency as soon as possible, but not later than 24 hours after the occurrence. In addition, the Railroad Commission of Texas has authority over discharges or spills from crude oil or natural gas pipelines under their jurisdiction. However, discharges or spills from pipelines transporting refined products such as gasoline, diesel, or other fuel oils fall under the jurisdiction of the commission. As specified under the "State of Texas Oil and Hazardous Substances Spill Contingency Plan," the agency serves as the lead in directing and approving the response for the discharge or spill of a harmful quantity of crude oil (defined as five or more barrels discharged or spilled on the ground or any quantity discharged or spilled into water) during highway transportation. Rail transportation spills are reported to the National Spill Response Center under the U.S. Department of Transportation. In addition, the commission works with the Texas Department of Transportation to address both potential contamination issues surrounding the construction of highways and the placement of hazardous material traps to capture accidental spills resulting from accidents.

FINAL REGULATORY IMPACT ANALYSIS

Section 2001.0225 of the Texas Government Code requires a state agency to prepare a regulatory analysis of a major environmental rule in certain circumstances. The regulatory analysis must be prepared where the result of the adoption of the rule is to: exceed a standard set by federal law, unless the rule is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or adopt a rule solely under the general powers of the agency instead of under a specific state law.

As discussed more fully below, the commission concludes that the regulatory analysis requirement does not apply to this rulemaking because it accomplishes none of those four results. State law specifically provides for the implementation and funding of the Edwards Aquifer protection program, as well as its periodic review and revision. These rules are adopted under the legal authority, among others, of Texas Water Code §26.046, which charges the commission to protect the Edwards Aquifer from pollution. Moreover, the statute specifically references the commission's rulemaking for the program. This proposal does not exceed a standard set by federal law, nor does it exceed a requirement of a delegation agreement or contract between the state and the federal government.

The commission's efforts to protect the Edwards Aquifer from pollution, as embodied in Title 30, Chapter 213 of the Texas Administrative Code and subject to amendment by this rulemaking, derive from the specific state law both of §26.046 mentioned above and of §26.0461 of the Texas Water Code. These statutory provisions directly and solely apply to the Edwards Aquifer and direct the commission to undertake protection of the aquifer.

By way of background, §26.121 (a) (2) of the Texas Water Code prohibits certain discharges into or adjacent to water in the state except as authorized by the commission under a water pollution and abatement plan. The use of such plans in the protection of the Edwards Aquifer is recognized in §26.0461 of the Texas Water Code, which provides for a fee to be assessed for the review of and action on these plans. Section 26.046 of the Code further requires the commission to hold an annual hearing to receive evidence on actions the commission should take to protect the Edwards Aquifer. With regard to the geographic scope of the regulatory program, §26.046(a) defers to the commission's Edwards Aquifer rules for the geographic definition of the aquifer and by reference to the most recent rules of the commission for the protection of the quality of the aquifer.

In accordance with §26.046 of the Texas Water Code, the commission has held annual hearings to receive public comment on how the Edwards Aquifer water quality program and rules should be amended to better protect the aquifer. In response to comments received during the 1994 hearings, the commission prepared a report of the comments received at the hearings and the responses to these comments. Among these comments were suggestions to expand the scope of the program into the contributing zone of the aquifer and to provide performance standards for best management practices. In the report, the commission determined to approach rulemaking in two phases. The first phase, completed in 1996, provided additional protection to surface streams in the Recharge Zone that recharge the aquifer. It also strengthened requirements relating to design, installation, and maintenance of Underground Storage Tanks. The second phase, which culminated in the present rule, involved additional hearings on and technical evaluation of recommended performance standards and the geographic scope of the regulatory program. Following the completion of these efforts, the commission proposed this rule, thereby effectuating the intent of §26.046 of the Texas Water Code.

With this background in mind, the commission next demonstrates how each of the four circumstances under which a regulatory analysis is required does not apply to this rulemaking.

Exceedance of a standard set by federal law

The requirements of this rule, which seek to protect the quality of potable underground water, relate to the Edwards Aquifer in certain counties in Central Texas. There are no federal law standards relating to or applicable to the protection of the Edwards Aquifer, including by way of example regulations concerning construction activities. Accordingly, there are no

applicable standards set by federal law that could be exceeded by this rule.

The commission does recognize the Sole Source Aquifer Program administrated by the Environmental Protection Agency and its prohibition against the use of federal funds for projects that may contaminate sole source aquifers (see §1427 Safe Water Drinking Act). The commission notes, however, that there are no federal regulations that set technical standards for such projects.

The federal Clean Water Act also does not set standards applicable to the subject matter of this rulemaking. The Region 6 Environmental Protection Agency (EPA) NPDES general permit for storm water discharges from construction activities in Region 6, issued in compliance with the Clean Water Act (33 U.S.C. 1251 et. seq.), authorizes the discharge of pollutants to waters of the United States in accordance with the conditions and requirements set forth in the general permit. The Clean Water Act and the EPA general permit are surface water quality measures; these rules are implemented to protect groundwater.

Exceedance of an express requirement of state law

As more fully illustrated above, the requirements of this rule seek to carry out the commission's statutory responsibility to protect the quality of the aquifer pursuant to §§26.046 and 26.0461 of the Texas Water Code and in accordance with §26.011 (The commission has the powers and duties specifically prescribed by this chapter and all other powers necessary or convenient to carry out its responsibilities). In this case, the law's requirement is that the commission act to achieve a result, the protection of the quality of potable underground water, not that it act in a particular way. By seeking only to achieve the directed result the rule seeks to comply with the relevant specific state law, and not to exceed it.

Exceedance of a requirement of a delegation agreement

The commission is not a party to a delegation agreement with the federal government concerning a state and federal program that would be applicable to requirements set forth in the rule. Accordingly, there are no delegation agreement requirements that could be exceeded by this rule. The commission has entered into a memorandum of agreement with EPA concerning the National Pollutant Discharge Elimination System (NPDES). As mentioned above, the NPDES program does not directly regulate effects on groundwater. Further, the NPDES stormwater permit is effective only for the construction phase of a project.

The commission does note that persons subject to this rule, at their option, may elect to document compliance with some of the rule's requirements through the use of materials that have been filed or are required in connection with a NPDES general permit. This optional provision, however, does not relate to any substantive design or performance requirements, and does not exceed any parallel, substantive federal requirement.

Adoption of a rule solely under the agency's general powers

As more fully illustrated above, the commission has adopted these rules to protect the Edwards Aquifer pursuant to and in furtherance of its obligations under §§26.046 and 26.0461 of the Texas Water Code. Sections 26.046 and 26.0461, as the specific state law relating to the protection of the Edwards Aquifer, incorporates the commission's existing Edwards Aquifer rules, sets out the framework for identification of actions that may be taken by the commission to protect the aquifer, establishes fees for the Edwards Aquifer program, and references the commission's utilization of Edwards Aquifer protection plans and related water quality protection structural projects.

The commission, in the present rulemaking, thus acts to continue its efforts under the specific state law of §26.046 and §26.0461 of the Texas Water Code and thus does not adopt the rule solely under the commission's general powers.

TAKINGS IMPACT ASSESSMENT

Exception under Texas Government Code § 2007.003 (b)(13)

The Private Real Property Rights Preservation Act does not apply to this rule because it is a governmental action taken in response to a real and substantial threat to public health and safety, which is designed to significantly advance the health and safety purpose and which does not impose a greater burden than is necessary to achieve that purpose. (see Texas Government Code §2007.003(b)(13)).

The Edwards Aquifer is the sole or primary source of drinking water for over 1.7 million people. Degradation to the quality of the water supply in the Edwards Aquifer caused by activities conducted in the contributing zone and on the recharge and transition zones presents a real and substantial threat to public health and safety. The Edwards Aquifer contributing zone is the area generally west or north of the recharge zone containing the streams and rivers that arise in topographically higher areas and flow downstream to eventually cross the aquifer's recharge zone.

The commission believes there is credible scientific evidence that increased urbanization in the contributing zone will result in increased loading of pollutants in receiving streams, which in turn will threaten the quality of water in the Edwards Aquifer.

Based upon studies of actual and projected population growth for the areas included in the Edwards Aquifer recharge, transition, and contributing zones, a population increase of almost 30 percent will occur between 1990 and 2000. The population is projected to increase to approximately 3.3 million people by 2010. The United States Geological Survey (USGS) study titled "Relation Between Urbanization and Water Quality of Streams in the Austin Area" found that selected streams in the Austin area have higher levels of suspended solids (pollutants) in areas of development. The study determined that concentrations of total suspended solids were much higher at the beginning of a rain event than toward the end of the event. Rain event created stormwater runoff washes nonpoint source pollution from developed lands into the downgradient surface waters. The USGS study also shows that the variability of pollution concentrations generally increases with the increase of impervious cover. Therefore, in areas of greater development activities, the average pollution concentration was significantly larger than background (undeveloped) levels. The study noted that impervious cover prevents rain from seeping into the ground and thereby reduces natural soil filtration. As the amounts of impervious cover increases from future developments resulting from the needs of the projected population growth, there will be an increase in polluted stormwater runoff into urban streams and a reduction of natural soil filtration. Unless some methods to compensate for the loss of natural filtration is required, an adverse affect to human health and safety will result.

Similarly, a study by the National Urban Runoff Program (NURP) compared water quality measurements among selected watersheds with different levels of urban and suburban develop-

ment. The study concluded that increasing levels of development cause greater amounts of run off with increased loading of pollutants in receiving streams.

These regulations are necessary to carry out the statutory authority and responsibility of the commission to protect human health and the environment and otherwise control water quality. The rules impose no greater burden than is necessary to achieve the health and safety purpose by providing flexibility to the applicant to choose the methods to be used to meet specific water quality performance standards. For example, rather than imposing performance standards for Best Management Practices (BMPs) on applicants, the commission is adopting the more flexible technical requirements provided under EPA's general permit for storm water discharges from construction activities during construction. In addition, the design standard identified in the rule represents a minimum standard necessary to protect the Edwards Aquifer. The applicant may achieve this minimum standard by choosing from several BMPs which vary in cost of implementation. This minimum design standard in combination with the flexibility afforded applicants in selecting BMPs, imposes no greater burden than is necessary to accomplish the protection of the aquifer.

Notwithstanding the claimed exception, 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.

I. Specific Purpose of the proposed rule:

The specific purpose of the rule is to regulate activities having the potential for polluting the Edwards Aquifer and hydrologically connected surface water to protect existing and potential uses of groundwater and maintain Texas Surface Water Quality Standards. The amendments to Subchapter A are intended to strengthen the current rule, including the addition of water quality performance standards for stormwater leaving a regulated activity, specific requirements for temporary and permanent BMPs and measures, and assigned responsibility for the maintenance of permanent BMPs.

The specific purpose of new Subchapter B is to regulate construction-related and post-construction activities having the potential for contributing pollution to surface streams that enter the Edwards Aquifer recharge zone. To achieve that goal, the rule establishes a contributing zone which is located upstream (upgradient topographically and generally north and northwest of the recharge zone where runoff from precipitation flows downgradient to the recharge zone of the Edwards Aquifer in the counties or parts of counties currently subject to Chapter 213). Temporary and permanent BMPs and measures must be implemented at larger developments to control the discharge of pollution from regulated activities during and after the completion of construction and water quality performance standards for stormwater leaving a regulated activity must be met. Further, the rule requires the submission of a contributing zone plan before commencement of new or additional regulated activities. By regulating activities in the contributing zone, the rule will protect existing and potential uses of groundwater in the Edwards Aquifer and maintain Texas Surface Water Quality Standards consistent with Texas Water Code, §§26.011, 26.046, 26.0461, and 26.121. This Chapter specifically applies to the Edwards Aquifer and is not intended to be applied to any other aquifers in the state of Texas.

(A) How the proposed action substantially advances its stated purpose:

The proposed rules will significantly advance the stated purpose of protecting existing and potential uses of groundwater and maintain Texas Surface Water Quality Standards by regulating activities in the recharge zone and the contributing zone and setting performance standards to achieve water quality protection. These regulations will reduce the amount of nonpoint source pollution such as stormwater runoff from construction sites which flows into the Edwards Aquifer.

(B) Burdens imposed on private real property and benefits to society

In the Recharge Zone, these rules will require applicants to submit an Edwards Aquifer protection plan which includes a water pollution abatement plan, a geologic assessment, and a technical report which describes the nature of the regulated activity and which describes temporary and permanent BMPs and measures which prevent pollution of surface water, groundwater, or stormwater and which will be used during and after construction is completed. In the Contributing Zone, these rules will require applicants to submit a Contributing Zone plan which includes a technical report which describes the nature of the regulated activity and which describes temporary and permanent BMPs and measures which prevent pollution of surface water or stormwater and which will be used during and after construction is completed. Once executive director approval is obtained the protection plan must be implemented if the project goes forward.

The benefit to society resulting from the proposed use of private real property will be the reduction of nonpoint source pollution such as stormwater runoff from construction sites which will in turn reduce the amount of pollutants which reach the Edwards Aquifer and protect existing and potential uses of groundwater.

II. Does the proposed action constitute a taking:

The Private Real Property Rights Preservation Act defines a "taking" as a government action which affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States constitution. The commission has reviewed the potential affect of these rules and has determined that the regulations will not result in a constitutional taking as defined by state and federal takings case law.

The Private Real Property Rights Preservation Act also defines as a "taking" a governmental action which affects an owner's private real property in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action, and is the producing cause of a reduction of at least 25 percent in the market value of the affected private real property. Based on the commission's experience with the application of the existing rules requiring best management practices in the Edwards Aquifer recharge zone, the agency does not believe that the requirements imposed under the proposed rules for the contributing zone can reasonably be anticipated to effect a reduction in fair market value of properties in this area in excess of 25 percent. Many comments on the proposed rules spoke to the issue of a Ataking@ of property as a result of the imposition of performance based standards for control of pollution from

developed areas. No comments were received, however, which provided examples or evidence to support the contention that the proposed rules could, under any reasonable circumstance, result in a 25 percent reduction in fair market value.

The commission has acknowledged that these rules, in order to reduce the threat of pollution of the aquifer from developed areas in the contributing zone, will impose costs on property owners who elect to develop properties in ways to the extent that pose the greatest threat of water quality degradation. The commission also acknowledges that the potential imposition of these additional costs may, to some degree, be reflected in the perceptions of market value of properties in the contributing zone. Even if additional costs imposed under these rules were assumed to directly reflect market value, however, no information available to the commission, or presented in the response to the proposed rules, could be interpreted to mean that these additional requirements would increase costs of development by 25 percent. In fact, most examples documented by both staff and commenters cited cost increases ranging from 2 percent to less than 10 percent of anticipated development costs. It must also be recognized that these cost increases are for proposed projects, rather than changes in market value of the undeveloped property.

III. Description of reasonable alternatives that could accomplish the same purpose and discussion of whether these alternatives would further the specific purpose and whether these alternatives would result in a taking.

Alternative 1: *Impose impervious cover limits* - Some jurisdictions limit the amount of impervious cover developers are allowed to construct on their property in order to protect water quality. Impervious cover has the effect of increasing the volume and rate of flow of runoff from developed areas and thus increases the potential of these areas to degrade the quality of adjacent water resources.

This alternative would accomplish the specific purpose of the rule because it has the effect of reducing the intensity of development and the resultant adverse effects of development. It is not clear whether such an approach would result in a taking, such a determination would require fact specific analysis. However, the commission believes that this approach does not have the same degree of flexibility as the proposed rules, which allow property owners to choose a variety of different methods to achieve a design standard. Therefore, the commission believes that such an approach would be more burdensome for property owners.

Alternative 2: *Adopt Water Quality-Based Management Strategies* - Programs such as TMDLs conduct analyses necessary to determine the amount of pollution a water body can receive without becoming impaired. The allowable loading of pollutants is allocated among the sources in the watershed and management measures are implemented for each source as necessary to meet the pollutant load allocation. This strategy requires a significant commitment of time and resources to develop the science on which to base the load allocation and other management decisions.

This alternative would accomplish the specific purpose of the rule by identifying the maximum allowable loading of pollutants and identifying appropriate management measures for each source which threatens the aquifer. This approach would probably not result in a taking as that term is defined by the §2007.043 of the Texas Government Code because the prescribed management measures would not result in a constitutional taking and would not result in a 25 percent reduction of the fair market value of property. However, this approach would likely result in a more prescriptive requirements for landowners. Therefore, the commission believes that this approach would be more burdensome for property owners. In addition, this approach contemplates implementing regulations after a water source has become threatened or impaired, in contrast, these rules seek to protect the Edwards Aquifer before the aquifer is threatened or impaired. In addition this approach requires a significant commitment of time and resources to accomplish the stated purpose of the proposed rules.

Alternative 3: *MEP-Based Approach* - Programs such as the NPDES municipal storm water permitting program require regulated activities to provide management measures which reduce the discharge of pollutants in storm water to the maximum extent practicable (MEP). MEP is established on a case-by-case basis through a negotiated process. This strategy requires significant resources to negotiate the requirements for each project, may result in different provisions for each project, and has an unknown benefit for water quality protection. Therefore, this approach may not accomplish the specified purpose of the proposed rules. This approach would not result in a taking because the management measures implemented to reduce pollutants to the maximum extent practicable would not result in a taking as that term is defined in §2007.043 of the Texas Government Code.

Alternative 4: *Maintain Background Conditions* - This approach requires applicants to implement measures necessary to ensure that post-development conditions are not different from pre-development conditions in a way that adversely affects water quality. This strategy requires resources necessary to establish background conditions, the effect of development activities, and the effectiveness of control strategies. This strategy does not account for the assimilative capacity of the receiving waters. This approach would not result in a taking because the measures required to ensure the maintenance of background conditions would not result in a taking as defined in § 2007.043 of the Texas Government Code.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The executive director has reviewed the proposed rulemaking and determined that it is not an action that may adversely affect a coastal natural resource area that is subject to the Coastal Management Program (CMP). The proposed rule does not govern any of the actions that are within the designated coastal zone management area or otherwise specifically identified under the Texas Coastal Management Act or related rules of the Coastal Coordination Council that must be subject to the goals and policies of the CMP, pursuant to 31 TAC §505.11.

HEARINGS AND COMMENTS

The proposed rule was published in the March 27, 1998 issue of the *Texas Register* (23 TexReg 3192) and Figures appeared in the same issue (23 TexReg 3297). Public hearings on this proposal and rules review were held in Wimberley on Monday, May 4, 1998, in Austin on Tuesday, May 5, 1998, and in San Antonio on Wednesday, May 6, 1998. In conjunction with these hearings, the commission held its annual public hearing (under §26.046 of the Texas Water Code) to receive evidence from the public on actions the commission should take to protect the

Edwards Aquifer from pollution. The comment period closed on June 11, 1998.

A total of 328 commentors provided both general and specific comments on the overall proposal. Of these, 141 indicated that they were generally in favor of the proposal, 27 indicated that they generally supported the proposal but suggested changes, 28 provided general and specific comments on overall proposal, 23 expressed no support or opposition but suggested changes, 91 indicated that they were opposed to the proposal, 14 were opposed to specific areas of the proposal, and 4 wanted to expand the comment period. The following commented on the rule: U. S. Representative Henry Bonilla; State Representatives Leo Avarado, Jr., Frank J. Corte, Jr., Christine Hernandez, Mike Krusee, John A. Longoria, Ruth Jones McClendon, Robert R. Puente, Arthur Renya, Bill Sielbert, John H. Shields, Carlos Uresti, and Leticia Van de Putte; Office of Public Interest Counsel of the Texas Natural Resource Conservation Commission (OPIC); Texas Department of Transportation (TxDOT); Texas Department of Transportation-Austin District (TxDOT-A); Texas Department of Transportation-San Antonio District (TxDOT-SA); Hays County Commissioners Court (Hays County); Hays County Commissioner William "Bill" Burnett, Precinct 3 (Commissioner Burnett); Hays County Commissioner Russ Molenaar, Precinct 4 (Commissioner Molenaar); Kendall County Commissioner John C. Knight, Precinct 1 (Commissioner Knight); Travis County, Transportation and Natural Resources Department (Travis County); Barton Springs/Edwards Aquifer Conservation District (BS/EACD); Edwards Aquifer Authority (EAA); Lower Colorado River Authority (LCRA); United States Department of the Interior, Fish and Wildlife Service (USFWS); City of Austin, Watershed Protection Department (COA); City Public Service of San Antonio (CPS); City of San Antonio-City Arborist (SACA); San Antonio Water System (SAWS); Diana Schwind, Alderman, Bulverde East (BuE); Bob Heronymus, Mayor Bulverde West (BW); AGRA Earth & Environmental (AGRA); Alamo Sierra Club (ASC); Alfred Stanley and Associates (ASA); American Institute of Professional Geologists (AIPG); Aquifer Protection Association (APA); Associated General Contractors of Texas (AGCT); Blake Magee Company (BMC); British American Development Corporation (BADC); Brown Engineering (BE); Bury and Pitmann (BP); Canyon Properties (CP); Consulting Engineers Council of Texas (CECT); Collie Enterprises (CE); David T. Smith, P.E. (Smith); David Ham & Associates (DHA); Dwight C. Russell Associates, Inc. (DRA); Ethel Barnes Association (EBA); Extra Environmental, Inc. (EE); Forest Surveying and Mapping Co. (FSMC); Glenrose Engineering (GE); GEOS Consulting (GEOS); George Veni and Associates (GVA); Gray * Jansing & Associates, Inc. (GJA); Greater San Antonio Chamber of Commerce (GSACC); Greater Dripping Springs Community Planning Partnership (GDSCPP); HDR Engineering, Inc. (HDR); Jalasham Enterprises (JE); James W. Sansom, Jr. (JWS); Jim McCrocklin and Associates Real Estate (JMARE); Koontz/McCombs, L.L.C. (KM); League of Women Voters of Texas (LWV); League of Women Voters of San Antonio (LWVSA); Leon Springs Utility Company (LSUC); McGinnis, Lochridge, and Kilgore (MLK); MEC – Murfee Engineering Company (MEC); Milburn Homes (MH); Oak Hill Business and Professional Association (OHBPA); Parkway Management Corporation (PMC); Pape-Dawson Engineers, Inc. (PDE); Pence Properties (PP); Perron & Company (PC); Properties of the Southwest (PS); Real Estate Council of Austin (RECA); Real Estate Council of San Antonio (RECSA); R. L. Masters (RLM); Robert Bluntzer (RB); San Antonio Board of Realtors, Inc. (SABR); San Antonio Open Space Advisory Board (SAOSAB); Save Our Springs Alliance (SOS); Small, Craig & Werkenthin (SCW); TEW Associates/Architects (TEW); Texas Association of Professional Geologists (TAPG); Texas Capitol Area Builders Association (TxCABA); Texas Center for Policy Studies (TCPS); Texas Clean Water Action (TCWA); TK Consulting Engineers (TK); TU Services (TU); Ultramar Diamond Shamrock Corporation (UDSC); Vickrey and Associates, Inc. (VA); W&G Partnership (WGP); Wimberley Water Supply Corporation (WWSC); Winkley Engineering, Inc. (WE); and Woodcreek Property Owners Association (WPOA). A number of private individuals also commented on the proposed rules.

GENERAL COMMENTS

U. S. Representative Henry Bonilla provided a copy of a letter from the San Antonio Board of Realtors expressing concerns over the proposed changes and requested that every consideration be given to their concerns.

The commission responds that it appreciates such comments and considers all comments and suggestions either in oral or written form received during the comment period.

Representative Corte commented that in the Austin newspaper, there was an article stating the proposed rules were developed in response to requests from environmental groups and the cities of San Antonio and Austin. He continued that he is alarmed when a state agency is pushed into action, or inaction, by special interests.

The commission responds that the rules were proposed to respond to the impact on water quality that is expected from the rapid urbanization over the recharge and the contributing zones of the Edwards Aquifer. The proposed rule seeks to protect the Edwards Aquifer by regulating certain activities having the potential for polluting the aquifer and hydrologically-connected surface water in the recharge and contributing zones of the aquifer. These proposed rules are intended to be proactive to protect public health by preventing the degradation of the aquifer and its recharge waters, rather than reactive, responding to pollution after the aquifer has become contaminated.

The commission is required by statute (Texas Water Code, §26.046) to hold annual public hearings to receive evidence from the public on action the commission should take to protect the Edwards Aquifer from pollution. For many years, the agency has received comment that it should extend its regulations into the contributing zone. The recent jump in actual and projected growth over the recharge and contributing zones (almost 30 percent increase from 1990 to 2000 and 3.3 million people projected to live in the regulated counties by 2010) prompted the commission to reevaluate this recommended action.

Based upon its findings, the commission proposed rules for the contributing zone to address the potential threat to the Edwards Aquifer water quality. With the projected influx of urbanization and without proper water quality controls, the quality of stormwater runoff which directly enters the aquifer water will decrease. Stormwater runoff from parking lots, highways, roof tops, yards, and sidewalks and other impervious surfaces will contain increased concentrations of suspended solids, pesticides, bacteria, petroleum residues (oil and grease), fertilizers, animal waste and metals.

BS/EACD commented that it would like to work with the commission to help reduce the impacts of proposed disturbance activities without inhibiting local economic growth. The BS/

EACD commented that it can provide tools and assistance to facilitate the implementation of the Edwards Rules and other aquifer-protection programs.

The commission responds that it would like to work with the BS/EACD to further these goals and has directed the executive director to further explore this issue with the district.

LCRA stated that they view the proposed rules as being a responsible and moderate approach to the issues posed by increased development. Three components of the proposed rules are particularly important in providing protection for the aquifer in the future: extending protection to the contributing zone; establishing a water quality performance standard for runoff; and limiting the rate of runoff from new development.

The commission agrees with the comments and have adopted related rules accordingly.

Travis County stated that it supports the continued public review process associated with the Edwards Aquifer Rules and favors programmatic and rulemaking responses to reasonable, necessary and cost-effective means of addressing specific, demonstrated water quality threats. Travis County further commented that this support is predicated upon the assumption that sufficient notice of the impending rule changes was provided to both public and private sectors of the affected constituency.

The commission agrees with this comment and in response points out that this rule has been discussed in the public forum since 1994. As required by statute, the commission is required to hold annual public hearings. Three hearings were held in 1994. The comments received at these hearings were summarized in a report *Edwards Aquifer Water Quality Protection Program, DRAFT 1994 Public Comment Report.* The availability of the report was announced in the Texas Register with the Public Comment Opportunity and Hearing announcement for the 1995 hearings. News releases of these events were also provided to the local media. Copies were distributed from the Field Offices, the Edwards Underground Water District, and on the agency's web site. As part of a 60 day comment period, three hearings were held on this document which outlined the phased approach the agency intended to take to upgrade the Edwards Aquifer Protection Program and on the recommendations for future rulemaking contained within the report. The two comment hearings on the Phase I proposed rules along with annual public comment hearing were held September 4 and 10, 1996. Fifty-one commenters provided both general and specific comments on the overall proposal and on the program during the 60 day comment period. The Chapter 213 adoption preamble dated December 17, 1996 *Texas Register* (21 TexReg 12125) identified several issues needing additional study under Phase II of the rules for the program, such as contributing zone regulation, performance standards for BMPs, and responsibility for maintenance of permanent BMPs. The agency approved work on the second phase of the Edwards Aquifer Rules on January 30, 1997. This rulemaking has been mentioned at the monthly agency regulatory forum. This project has also been summarized in the agency's rule log (available on the agency Internet web site) with a telephone number to contact for more information. Public hearings on Phase II proposal, which included the annual public hearing, held May 4, 5, and 6, 1998. During the 76 day comment period, the agency received comments from 328 individuals, local governments, state agencies, elected officials, developers, and consultants. On September 4, 1998, a letter was sent to all commentors for which the agency had an address which provided follow-up on the status of the rule, when the rule would appear at commission agenda, and how to obtain a copy of the draft rule to review–either from the local Field Operations Office or from the agency web site.

A commenter living in Comal County expressed no objection to measures taken to abate pollution over the Edwards Aquifer Recharge Zone, parts of which are located in Comal County.

The commission responds that it is appreciative of support by private citizens of measures necessary to protect water quality.

TCPS commented that the rules must acknowledge the relationship between water quality and water quantity. Thus, while the quality of the water as measured by TSS and other parameters should be protected, stream base flow and aquifer recharge volume should also be maintained. Otherwise, pollutants will become concentrated in the aquifer.

The commission agrees with the comment. Although the regulation of ground water quantity is beyond the jurisdiction of the agency, the commission will consider the impacts to groundwater when it reviews and takes action as a surface water right application pursuant to Texas Water Code §11.134. The commission will also work cooperatively with groundwater districts and authorities to address the issue raised by the commentor.

A private individual commented that he lives out at Cypress Creek, and all the pollution that they have found does not just come from the creek, but from what happens out from the creek and runs into it; thus, it has to be addressed in a general rather than a specific way.

The commission agrees with the comment and responds that the rules address the stormwater runoff from regulated activities beyond the creek boundaries.

Two individuals commented that they believe that construction over any part of the aquifer should be stopped. Before building permits are approved to build homes, businesses etc., a detailed impact study should be done.

The commission does not agree with this comment. It is unnecessary to halt construction in order to protect water quality. Rather, those rules set forth the conditions under which construction may proceed while still providing protection to water quality. The purpose of the proposed new Subchapter B is to regulate construction-related and post-construction activities having the potential for contributing pollution to surface streams that enter the Edwards Aquifer recharge zone. To achieve that goal, the rule establishes a contributing zone which is located upstream (upgradient topographically and generally north and northwest of the recharge zone where runoff from precipitation flows downgradient to the recharge zone of the Edwards Aquifer in the counties or parts of counties subject to Chapter 213). Temporary and permanent best management practices (BMPs) and measures must be implemented to control the discharge of pollution from regulated activities during and after the completion of construction and technical standards for stormwater leaving a regulated activity must be met. Further, the rule requires the submission of a contributing zone plan prior to commencement of new or additional regulated activities. The plan must be approved by the executive director before such activities may commence. By regulating activities in the contributing zone, the rule will protect existing and potential uses of groundwater in the Edwards Aquifer and maintain Texas

Surface Water Quality Standards consistent with Texas Water Code, §§26.011, 26.046, 26.0461, and 26.121.

Two individuals commented that the Edwards Rules need to be strengthened.

The commission responds that the rules are based upon comments, studies, data and other information indicating where the agency can provide better protection of the Edwards Aquifer.

MEC commented that the proposed rules appear to be an attempt by the commission to achieve the previous goal of attempting to designate the Barton Springs and Barton Creek as an Outstanding National Resource Waters (ONRW). An ONRW designation would have a severe economic impact on new development and would require costly retrofit to existing development.

The commission responds that these rules do not establish an ONRW. The effect of such a designation would be a prohibition of any new or increased discharges to Barton Creek. There is no such prohibition in the rules. Rather, the rules provide for the use of BMPs meeting a certain pollution removal efficiency standard. In addition, the scope of the rules is to regulate new activities having the potential for polluting the Edwards Aquifer over all the regulated counties, and is not related to a particular watershed or the ONRW program, a surface water program under the Clean Water Act. Currently, over 1.7 million people in eleven counties rely upon the aquifer to meet their water supply needs. The rules are intended to be proactive to protect public health by preventing the degradation of the Edwards Aquifer and its recharge waters, rather than reactive, responding to pollution after the aquifer has become contaminated. At the same time, through its regulations, the agency seeks to impose only what is reasonably necessary for this purpose. The previous rules did not address potentially contaminating activities from urbanization in the contributing zone, did not provide for design standards for best management practices and measures to prevent pollution that allows for certainty for development, nor did they provide for assignment of responsibility for the maintenance of permanent best management practices. The new rules address these issues by using the requirements from the National Pollutant Discharge Elimination System (NPDES) general permit for storm water discharge during construction, providing a post-construction total suspended solids (TSS) design standard, and providing for the ongoing maintenance of best management practices during and after construction.

An individual commented that if wells are being clogged from siltation, then he suggests a program that promotes the harvesting of cedar trees and planting grasses rather than more regulation.

The commission encourages the use of measures with demonstrated water quality protection benefits. However, brush cleaning and vegetative buffer zones are not specifically mandated by these rules. Rather, they may be options used to meet required performance standards. The commission further clarifies that the clearing of trees (cedar) and brush on sites used for agricultural activities are not included in the definition of a regulated activity.

An individual commented that although he agrees with the need to protect the aquifer, he believes the language of the rule is tumultuous and indeterminate and written in a way only lawyers understand.

The commission has attempted to promulgate rules which are clear and easy to understand; however, some of the rule language is, by necessity, technical in nature.

An individual commented that state law gives the highest priority of use to the domestic user; however, this is not respected in the current law, which makes it unconstitutional. Thus, the state law should be revised so that domestic use is once again the top priority, with irrigation, industry and finally recreation. He commented that the commission should emphasize the recharge of the Edwards Aquifer which seems much better than the negative attitude of a limited resource that some people apparently believe cannot be enhanced. The BMPs suggested at Seco Creek strongly suggested a more positive attitude. More recharge can also be achieved by altering the course of streams to the more porous and permeable zones of the Edwards Aquifer. Also, the major source of leakage and loss of pressure is through openings in the crust known as springs, and the most prolific is Comal Springs. This uncontrollable leakage needs to be controlled so that a constant volume of water could flow to the river interests downstream.

The commission responds that the comments are unrelated to the content or format of the rule proposal. The comments address water quantity issues and the management of the water quantity of the Edwards Aquifer which are not within the purview or jurisdiction of the commission. Further, the comments do not address water quality issues related to the agency's Edwards Aquifer Protection Program or issues in the proposed rules.

An individual commented that land granted under a Sovereign retains the laws of the Sovereign regarding certain rights, and no act of legislature can change this or alter this to satisfy anyone. Research shows that a lot of the property in the aquifer contributing zones and the aquifer itself are in Mexican land grants. The SOS Ordinance is mild, compared to the Law of the Sovereign that applies. If these rules are applied to all of the property which is under consideration, everyone will have ample water.

The commission responds that the laws of Texas apply in this matter. The commission has the authority, under Texas Water Code §5.103, to promulgate rules necessary for the exercise of its jurisdiction and powers provided by the Code and other laws of Texas, and §5.105 provides that the commission shall establish and approve all general policy of the commission. Section 26.011 of the Code provides that the commission shall establish the level of quality to be maintained in, and shall control the quality of, the water in the state, including groundwater.

The Edwards Aquifer is the sole or primary source of drinking water for over 1.7 million people. Degradation to the quality of the water supply in the Edwards Aquifer caused by activities conducted in the contributing zone and on the recharge and transition zones presents a real and substantial threat to public health and safety. The proposed rules will significantly advance the health and safety purpose by regulating activities in the contributing zone and technical standards to achieve water quality protection.

The LCRA commended the commission for proposing updated rules which provide enhanced protection for this valuable resource and that the commission is to be commended for moving forward on this issue. LCRA continued that the high level of vulnerability of the aquifer, combined with the fact that well over one million Texans rely on it for their drinking water, makes it im-

perative that the water quality of this resource be provided ample protection. LCRA states that they have been implementing water quality programs incorporating many of the components of the proposed Edwards Aquifer rules since 1990 and that the draft rules have generally been well thought out and represent a responsible approach to the issue. LCRA concluded that addressing the potential threat posed by future development of the recharge and contributing zones at this time is a farsighted step.

The commission is appreciative of supporting comments and will work with local entities such as LCRA to provide the most cost effective means of protecting the state's water resources.

EAA commended the commission for proposing revisions to the Edwards Aquifer Rules and believes many of the proposed amendments to Subchapter A will strengthen and clarify the rules. USFWS commented that overall, the proposed changes to the Edwards Rules to include portions of the contributing zone and performance standards for best management practices are a vast improvement over the former rules. BS/EACD commented that the proposed rules include some improvements, and it is also commendable that the proposed amendments recognize the need to avoid sealing sensitive features in order to maintain recharge to the Edwards Aquifer.

State Representatives Robert R. Puente, Leo Avarado, Jr., Christine Hernandez, John A. Longoria, Ruth Jones McClendon, Arthur Renya, Bill Sielbert, Carlos Uresti, and Leticia Van de Putte stated that protection of the Edwards Aquifer is an increasingly important matter for the commission and commend the recent publication of proposed rules which would expand the jurisdiction of the Edwards Program to include the contributing zone.

AGRA and Travis County commented that they had reviewed the proposed rule revisions and are in general agreement with their scope and intent and that the Edwards Aquifer is a vital water resource for over 1.75 million Central Texans and is particularly sensitive to pollution from surface water sources. CE and ASA stated support for the commissions involvement in promulgating regulations to protect the Edwards Aquifer. ASA continued that the commission's action is a good thing and long overdue and that they support the concept that the rules target all construction over the contributing zones of the Edwards Aquifer.

EBA commented about their interest in the much broader issue of health and safety for the county in unregulated areas and support the amended rule changes currently under consideration. Ninety-seven percent of the soil in Williamson county is classed as "severe" for septic tank use. In addition, much of the Western part of the county lies over very critical fault areas that provide potential contamination avenues for effluent into the Edwards, Trinity and other aquifers. To support the proposed changes a comment letter and a report were attached regarding the critical conditions of the contributing zones in Western Williamson county.

One hundred twenty-two individuals with TCWA expressed concerns about reports that the State of Texas is not doing enough to protect the Edwards Aquifer. TCWA commented that they want stronger protection of the Edwards Aquifer due to it being threatened by rapid urbanization.

LWVSA and LWA commented that they commend the commission for its strengthening of these rules, especially in the proposed implementation of water quality performance standards for stormwater leaving a regulated activity, the design requirements for both temporary and best management practices, and the extension of regulated activities to parts of the contributing zone of the aquifer. APA supports the rules as they are working towards the ideal goal of preserving the aquifer for future use. Two individuals commented that they are in support of these rules as they give the commission a way to begin to manage the implications of water and wastewater outside unincorporated areas.

Two individuals commented that they are in favor of more stringent rules and regulations to ensure clean water for the people who are already living in Hays County. As homeowners, they are concerned that all the new development will negatively affect their water supply forcing then to drill deeper wells or go without water. ASC commented that they are in favor of more stringent rules as a means to protect the aquifer. Two individuals commented that they are in favor of the proposed regulations as a means to protect the water quality/supply.

The commission acknowledges these positive comments on the proposed rules.

An individual commented that he is in support of the proposed rules as they are a way to manage water quality using best management practices as long as it doesn't infringe into the county's business causing four or five extra permits to build.

The commission responds that nothing in this rule is intended to restrict the powers of any other governmental entity to prevent, correct, or curtail activities that result or may result in pollution of the Edwards Aquifer. In order to avoid duplicative regulatory programs, the commission has added new §213.4(a)(5) and §213.21(g) to provide for a local governmental entity to assume the rights, duties, and responsibilities to review and either approve or deny Edwards Aquifer Protection Plans under Subchapter A or Contributing Zone Plans under Subchapter B within its boundaries and monitor and enforce compliance with plans if the local government obtains certification from the executive director.

BW stated that in their estimation this program is unscientifically devised, politically motivated, unfairly and unequally applied, and none of the commission's business when BW is trying manage it themselves, and they have just now started to get the tools to be able to do it. BW concluded that they believe that it would be appropriate for the commission to table the contributing zone concept for this time and let those other agencies which have a legislatively-mandated responsibility for that geographic area do their job and keep it at the local level.

The commission responds that the commission has a specific mandate to protection water quality and, specifically, to protect water quality in the Edwards Aquifer. Other state agencies and local government have limited or no ability to adopt and enforce comprehensive regulations to protect water quality of the aquifer as a whole. However, to the extent certification can be provided to qualified entities who request such certification, the commission will avoid duplicative regulatory programs.

Public Benefit:

A number of commentors questioned the need and cost of these regulatory changes in general. Representative Krusee stated that his county cannot afford these costly changes for the dubious results that are promised. BMC and SABR expressed similar concerns about the proposed rule. An

individual commented that he is opposed to the proposed rules for Hays and Comal Counties.

WPOA and fifty-nine Wimberley residents commented that they object and protest the commission proposed regulations to be enforced in their area. They stated that it is not the building of homes or room additions that will cause pollution to the Aquifer Recharge zone and that the proposal will not solve the problems of water pollution to the aquifer. They further commented that the EPA already has state regulations in effect dealing with watershed for roads and other development. They concluded that the rules will only make life miserable for homeowners, and they do not want more government control. They stated that property values will also fall because of expensive permitting needed to build in this area.

GDSCPP commented that regulations regarding protection of the Edwards Aquifer are needed both within the recharge zone and the contributing zone of the Aquifer. However, they are opposed to the proposed revisions of 30 TAC Chapter 213 in their present form. GDSCPP commented that both Hays County and the City of Dripping Springs have regulations that are generally more restrictive on land development than other similar-sized communities due to the lack of centralized sewer service and community-wide water distributions systems in Hays County. They further commented that urban and fringe suburban developments are nonexistent in their area and the rules as proposed would certainly be overwhelming to their largely rural community.

Finally, Hays County stated that with the exception of areas immediately around Wimberley and Dripping Springs, most commercial development and high density residential development is occurring along and east of the IH 35 corridor, which is off the recharge and contributing zones. Much of the development in the more sensitive areas is expected to continue to be fairly large lot residential subdivisions.

The commission responds that the rules seek to provide the most cost effective measures to protect water quality only where necessary, based upon data, studies, and other reliable information while still allowing for economic growth and the reasonable enjoyment of private property. The commission's position is to be proactive in protecting the water quality of the Edwards Aquifer. The commission has, however, provided for certain exemptions in the proposed rule for developments that are not anticipated to have potential, long-term water quality impacts to the Edwards Aquifer. For instance in the recharge zone, construction of single-family residences on lots that are larger than five acres, where no more than one single-family residence is located on each lot, is not regulated under Subchapter A. An individual land owner who seeks to construct his/her own single-family residence or associated residential structures on the site is exempted from the Edwards Aquifer Protection Plan application requirements under this section (that requires a plan to be submitted and a fee paid), provided that he/she does not exceed 20 percent impervious cover on the site. Temporary erosion and sedimentation controls are required to be used; however, no additional permanent BMPs are required. In response to these and similar comments, the commission has also provided in the rules that other permanent BMPs are not required when a site used for low density single-family residential development has 20 percent or less impervious cover. A plan is required to be submitted and approved and temporary erosion and sedimentation controls are required to be used. This exemption from other permanent BMPs is required to be recorded in the county deed records, with a notice that if the percent of impervious cover increases above 20 percent or land use changes, the exemption of the whole site may no longer apply and the property owner must notify the appropriate regional office of these changes. In addition, the executive director may waive the requirement for other permanent BMPs for multi-family residential development, schools, or small business sites where 20 percent or less impervious cover is used at the site. The same deed recording requirements as for single-family residential development are required. A plan is required to be submitted and approved and temporary erosion and sedimentation controls are required to be used.

TAKINGS ISSUES

PMC opposed the proposed changes to Subchapter A and B and believe what the commission is doing is unconstitutional. TEW commented that they oppose the new regulations for development in the Edwards Aquifer recharge zone extending into Williamson County and that government intrusion into the rights of people to develop their own property are an insult to the constitution of both the United States and the State of Texas.

The commission does not agree with these comments. The specific purpose of the rule is to regulate activities having the potential for polluting the Edwards Aquifer and hydrologically connected surface water to protect existing and potential uses of groundwater and maintain Texas Surface Water Quality Standards. The commission had prepared a takings impact assessment which explains that promulgation and enforcement of these amendments to the rules could burden private real property which is the subject of the rules to the extent necessary to protect water quality and public health and safety. However, this rulemaking is exempt from the Private Real Property Rights Protection Act because this action is taken in response to a real and substantial threat to public health and safety (see Texas Government Code §2007.003(b)(13)) that may be caused by significant, existing or potential threats to public water supplies. The Edwards Aquifer is the sole or primary source of drinking water for over 1.7 million people. Many of these people use small, domestic wells not connected to a public water supply system. Degradation to the quality of the water supply in the Edwards Aquifer caused by activities conducted in the contributing zone and on the recharge and transition zones presents a real and substantial threat to public health and safety. Such degradation may be caused quickly because of the relatively quick and direct recharge of the aquifer being surface water and the practical difficulty in the remediating contamination in a karst aquifer. The proposed rules will significantly advance the health and safety purpose by regulating activities in the contributing zone and by setting technical standards to achieve water quality protection. These regulations are necessary to carry out the stated authority of the commission to protect human health and the environment and otherwise control water quality. The rules impose no greater burden than is necessary to achieve the health and safety purpose by providing flexibility to the applicant to choose the methods to be used to meet specific water quality performance standards.

In addition, the commission does not believe that this rulemaking constitutes a regulatory taking under the Fifth and Fourteenth amendments of the United States constitution. These rules still allow for the reasonable use and enjoyment of private property while providing for rewardable and necessary mea-

sures for the protection of public health and safety through water quality protection.

The Texas Water Development Board (a predecessor agency to the commission) adopted the proposed rule adding Williamson County to the recharge zone on May 7, 1985 under its authority to regulate and promulgate rules, for the protection of water quality in the state, under the then Texas Water Code, §§5.131, 5.132, and 26.011. The effective date of the new rule was May 21, 1985. On March 9, 1990 the Texas Water Commission (another predecessor to the commission) adopted a rule that changed the scope of the transition zone in Williamson County.

The Edwards Aquifer located in Williamson County serves as a source of drinking water for many residents of Williamson County, including those people residing in the cities of Georgetown and Round Rock, and many people relying on private wells located on their own property. The geologic nature of the Edwards Aquifer is such that activities conducted in or near areas of significant recharge to the aquifer pose a threat to the quality of groundwater. The new rules provide for regulation of those activities thought to have potential impacts on the water quality of the Edwards Aquifer.

SABR expressed concern of the loss of property rights by owners of land in areas being regulated by proposed rules. AGCT questioned that this is a violation of property rights and the expanded definition of regulated activity may be a "taking" and would be unconstitutional.

The commission prepared a takings impact analysis on the rule and the following is a summary of the analysis which appears earlier in the preamble for this rule. The specific purpose of the rule is to regulate activities having the potential for polluting the Edwards Aquifer and hydrologically connected surface water to protect existing and potential uses of groundwater and maintain Texas Surface Water Quality Standards. Promulgation and enforcement of these amendments to the rules could burden private real property which is the subject of the rules. However, the following exception to the application listed in Texas Government Code, §2007.003(b) applies to these rules. The action is taken in response to a real and substantial threat to public health and safety (see Texas Government Code §2007.003(b)(13)). The Edwards Aquifer is the sole or primary source of drinking water for over 1.7 million people. Degradation to the quality of the water supply in the Edwards Aquifer caused by activities conducted in the contributing zone and on the recharge and transition zones presents a real and substantial threat to public health and safety. The proposed rules will significantly advance the health and safety purpose by regulating activities in the contributing zone and setting performance standards to achieve water quality protection. These regulations are necessary to carry out the stated authority of the commission to protect human health and the environment and otherwise control water quality. The rules impose no greater burden than is necessary to achieve the health and safety purpose by providing flexibility to the applicant to choose the methods to be used to meet specific water quality performance standards.

REGULATORY IMPACT ISSUES

An individual commented that he is opposed to the proposed Edwards rules as they are unnecessary and extremely complex.

The commission does not agree that these rules are unnecessary and extremely complex. The rules are necessary to protect the Edwards Aquifer, the sole or primary source of drinking water for over 1.7 million people. Degradation to the quality of the water supply in the Edwards Aquifer caused by activities conducted in the contributing zone and on the recharge and transition zones presents a real and substantial threat to public health and safety.

The Edwards Aquifer contributory watershed (contributing zone) is the area generally west or north of the recharge zone containing the streams and rivers that arise in topographically higher areas and flow downstream to eventually cross the aquifer's recharge zone. Water balance calculations by C. Woodruff (1984) comparing measured stream loss in the recharge zone of the aquifer with measured springflow show that approximately 85 percent of the aquifers total recharge in the Austin segment of the aquifer occurs in the beds of streams where they cross the exposed surface of the Edwards Group rock units. Therefore, polluted runoff entering these streams would also potentially impact the water quality of the aquifer.

A groundwater tracing study in Austin, Texas by the Barton Springs / Edwards Aquifer Conservation District and the City of Austin has measured travel times and destination for water entering two recharge points in Barton Creek and two points in Williamson Creek. Preliminary findings of the dye tracing study during 1996 - 1997 have shown relatively rapid flow rates of about half a mile per day during very low aquifer flow conditions to about five miles per day from selected injection points during high flow conditions to Barton Springs and Cold Springs. Overall, the preliminary results document the susceptibility of the aquifer to pollutants sourced in recharge waters entering streams and creeks that cross the recharge zone. In the San Antonio area, aquifer recharge conditions are similar to those in the Barton Springs segment and the percentage of recharge from stream loss should also be similar.

As to the complexity of the proposed rules, setting forth technical requirements for the protection of the Edwards Aquifer can be, by its very nature a complicated and technical subject. However, the agency has attempted to promulgate rules that are as simple and easy to understand as possible.

Representative Krusee urged the commission to reject these proposed rule changes.

In separate correspondence, the commission staff provided responses to each of the concerns listed by Representative Krusee in his letter to the commission. The commission believes that because over 1.7 million people in eleven counties currently rely upon the Edwards Aquifer for their water supply, degradation to the quality of the water supply in the aquifer caused by the activities conducted in the contributing zone and on the recharge and transition zones presents a real and substantial threat to public health and safety. The changes to Subchapter A and the new Subchapter B are designed to protect the Edwards Aquifer from regulated activities in the recharge and contributing zones.

PS stated that they could not believe the commission was trying to impose additional restrictions on individual property owners in the recharge zone and in a new 10 mile contribution zone. The commentor asked when is all the hassle and taking of land rights going to stop. The commentor also stated that commission should reconsider the proposed regulations and that there are enough developer regulations to protect the aquifer.

The commission does not agree with this comment. The specific purpose of the rule is to regulate activities having the

potential for polluting the Edwards Aquifer and hydrologically connected surface water to protect existing and potential uses of groundwater and maintain Texas Surface Water Quality Standards.

The Edwards Aquifer contributory watershed (contributing zone) is the area generally west or north of the recharge zone containing the streams and rivers that arise in topographically higher areas and flow downstream to eventually cross the aquifer's recharge zone. Water balance calculations by C. Woodruff (1984) comparing measured stream loss in the recharge zone of the aquifer with measured springflow show that approximately 85 percent of the aquifers total recharge in the Austin segment of the aquifer occurs in the beds of streams where they cross the exposed surface of the Edwards Group rock units. Therefore, polluted runoff entering these streams would also potentially impact the water quality of the aquifer. Finally, the commission has sought to avoid duplication or conflict with other applicable local and federal regulatory programs through local delegation agreements and consistency with NPDES stormwater permit requirements.

PP commented that the commission should indefinitely postpone the establishment of new regulations concerning the contributing zones of the Edward's Aquifer.

The commission believes that they are required by statute to protect public health by preventing degradation of the Edwards Aquifer, rather than waiting to react to pollution only after the aquifer has been contaminated. As described earlier in this preamble, the preliminary results of studies have indicated the susceptibility of the aquifer to pollutants sourced in recharge waters entering streams and creeks that cross the recharge zone. Therefore, the commission believes that it is necessary to enact these proposed rules now, ahead of further development that may significantly affect water quality.

TK commented that they strongly disagreed with placing the primary burden for water quality on new development; thus, he requested the commission hold the rules until an acceptable plan for retrofitting existing construction is established.

The commission notes that as stated in the proposed rule, regulated activities are any construction or post-construction activity occurring on the contributing zone of the Edwards Aquifer that has the potential of contributing pollution of surface streams that enter the Edwards Aquifer recharge zone. The projected urban / suburban growth in the recharge and contributing zone over the next ten years along with the additional pollutant loading to the aquifer recharge waters is the subject of the proposed rules. This includes both residential and commercial construction. Any existing residential or commercial sites which undertake new construction will be required to meet the proposed regulations. Obviously, new regulations relating to construction requirements cannot apply to existing built-out-sites. The commission does not have sufficient evidence to determine if new regulations or other initiatives are needed to address water resource impacts from existing development in order to meet the water quality objectives for the Edwards Aquifer.

Hays County objected to some portions of proposed rule changes contained in 30 TAC Chapter 213 revising Subchapter A. In addition, all of the members of the court objected to parts of new Subchapter B as written, and some objected to any extension of Ch. 213 rules into the contributing zone. Hays County requested that the existing rules be readopted as written and the proposed rules be withdrawn, amended as requested and republished for public comment.

The commission responds that part of this comment is addressed in the rules review section of this issues of the Texas Register for §§213.1-213.2 and 213.11-213.14. The commission believes that they are required by statute to protect public health by preventing degradation of the Edwards Aquifer, rather than in reaction to pollution only after the aquifer has been contaminated. The preliminary results of studies have indicated the susceptibility of the aquifer to pollutants sourced in recharge waters entering streams and creeks that cross the recharge zone. Therefore, it is necessary to enact these proposed rules now, before the water quality is comprised.

The EAA believes many of the proposed amendments to Subchapter A will strengthen and clarify the rules.

The commission agrees with this comment.

USFWS commented that the text for the regulatory impact analysis states that no federal regulations exist on setting technical standards in reference to federally financed projects that create significant hazards to public health. There may not be technical guidelines for a project capable of contaminating the aquifer, but there is a groundwater monitoring list in 40 CFR Part 264 Appendix IX that has been adopted by the state as its water quality standards for groundwater.

The commission agrees with this comment but reiterates that these rules do not exceed any federal requirements relating to or applicable to the protection of the Edwards Aquifer, and therefore, no Regulatory Impact Analysis is required.

COA commented that the second paragraph, fourth sentence of the Regulatory Impact Analysis, stated that "There is no federal law that specifically addresses construction activities that may impact the Edwards Aquifer." The NPDES general construction permit promulgated under 40 CFR 122.26 implementing Section 402 of the Federal Clean Water Act (Federal Register Vol. 63 No. 31 Reissuance of NPDES General Permits for Storm Water Discharges from Construction Activities) provides detailed restrictions on construction activities regardless of their location.

The commission responds that the NPDES general construction permit regulates the discharge of pollutants to hydrologically connected to surface water (stormwater) and the intent of the program is not to regulate the discharge of pollutants to groundwater. The commission reiterates that these rules do not exceed any federal requirements, therefore, no regulatory impact analysis is required.

AGCT commented that SB 633 requires state agencies, who plan to adopt a major environmental rule which exceed state or federal law, to conduct a regulatory impact analysis of the rule. The commentor further elaborated that the proposed rules are major and exceed any current state or federal law, and that a regulatory impact analysis was not performed for this rule. The commentor continued that in the case of the proposed rules, the following questions arise: 1) what specific problems are the proposed rules attempting to address, 2) what factors led to the determination that a new rule was necessary, and 3) what were the results of the cost benefit analysis? The commentor also stated that the draft regulatory impact analysis should be incorporated into the fiscal note which will identify the benefits the agency anticipates from adoption and implementation of the rule, and that the agency describe alternative methods that were

considered for achieving the purpose of the rule and provide reasons why the alternatives were rejected.

The commission responds that this rule does meet the definition of a "major environmental rule" as that term is defined in §2001.0225 of the Texas Government Code, however the rules do not exceed any federal requirements, therefore, no regulatory impact analysis is required. The commission has revised the wording of the preamble to clarify this issue. The additional questions asked by the commentor are also addressed in this part of the preamble.

SCW commented that under the "Regulatory Impact Analysis" heading of the preamble to the proposed rules, the commission acknowledges that the proposed rules are in fact a "major environmental rule" 30 Tex Reg 3203 (1998). However, SCW continues that the commission errs in concluding that the rule does not result in any of the instances that would trigger the applicability of Texas Government Code §2001.0225. Subsection (a) of §2001.0225 lists four circumstances wherein the statutory regulatory analysis is required. Of those four, the commentor stated that the proposed rules effectuate the results prescribed by two. First, the proposed rule will exceed a standard set by federal law, and second, the rule is to be adopted pursuant to the agency's general powers and not a specific state law. The commentor continued that the proposed Subchapter B would expand regulation to the Edwards Aquifer contributing zone which is not currently regulated and this proposed protection plainly exceeds standards set by federal law. Additionally, the commentor stated that the statutory authority under which the commission is proposing these rules is the agency's general authority to protect and regulate the quality of waters in the state. They conclude that proposal of a major environmental rule that is not pursuant to a "specific state law" must include a regulatory analysis because no state law specifically requires the expansion of the rules to the Edwards Aquifer contributing zone. They concluded that the commission may not validly adopt the proposed rules without complying with the statute and preparing a regulatory impact analysis which addresses each of the criteria set forth in §2001.0225(c) of the Government Code.

The commission responds that this rule does meet the definition of a "major environmental rule" as that term is defined in §2001.0225 of the Texas Government Code. However the commission reiterates that a regulatory impact analysis is not required because none of the four conditions which trigger such an analysis are met in this case. Specifically, the rules do not exceed any federal standard which exists for the protection of the Edwards Aquifer or any other aquifer. In addition, these rules are adopted pursuant to the authority found in §§26.046 and 26.0461 of the Texas Water Code.

ASA and PP commented that the proposed regulation exceeds federal law standards. ASA stated that federal law can not possibly anticipate every possible geological groundwater formation nor every circumstance threatening such systems. ASA continued that at best, federal law is a blunt instrument that sets minimal standards, and it is up to the state and local entities to set specific standards in response to local conditions and circumstances.

The commission responds that the requirements of this rule, which seeks to protect the quality of potable underground water, relate to the Edwards Aquifer in certain counties in Central Texas. There are no federal law standards relating to or applicable to the protection of the Edwards Aquifer, including by way of example regulations concerning construction activities. Accordingly, there are no applicable standards set by federal law that could be exceeded by the rule.

The commission does recognize the Sole Source Aquifer Program administrated by the Environmental Protection Agency and its prohibition against the use of federal funds for projects that may contaminate sole source aquifers (see §1427 Safe Water Drinking Act). The commission notes, however, that there are no federal regulations that set technical standards for such projects.

The federal Clean Water Act also does not set standards applicable to the subject matters of this rulemaking. The Region 6 Environmental Protection Agency (EPA) NPDES general permit for storm water discharges from construction activities in Region 6, issued in compliance with the Clean Water Act (33 U.S.C. 1251 et. seq.), authorizes the discharge of pollutants to waters of the United States in accordance with the conditions and requirements set forth in the general permit. The Clean Water Act and the EPA general permit are surface water quality measures; these rules are implemented to protect groundwater.

GSACC commends the commission for its past efforts to promulgate reasonable and credible rules that are effective in protecting the quality of the water supply for the people of the Edwards region. GSACC and RECSA commented that unfortunately, they believe the proposed rules, while well-intended, will create an unreasonably heavy burden on those private and public entities that design and build projects in the regulated areas, without demonstrably protecting water quality. GSACC encouraged the commission to revise those areas of the proposed rules that relate to the contributing zone definition and the use of performance standards.

The commission responds the rules have been revised with regard to technical standards and the scope of the contributing zone regulations has been revised to more closely follow the requirements already in place under the EPA NPDES general permit for storm water discharges from construction activities.

Program Funding:

A number of individuals and entities commented on the funding of the program. State Representatives Robert R. Puente; Leo Avarado, Jr.; Christine Hernandez; John A. Longoria; Ruth Jones McClendon; Arthur Renya; Bill Sielbert; Carlos Uresti; and Leticia Van de Putte support the establishment of an ongoing annual or biennial inspection fee under the commission's Edwards Aquifer Protection Program, as allowed for under House Bill 1016 of the 75th Texas Legislature. This proposed rule is a positive step forward for the program, but one which will leave the agency less able to meet the cumbersome demand of administering the program without the additional resources for program monitoring and inspection which an ongoing fee structure would provide. Among the changes last legislative session was an amendment to Section 26.0461 (a) of the Texas Water Code to provide for the commission to levy fees for "...inspecting the construction and maintenance of projects..." covered under the ongoing annual or biennial review of property developments under the program's jurisdiction, in order to insure that pollution abatement structures and other protection strategies outlined under the originally submitted plans continue to meet their function and purpose.

Additionally, SAWS recommended the commission should establish an inspection fee program for the inspection and enforce-

ment of existing facilities for compliance with approved plans for the Edwards Aquifer Protection Program. SAWS continued that this capability should be utilized with the implementation of an inspection fee program under the recently passed HB 1016, which makes it is possible for the commission to impose fees "for inspecting the construction and maintenance" of regulated sites. SAWS suggested an annual or biennial inspection fee be established for all sites with permanent pollution abatement measures and that this additional fee would allow for the allocation of additional staff to conduct compliance inspections. SAWS also stated that the fee would also act as a reminder to responsible parties that they have a continuing obligation to maintain their permanent pollution abatement measures.

In addition, APA commented that in terms of financial resources the commission should not restrict itself to using fees collected from private landowners to enforce the regulations. Rather, the primary beneficiaries of the application of these regulations - the citizens of San Antonio - have resources that they should contribute towards enforcement of these rules.

Finally, TCWA commented that they hope the commission will pursue other means of fee collection so that the agency will be able to fund the ambitious goal of the amendments made in the Edwards rules. They are afraid that if the agency solely relies on fees to go through the enforcement process or to do record inspection permitting, then this just escalates the development of the area.

The commission responds that the scope of the proposed rules does not address the fee structure for the recharge zone. Because of legal requirements under the Administrative Procedure Act, the consideration of any changes to the rules outside the scope of the proposed changes such as the fee structure would have to be taken up as part of a separate rulemaking.

SAWS recommended an annual report be produced documenting the Edwards Aquifer Protection Program expenses and allocation of all Edwards Aquifer fees. SAWS further commented that since HB 1016 states that Edwards program fees "be used only for the commission's Edwards Aquifer programs", an annual report documenting the proper disposition of all Edwards program fees should be produced. SAWS also commented that this document should be given to the Governor, members of the Natural Resources Committee of the Texas House, members of the Natural Resources Committee of the Texas Senate, and be available for public distribution at the Austin and San Antonio regional offices.

The commission responds that Edwards Aquifer Protection Program fees are deposited into a special account that is used solely for the support of the Edwards Aquifer Protection Program. The commission also notes, however, that in past years, funds from other commission water programs have been used to support the Edwards Aquifer Protection Program.

BW stated that the Comal County representative on the Edwards Aquifer Authority board admitted in public meeting here two weeks ago that the EAA has no resources to contribute to the enforcement or implementation of these rules. BW concluded that means the implementation of these rules is going to be funded entirely by somebody else and that this is an unfunded mandate. BW continued that they are a small community and if this kind of thing comes in on them as an unfunded mandate, they may not even be able to raise the tax monies in order to implement the programs that are there and are demanded.

The commission responds that the proposed rules would not create a new bureaucracy and will be funded through the fees collected under the program. The proposed rule will be implemented by the existing agency staff in the regional offices. Additionally, the proposed rules do not seek to duplicate or conflict with local ordinances and regulations. Applications are provided to the executive director for approval, the agency conducts site inspections, and the agency is responsible for enforcement if violations of the rules occur. Local government is only involved in the review of plans if they so desire. In the recharge zone, the regional office will provide copies of applications to affected incorporated cities, groundwater conservation districts, and counties in which the proposed regulated activity will be located. While local government is given the opportunity to review proposed plans, there is no requirement that they review the plan. As currently proposed, there is no review process for local government proposed in the contributing zone rules. A local government entity (with sufficient resources and jurisdiction) may seek certification of their program and conduct plan review, approval, inspections and enforcement activities. However, this is not a mandatory delegation or an unfunded mandate for program assumption. The rule does not delegate responsibility for maintenance to a local municipal or county government. Not all cities or counties which are covered by this proposed rule have the ability to adsorb an unplanned for burden on their budget. The transfer of maintenance is between the applicant and the receiving governmental entity, has to be approved by the receiving governmental entity.

Fiscal Note:

A number of individuals and entities made comments an the fiscal note for the proposed rules. Representative Shields, Representative Corte, Representative Krusee, BE, Hays County, GDSCPP, Commissioner Burnett, TxCABA, RESCA, JMARE, SCW, SABR, TEW, BMC, TxDOT, TxDOT-SA, BADC, ASA, Powers, LCRA, COA, GDSCPP, CECT, FSMC, HDR, VA, MEC, FSMC, PDE, JMARE, and JE all commented on different aspects of the fiscal impact of the proposed rule. A number of the responses to the proposed rule addressed the issues of financial impact and cost of compliance. Generally, some commenters felt that the proposed rules are onerous for single-family residential construction, would impose unreasonable costs to home buyers, and would adversely affect affordability of moderate priced homes. More than one commenter cited an estimate that a $1,000 cost increase in the median priced home will exclude 30,000 additional buyers from qualification in Texas. In addition, comments were received that expressed concern for additional burdens on state funded highway construction in the areas subject to the rules and potential increased taxes resulting from higher road construction costs and maintenance.

Some commenters requested the commission to clarify if the fiscal note should be interpreted to mean that the estimated cost of an engineering plan will add $1,000 to $2,000 to the cost of a new house. Other commenters stated that the estimated engineering costs for plans are too low and the cost of installation of BMPs should be included (estimated range, $5,000 to $65,000). Estimates of impact of the proposed rules provided by commenters varied considerably, between $500 and $5,000 per lot for residential development. Some

commenters asked whether a detailed cost-benefit analysis had been done and others disagreed with a presumption that the proposed rules did not impose additional costs to units of local government.

The commission responds that it has acknowledged in the preamble to the proposed rule that there will be fiscal implications of the rules, particularly in the contributing zone of the Edwards Aquifer which has not previously been regulated. The fiscal note to the proposed rules stated that the anticipated cost to develop a contributing zone plan would range from $1,000 to $2,000 for projects of typical size and description, but that these costs were variable and could be higher. This is consistent with the statements of some commenters that the cited costs of plan preparation could be too low for some projects.

Some commenters felt the cost estimates for permanent control structures were too low. The commission stated that the annual operating and maintenance cost of permanent control structures could vary significantly, but estimated that costs for a typical or representative structure could average between $1,000 - $2,000. To clarify, this is a cost estimate per structure - the total costs for a project with more than one structure will be obviously higher. While some commenters have cited examples where operation and maintenance costs of permanent structures exceed the commission's estimates, the differences in most instances are not substantial. The commission feels that the estimates are valid to the extent that they were represented to be applicable to an average or typical project. However, it should be acknowledged that for some larger projects, or for structures requiring specialized maintenance, the operational costs of these structures could be significantly greater.

The commission did not provide a specific estimate of the actual construction costs of permanent structures, but stated that these costs would be highly variable and site-specific. This is supported by the responses to the proposed rule where commenters cited costs ranging from $5,000 to more than $1,000,000 for construction of a permanent control structure. The commission feels that the costs imposed for construction of control structures are highly site-specific, but that these costs in the contributing zone are not significantly different from the costs that have been incorporated in developments on the recharge zone of the Edwards Aquifer for some time. However, in adopting this rule, the commission recognizes that, in addition to the engineering and operations and maintenance costs of control structures, there are significant costs associated with both the construction of such features and the obligation to permanently set aside land for such uses. The commission is generally in agreement that the costs cited by commenters for construction of permanent structures are reasonable, given the type and size of development to which they are related.

In response to the issue of affordability of housing as a result of the proposed rule, the commission acknowledges that statistically some percentage of home buyers will be excluded from qualification for purchase based on some incremental increase in the price of a home. On a state-wide basis, however, the number of potential home buyers within the affected Edwards Aquifer contributing zone that would be significantly affected by the potential cost increases imposed by this rule is anticipated to be a relatively small percentage of the total number of home buyers affected. Also, while acknowledging some potential impact on housing affordability, the commission also points out that the potential affects on housing affordability are less significant at housing prices above the median and that median priced housing will be affected only to the extent that housing at this price level is actually constructed and marketed within the contributing zone. In addition, the affects on housing affordability in the contributing zone are not anticipated to be significantly greater than the affects of current requirements in the recharge zone. Also, it should be noted that any affects of the costs imposed by the proposed rules on residential development can be magnified or mitigated by changes in other variables such as market demand for housing, interest rates, and costs of labor and materials.

To clarify the cost implications to local government, the preamble to the proposed rules clearly stated that there will be fiscal impacts to units of local government that undertake projects subject to the proposed rules, particularly in the currently unregulated contributing zone, and that these costs will be similar to those that would be imposed on any affected party. These costs to local governments would also include the costs of operation and maintenance of permanent BMPs for locally sponsored projects. The assumption of responsibility for operation and maintenance of BMPs by a local government from another property owner or party is not mandated by the proposed rules, however, and would occur only by joint, written agreement between the affected parties. The commission does acknowledge, however, that a local government assuming such responsibility, as a result of its own action, will assume the same costs as any other party under similar circumstances.

The commission also feels that the rules as adopted represent a significant reduction in potential cost when compared to the rules that were proposed. Most significantly, the exemption for areas of less than 5 acres, and the exemption for projects of less than 20 percent of impervious cover, will preclude any measurable cost effects on a significant number of potential developments, particularly smaller projects and individual home builders. In addition, the revisions to the requirements imposed during construction that are adopted are identical to existing federal general stormwater permit requirements and will impose no significant additional cost to project sponsors and property owners beyond the cost of submitting a copy to the commission of the site plans already required by EPA. The proposed application fee of $500 is also reduced to $250 in the rule as adopted.

As stated in the preamble to the proposed rule, the most significant cost implications of these rules are the costs of construction, operation and maintenance of permanent BMPs in the currently unregulated contributing zone of the Edwards Aquifer. Many of the potential costs can be mitigated by site-specific design considerations, or avoided by adjusting the intensity or density of development. The commission acknowledges, however, that for large projects that do represent intensive development in the contributing zone, the costs of compliance with the rules as adopted could be significant if not mitigated. The commission also acknowledges that these cost can be consistent with estimates cited by commenters to the proposed rules.

The potential costs of compliance with the rules must also be evaluated in comparison to the potential benefits of those provisions intended to protect the quality of the water in the Edwards Aquifer. The specific goal of the rules here adopted is to avoid the costs of addressing degradation of water quality in the aquifer. The Edwards Aquifer serves as the sole source of drinking water for a population in excess of 1.7 million people, including many private well owners. While it

is difficult to quantify the potential costs of not adopting these rules, it is the commission's belief that the potential costs of supplemental treatment or even temporary provision of alternate supply for any significant part of this population of groundwater users justify the potential costs imposed on those projects that represent the most intensive development in the contributing zone.

Technical Guidance Document:

MLK expressed concern that a Technical Guidance document was not drafted simultaneously with the proposals. Guidance documents are central to the actual use and application of any technical rules. MLK requested that they and other interested parties be allowed to participate in the Technical Guidance's drafting. MLK and TxDOT-SA requested that no new rules be adopted until the technical guidance document is completed so that comments on both the rules and the guidance document can be prepared in consonance.

WGP commented that because of their technical nature, it is difficult, if not impossible, to comment on these proposed rules without having information with respect to how they will be implemented. They continued that they understand that the commission staff has been working on a technical implementation manual for some time and they strongly recommend that the proposed amendments not be adopted until a technical manual is available for public review and can also be adopted.

PDE commented that any portion of the proposed regulations which makes reference to the Technical Guidance Manual or Document should not be enforced or adopted until the Manual or Document has been issued. CPS stated that the definition of best management practices refers to a technical guidance document prepared by the executive director, and the Edwards Aquifer Technical Guidance is currently under revision and is not yet available for public use.

TxDOT expressed concern that much of the impact of the proposed rules is dependent on the technical guidance manual, which is still being developed. TxDOT stated that it is difficult to make informed or quantitative comments on the impact of the proposed rules and suggested that the guidance manual and the rules are interdependent and recommended that they be developed, reviewed and adopted simultaneously. TxDOT-A and TxDOT-SA commented that there are several sections in the proposed rules that make reference to technical guidance prepared by the executive director. They continued that to date, they have not had an opportunity to review this information and that this makes it difficult for them to determine the impact these rules will have on our ability to address transportation-related safety and mobility issues in the Austin and San Antonio areas as well as in other areas within their district boundary that will be affected by these rules. They requested an opportunity to read and possibly comment on this technical information prior to the adoption of the final rules.

BE and PDE stated that the agency should develop the technical guidance simultaneously with any proposed rules which rely on them because several crucial issues are only partially explained in the rules and cannot be reviewed without the backup technical guidance.

DHA commented that there are many technical questions that arise from the way the rules are proposed without the technical guidance rules (BMPs); thus, they ask that a continuance be given to adoption or the proposed rules until such time that technical guidance is considered jointly.

TxDOT stated that since the main purpose of a performance standard is to guide the design of the BMPs, they recommend that performance standards not be adopted in rule form but used only in the guidance manual. They continued that adopting the performance standard as guidance only would allow for flexibility and the opportunity to make changes as the technologies progress.

The commission responds that technical guidance documents provide guidance to the regulated community for complying with adopted rules. The technical guidance document for best management practices (BMPs) for the Edwards Aquifer Protection Program will provide information related to the Edwards Aquifer Protection Program rules and will recommend specific design standards for pollutant removal required by 30 TAC Chapter 213. It will include a broad range of temporary and permanent structural and non-structural BMPs that are used on a nationwide basis and that will continue to provide a high level of protection to the water quality of the aquifer. Criteria that an entity must meet in order to receive a permit or other authorization, or requirements that are enforceable must be implemented through the rule making process. The commission also responds that the proposed rule will be adopted with a delayed implementation date of June 1, 1999, to coincide with the issuance of the Edwards Aquifer Technical Guidance Manual. This change is reflected in §213.4(a)(4)(D) for amendments to §§213.3-213.10 of Subchapter A and §213.21(h) for all of Subchapter B. The commission also notes that the proposed rule references technical guidance recognized by or prepared by the executive director. In the absence of an agency-prepared technical guidance manual, current Edwards Aquifer Protection Plan applications direct applicants to utilize guidance established by the City of Austin or the Lower Colorado River Authority for temporary and permanent best management practices.

TxDOT stated that they have significant literature and research on highway runoff and BMP effectiveness and that they will share these resources with the commission in the development of the technical guidance manual and/or to support our comments.

The commission appreciates TxDOT's cooperation.

Phased Construction Projects:

A number of individual entities commented on the applicability of the new rules to phased construction projects. WE commented that virtually all developments take place in several steps. Unless the development is a single or small tract, one can reasonably expect construction to occur in stages. The consideration of these stages should be included in the rules. The proposal of a project and its intended infrastructure does not necessarily lead to the actual development occurring. Being such, consideration should be given to the individual elements of the regulated activities that occur at a given time. Thus, it is recommended that the staff consider the development of guidelines directed at the stages of development. This would not be unlike the requirements of other jurisdictions with similar water quality control criteria.

Additionally, an individual commented that in order to eliminate the potential for abuse and speculation required under the proposed rules regarding the speculation on the possible end users in commercial developments, most cities and other

regulators utilize a streamlined process which requires the initial developer to provide controls only for the subdivision infrastructure and requires specific site plans for the end users based on a real use of the property at the time construction actually occurs.

In addition, MB commented that this rule will have widespread financial implications to development. Some projects have a preliminary plan of a large development that is to be developed in phases. While a preliminary plan is approved by a governmental entity for a large tract, the individual phases are later submitted and approved piece by piece by those governmental agencies and the commission. If these developments were suddenly required to meet the requirements of Subchapter B, significant unplannable financial setbacks would be incurred. The proposed rules should address how landowners with phased developments could not be damaged by changing the rules while a project is in progress.

The commission responds that phased developments that received executive director approval and which have been constructed within the approval period will not need to make additional submittals if the approved water pollution abatement plan included the different phases of construction that are yet to be constructed. The commission also notes that language has been added to the proposed rule that provides for regulated activity occurring in the proposed redefined recharge zone or in the contributing zone. Regulated activities will be considered to have commenced prior to the effective date of the rules and therefore not subject to the rules if the applicant has received all necessary federal, state and/or local approvals; and if either on-site construction directly related to the development has begun or construction commences within 6 months of the effective date of the rules.

Statutory Authority:

Representative Krusee questioned under what specific statutory authority is the commission acting under to write rules for the Edwards Aquifer Contributing Zone?

The commission responds that these amended sections are proposed under Texas Water Code (the code), §5.103 which provides the commission with the authority to promulgate rules necessary for the exercise of its jurisdiction and powers provided by the code and other laws of Texas, and §5.105 which provides that the commission shall establish and approve all general policy of the commission by rule. Section 26.011 provides that the commission will administer the provisions of Chapter 26 of the code and establish the level of quality to be maintained in and control the quality of the water in the state. Waste discharges or impending discharges are subject to rules adopted by the commission in the public interest. This section also grants the commission the powers necessary or convenient to carry out its responsibilities.

Section 26.341 recognizes that it is the policy of the state to maintain and protect the quality of groundwater and surface water resources from certain substances in underground and aboveground storage tanks that may pollute groundwater and surface water resource, and §26.345 allows the commission to develop a regulatory program regarding underground and aboveground storage tanks. Additionally, §26.046 requires the commission to hold an annual public hearing to receive evidence from the public on actions the commission should take to protect the Edwards Aquifer from pollution. The Edwards Aquifer is defined as that portion of an arcuate belt of porous, waterbearing limestones trending from west to east to northeast through Kinney, Uvalde, Medina, Bexar, Kendall, Comal, and Hays counties, respectively and as defined in the most recent rules of the commission for the protection of the quality of the potable underground water in those counties. Based upon a petition from City of Round Rock and the concurrence of county government, the regulations were extended to Williamson county in May 1985. Northern Hays county was added in July 1986, as a result of a request from a local elected official with support from the community. Travis county entered the program in March 1990 based upon a petition from the City of Austin with support from others.

Section 26.0461 of the code allows the commission to impose fees for inspecting the construction and maintenance of projects covered by plans and for processing plans or amendments that are subject to review or approval under the commission's rules for the protection of the Edwards Aquifer and for inspecting the construction and maintenance of projects covered by those plans, §26.121 prohibits unauthorized discharges to waters in the state. Section 26.401, establishes the goal for groundwater protection in the state to be that the existing quality of groundwater not be degraded. This goal of nondegradation does not mean zero-contaminant discharge. The policy of the state is also provided in §26.401 to be that discharges of pollutants, disposal of waste, or other activities subject to regulation by state agencies be conducted in a manner that will maintain present uses and not impair potential uses of groundwater or pose a public health hazard. Section 28.011 authorizes the commission to make and enforce rules for the protection and preservation of groundwater quality.

Texas Health and Safety Code, §361.024, provides the commission with the authority to promulgate rules consistent with the Solid Waste Disposal Act and standards of operation for the management and control of solid waste. Texas Health and Safety Code, §366.012 provides the commission with the authority to adopt rules governing the installation of on-site sewage disposal systems.

Need for Special Edwards Rules:

Representative Corte questioned whether setting special standards for the Edwards Aquifer is appropriate. He continued that it is his understanding that it is incumbent upon regulatory agencies to apply rules and standards equitably across the board.

The commission responds that the Edwards Aquifer is unique in Texas. This aquifer has been recognized by both the state and federal legislatures as needing special protection because of its vulnerability to contamination and its importance as a high quality water supply. The commission and its predecessor agencies have administered special water quality protection rules for the aquifer for approximately 28 years. The rules to protect the water quality of the Edwards Aquifer apply equitably across all geographic areas subject to regulation under this program.

The importance of protecting the quality of the water in the Edwards Aquifer was recognized in 1970 when the Texas Water Quality Board issued the first regulations for the protection of the aquifer. The importance of protecting the aquifer also inspired the development of the federal Sole Source Aquifer (SSA) program in 1974. The Gonzalez Amendment to the Safe Drinking Water Act, sponsored by Representative Henry Gonzalez (San Antonio), established the U.S. Environmental Protection Agency (EPA) program for the designation of SSAs

and the review of federally-funded projects for aquifer water quality impacts. The Edwards Aquifer in the San Antonio Region was the first federally-designated SSA in 1974 and the model for the program nationwide. A portion of the Barton Springs segment was designated by EPA in the mid-1980s. Under this program, projects which receive federal funds such as highway construction and housing construction projects, and which may contaminate the aquifer so as to create a significant hazard to public health, are subject to EPA review for water quality impacts. This aquifer is the only designated SSA in Texas.

The special protection of the Edwards Aquifer is also supported by the various powers and duties that the legislature has given to the commission. The Edwards Aquifer is provided special recognition under §26.046 of the Texas Water Code (the code), which requires the commission to annually hold a public hearing to receive evidence from the public on action the commission should take to protect the Edwards Aquifer from pollution. The Edwards Aquifer is defined in the code as that portion of an arcuate belt of porous, waterbearing limestones trending from west to east to northeast through Kinney, Uvalde, Medina, Bexar, Kendall, Comal, and Hays counties, respectively, and as defined in the most recent rules of the commission for the protection of the quality of the potable underground water in those counties. Based upon a petition to the agency from the City of Round Rock and the concurrence of county government, the regulations were extended to Williamson County in May 1985. Northern Hays County was added in July 1986, as a result of a request to the agency from a local elected official with support from the community. Travis County entered the program in March 1990 based upon a petition to the agency from the City of Austin with support from others.

The Legislature also has provided special funding to the commission to conduct its Edwards Aquifer Protection Program. Section 26.0461 of the Water Code allows the commission to impose fees for inspecting the construction and maintenance of projects covered by plans and for processing plans or amendments that are subject to review or approval under the commission's rules for the protection of the Edwards Aquifer and for inspecting the construction and maintenance of projects covered by those plans.

The uniqueness of the aquifer's hydrology and geology has been described by the Texas Water Development Board on its web site:

"Water from the aquifer is primarily used for municipal, irrigation, and recreational purposes; approximately 54 percent is used for municipal supply. San Antonio, which obtains its entire municipal water supply from the Edwards aquifer, is one of the largest cities in the world to rely solely on a single ground-water source. The aquifer feeds several well-known recreational springs and underlies some of the most environmentally sensitive areas in the state.

Recharge to the aquifer occurs primarily by the downward percolation of surface water from streams draining off the Edwards Plateau to the north and west and by direct infiltration of precipitation on the outcrop. This recharge reaches the aquifer through crevices, faults, and sinkholes in the unsaturated zone. Unknown amounts of ground water enter the aquifer as lateral underflow from the Glen Rose Formation. Water in the aquifer generally moves from the recharge zone toward natural discharge points such as Comal, San Marcos, Barton, and Salado springs. Water is also discharged artificially from hundreds of pumping wells, particularly municipal supply wells in the San Antonio region and irrigation wells in the western extent.

In the updip portion, ground water moving through the aquifer system has dissolved large amounts of rock to create highly permeable solution zones and channels that facilitate rapid flow and relatively high storage capacity within the aquifer. Highly fractured strata in fault zones have also been preferentially dissolved to form conduits capable of transmitting large amounts of water. Due to its extensive honeycombed and cavernous character, the aquifer yields moderate to large quantities of water. Some wells yield in excess of 16,000 gallons per minute (gal/min), and one well drilled in Bexar County flowed 24,000 gal/min from a 30-inch diameter well.

Due to its highly permeable nature, the Edwards aquifer responds quickly to changes and extremes of stress placed on the system. This is indicated by rapid water-level fluctuations during relatively short periods of time."

The unique vulnerability of the Edwards Aquifer to contamination was documented in 1989. The Texas Water Commission conducted statewide mapping to classify the relative vulnerability of all the major and minor aquifers in the state to manmade contamination. The agency used the DRASTIC system to determine relative vulnerability using the following parameters: depth to water, annual recharge, aquifer media, soil media, topography, vadose zone impact, and hydraulic conductivity. Because of its hydrogeologic character (as discussed above), the Edwards Aquifer ranked as the most vulnerable major aquifer in the state to manmade contamination. It is considered to be more susceptible to pollution from contaminants deposited on or flowing over the recharge zone than other aquifers in the state.

Oil and Gas Transportation Pipelines:

USFWS commented that it is unclear as to what agency has jurisdiction over pipelines transporting refined products such as gasoline, diesel, etc. and asked if it is the commission.

The commission responds that the Railroad Commission of Texas is the agency with jurisdiction over these pipelines.

BW commented that they are opposed to any further action on Subchapter B of Chapter 213 relating to the Edwards Aquifer Contributing Zone which violates clear legislative intent of Senate Bill 1 which is now being implemented through Water Development Region L and Trinity Aquifer Regional Sub-group; thus, they recommend that the Water Development Regions should be given time to develop plans for their areas. BW stated that at this time this rule is premature in the face of the water development regions which are currently in the process of being organized statewide. Region L is just now beginning to become organized and a water development and management organization put in place by the legislature in order to develop water management plans. An attempt to put this contributing zone plan into place is rank interference with another governmental agency which is now attempting to do its job.

The commission responds that although water quality is critical to ensuring adequate future water supplies for the State of Texas, the subject matter and the regulatory program of the proposed rules is unrelated to regional water planning under Senate Bill 1 and is not within the purview of the Texas Water Development Board or its designated regional planning groups.

The commission disagrees with the commenter's contention of conflict between the proposed rules and the regional planning process. Indeed it is complementary to providing a safe and affordable future supply of water for Texas. Senate Bill 1 requires the development of a regional plan for water resource development and use. However, the protection of water quality is the primary responsibility and mandate of the commission and local districts and other entities under a number of specific state laws.

Delegation to Local Governments:

Hays County commented that to the extent possible, pollution prevention plans for creeks and aquifers are most effective, and most acceptable to the public, when administered on a local level. Hays County stated that it has already taken steps to protect stormwater quality by increasing minimum lot size requirements. In the recharge and contributing zones, acreage requirements range from one to five acres and that this effectively limits densities, reduces impervious cover, and generally protects against heavy sediment loading. Hays County continued that its rules also provide development incentives for: 1) the use of secondary treatment OSSF systems which generally result in cleaner effluent, lower organic and bacterial loading of the soil, and lower overall site disturbance; 2) rain water collection systems which result in less well borings into the aquifer, less demand on the aquifers and limiting runoff obtained through rainwater capture; 3) lots served by public water wells, and surface water sources; and 4) narrower road surfaces, where appropriate which equates to reduced site disturbance. Hays County stated that they encourage site development incorporating the removal of cedar trees and the reintroduction of native grass species which strengthens groundwater reserves and reduces natural erosion. Similarly, GE commented that since commission staff falls far short of the number necessary to implement the Edwards Rules; thus, the commission might consider implementation of the rules by counties through a local process, including audits by the State, similar to the process used to implement the state onsite waste water system regulations.

The commission responds by stating that the rules provide a mechanism for assumption of the Edwards Aquifer Protection Program by local governmental entities under §213.4(a)(5) and §213.21(g).

Avoidance of Duplicative Regulatory Programs:

A number of persons and entities commented on the potential for the rules to impose unnecessary duplicative regulatory programs. Commissioner Molenaar and an individual commented that Hays County has already rewritten their Subdivision Rules, Wastewater Rules, and has implemented the use of Rock Burms and Silt Fencing. They continued that they are working on other methods to prevent silt run off into our creeks. Commissioner Molenaar stated that he could understand the commission implementing Recharge Zone Rules over the Contributing Zone if Hays County was not making an effort to try and prevent flood water run-off pollution and concluded that the county can continue to regulate itself and control their own destiny and that more rules and regulations is not the answer.

Additionally, BS/EACD commented that the rules should consider the possibility of delegating the review and enforcement of the Edwards Rules by local authorities. SAWS recommended that the commission meet with all interested regional parties to discuss how other agencies may be able to help with the administration of the Edwards Aquifer Protection Program. SAWS commented that based on the commission's staffing limitations, SAWS recognizes the need for additional resources to adequately administer the Edwards Aquifer Protection Program and that other regional agencies, including SAWS, may be able to provide assistance and additional resources. In addition, WE commented that the proposed rules appear to neglect the other regulatory jurisdictions that have water quality rules in effect and that many of these rules may or may not be more restrictive than those proposed. However, it is quite possible that dual jurisdictional conditions will exist in several areas. This duality will cause undue expenditures by the proposed developer of regulated projects, whether public or private.

In addition to these expenditures, there may be undue confusion as to which jurisdiction has authority. WE further commented that these elements should not be left in an undetermined manner. Therefore, WE recommended that the staff identify and negotiate with the governing authorities that are within the regulated area. Such negotiations should be considered in the rules for the clarification of the truly governing authority.

An individual also commented that the rules should include a reasonable attempt to coordinate or maintain a consistent review process in these overlapping jurisdictions, such as LCRA's policy to defer to local regulations which meet the same goal of improved water quality. Finally, MB commented that within the City of Austin, Subchapter B merely provides another hoop for a developer and engineer to jump through. By City ordinances, most developments are required to meet the requirements of these regulations anyway. MB continued that requiring commission approval merely means more bureaucratic red tape with little or no change in factors effecting water quality. MB stated that currently, applications that are in the recharge zone which meet the City of Austin's requirements for erosion controls, structural controls, recharge features, and sewage collection systems are readily approvable by the commission. MB concluded that it does not makes sense to have to spend the money and time to obtain executive director approval when they already have stringent requirements enforced by the City of Austin. MB suggested that perhaps an inter-local agreement with the City of Austin would be beneficial.

As provided under Texas Water Code §5.103, Commission is the state agency with jurisdiction over the state's water quality program including issuance of permits, enforcement of water quality rules, standards, orders, and permits, and water quality planning. Development in the Edwards Aquifer recharge and contributing zones threatens water quality in the state and therefore is subject to regulation by the commission. Because the commission is charged with the protection of the state's water, it has proposed rules which are to be uniformly applied to the areas within the mapped recharge and contributing zones. However, under Texas Water Code §26.175, the commission may enter into cooperative agreements with qualified local governments for the delegation of commission progress. Accordingly, in §213.4(a)(5) and §213.21(g) of the rules, the commission has included specific criteria and conditions for local assumption of the state program. In addition, a model cooperative agreement was created and published in the Texas Register concurrent with the proposed rulemaking in response to public comment received in Phase I of the creation of the Edwards Aquifer Rules. Specifically, the commenters suggested delegation of approval and enforcement authority to certain local agencies that have sufficient resources to implement the review and approval process. According to some

commenters, such delegation would enhance environmental protection and speed up the review and approval of water pollution abatement plans.

The model cooperative agreement was developed and made available for review that would be entered into between the commission and local governments. Under the agreement, the commission delegates the review, approval, inspection and enforcement of Edwards Aquifer Protection Plans to local governments that have sufficient resources and jurisdiction to perform those responsibilities. Such agreements would be entered into pursuant to §§26.175 and 5.229 of the Texas Water Code.

FSMC also commented that local rule changes in Williamson County that increase the minimum lot sizes to 1 acre for lots served by water lines and 2 acres for lots on water wells should be evaluated as the commission looks at the various factors which can effect water run-off into the surface waters of the state.

The commission responds that the it adopts rules establishing the minimum requirements for the programs over which the legislature has given the commission responsibility and the local counties, cities, and regulating entities may establish regulations which meet or exceed them.

An individual commented that a separate permit process (regarding residential development) imposed by the State on top of that at the County level is not acceptable. Permits for all development should be available to the homeowner from one office. The proper means of control is for the State to enable the County to have more control over development.

The commission responds that it is the agency with jurisdiction over the state's water quality program including issuance of permits, enforcement of water quality rules, standards, orders, and permits, and water quality planning under TWC §5.013. Development in the Edwards Aquifer recharge and contributing zones threaten water quality in the state and therefore are subject to regulation by the commission.

The commission has proposed a model cooperative agreement under which the program could be delegated to local governments. The model cooperative agreement was developed and made available for review that would be entered into between the commission and local governments. Under the agreement, the commission delegates the review, approval, inspection and enforcement of Edwards Aquifer Protection Plans to local governments that have sufficient resources and jurisdiction to perform those responsibilities. Such agreements would be entered into pursuant to §§26.175, 5.229 and 7.351 of the Texas Water Code. The commission has also provided for the certification of a local program by the executive director under §213.4(a)(5) and §213.21(g).

LWV commented that they support cooperation among local governments and underground water conservation districts as well as other authorities in an effort to protect the Aquifer from pollution. In addition, measures for the protection of drinking water sources like Austin's recent action to buy land in the watershed or the purchase of easements are two additional protection strategies that should be explored.

The commission responds that it is the agency with jurisdiction over the state's water quality program including issuance of permits, enforcement of water quality rules, standards, orders, and permits, and water quality planning under TWC 5.013. Development in the Edwards Aquifer recharge and contributing zones threaten water quality in the state and therefore are subject to regulation by the commission. The rules apply to anyone engaging in regulated activity within the recharge and contributing zone, regardless of whether they are also within a local government's or another agency's jurisdiction, and are protective of the entire area covered by the rules. However, the commission encourages local government's to take additional measures that are within their power to protect water quality in their jurisdiction.

An individual commented that the commission should coordinate local governments and agencies throughout the recharge zone to ensure that the rules protect the entire area. Similarly, BMC asked if the rules take precedence if local jurisdictions already impose stringent regulations affecting the Edwards Aquifer Recharge and Contributing Zones.

The commission responds that it is the agency with jurisdiction over the state's water quality program including issuance of permits, enforcement of water quality rules, standards, orders, and permits, and water quality planning under TWC 5.013. Development in the Edwards Aquifer recharge and contributing zones threaten water quality in the state and therefore are subject to regulation by the commission. The rules apply to anyone engaging in regulated activity within the recharge and contributing zone, regardless of whether they are also within a local government's or another agency's jurisdiction, and are protective of the entire area covered by the rules.

Where a local authority currently has rules or ordinances governing the pollution of the Edwards Aquifer, both local and state requirements must be met. The existence of local regulations does not exempt anyone engaging in regulated activity under these rules from the state's rules. However, under §213.4(a)(5) and §213.21(g) of the rules, the commission has included specific criteria and conditions for local assumption of the state program.

RECA and SCW commented that the EPA has promulgated extensive stormwater regulations, including regulations which encompass construction activities and that the proposed rules target construction activities which must already comply with federal regulations. RECA commented that much of the proposed rules appear to be a duplication of the EPA's regulations and SCW continued that the duplicity of the regulations is unnecessary.

The commission responds that the requirements for temporary BMPs in the rules are similar to the applicable, technical requirements in the NPDES general permit for construction activities. This was done to avoid conflict with related federal requirements. However, the federal permit does not address post development BMPs necessary for the continued protection of water quality.

RECA and SCW stated that the proposed Subchapter B is more burdensome than the EPA General Permit for Construction Activities. SCW continued that under the General Permit, a party must file a Notice of Intent prior to commencing the construction project. However, the proposed rules under Subchapter B go further by requiring the party to file an application and obtain approval of the project prior to the beginning. SCW concluded that this requirement will undoubtedly increase costs and create delays.

The commission disagrees with the comment. The commission believes the proactive process specified in the rules which provides for water pollution abatement plans to be submitted and approved by the commission prior to the commencement of regulated activities will expedite the development process by eliminating the potential for plans to be found to be noncompliant with applicable requirements after the initiation of regulated activities. The commission has modified the requirements under Subchapter B to provide consistency with the requirements under the EPA NPDES general storm water permit to provide for protection of groundwater.

RECA and TxCABA noted that the commission should enact an agreement to administer stormwater quality by contract with EPA.

The commission has received approval of its application with EPA to assume delegation of the NPDES permitting program. However, the EPA NPDES general storm water permit for construction activities does not expire for five years. At that time, the commission will assume the function from EPA

RECA and TxCABA commented that the proposed rules exceed federal standards for both temporary and permanent structural controls because the federal standard for temporary is a goal of 80 percent removal of TSS, not a mandate and there is no performance criteria for permanent structures established by EPA in either existing Federal Register rules or the pending NPDES Phase II rules. TxCABA also recommended adopting EPA standards for structural controls. RECA and TxCABA also commented that the proposed rules exceed federal standards for both temporary and permanent structural controls because the federal standard for temporary is a goal of 80 percent removal of TSS, not a mandate, and there is no performance criteria for permanent structures established by EPA in either existing Federal Register rules or the pending NPDES Phase II rules. TxCABA also recommended adopting EPA standards for structural controls.

The commission disagrees with the comment. The commission has adopted the requirements of the NPDES general permit for construction activities in the rules. The requirements for permanent BMPs specified in the rules are the same requirements specified by EPA/NOAA for new development in the "Guidance Specifying Management Measures for Sources of Nonpoint Pollution in Coastal Waters". EPA has no other standards for structural controls.

Assessing Cumulative Impacts

USFWS states that it is not clear how the proposed rules address cumulative impacts of projects that together may pose potential significant adverse impacts to water quality. SOS, ASC, LWVSA and LWV commented that a GIS database containing the areas, location, type, and intensity of 111 existing and proposed development in the aquifer recharge and contributing zones must be developed and maintained as a basis for assessing the cumulative effects of development on the aquifer. Similarly, TCWA commented that the agency must use better information and data gathering, including using GIS systems. TCWA suggested the agency pursue and follow the same pattern that they have done in the surface water program under the source water assessment provided under the reauthorized Safe Drinking Water Act. In addition, GEOS commented that a master map or database of previously performed geologic assessments and WPAPs would be of great benefit as a way to identify and review previously performed assessments, particularly with regards to the concept of assessment integration.

The commission responds that while the suggestion to require submission of Edwards Aquifer protection plan information in an electronic GIS-compatible format would contribute to the ability of the agency and others to cumulatively assess development impacts, such a change in the agency's application process is resource intensive and not currently feasible at current staffing levels. The commission plans to study the GIS issues in future research efforts regarding cumulative assessment and the requirement will be considered in future rule proposals. The commission notes that water pollution abatement plans, including geologic assessments, are on file with the agency and are available to the public for reference and comparison.

SCW stated that the rules do not require studies or the collection of data to measure the effectiveness of the expansion of regulations into the contributing zone. SCW continued that the rules are costly and burdensome without providing for any way to accurately measure the cumulative effects of the required controls and that at this pace, the regulated community will be continually imposed upon without any kind of justification, until the end of time.

The commission responds that appropriate methodologies are not currently available to specifically address total loadings which might impact the aquifer and which would fairly address the cumulative effects of widely varying kinds of development. At this time, much of the Edwards Aquifer Recharge, Transition Zone and Contributing Zone is undeveloped. The proposed regulations are a proactive step intended to regulate activities that can affect the quality of the groundwater in the Edwards Aquifer, thus protecting the existing and potential uses of these water resources before they are substantially impacted. In addition, the large amounts of data necessary to provide reasonably accurate results have not been compiled into electronic format for the necessary data analyses. The commission has made no change to the rules in response to these comments.

A number of individuals and entities commented upon the adequacy of scientific studies to support the rule changes. Hays County stated that they believe that as a part of any new rule implementation process there should first be sound scientific studies demonstrating their need. Hays County recognized that if development trends continue there is an increasing potential threat to the aquifer from stormwater contamination resulting from increased sediment loading as well as associated bacteriological and chemical pollutants. They continued that at such time when stormwater monitoring establishes the presence of non-point source pollution threats to the aquifer, and with regional cooperation and planning, the court will consider supporting amendments to Chapter 213. In addition, JE and Commissioner Molenaar stated there is no evidence that shows these additional rules and regulations are necessary. Commissioner Molenaar stated that he is against this proposal for that reason. Additionally, two individuals commented that they are adamantly opposed to the excessive regulations that these rules impose upon citizens. They both want to see concrete scientific evidence that shows that regulation is the only option because this will drastically lower their property values. Also, PP and SCW commented that the proposed rules fail to identify any quantitative studies of the benefits to the Aquifer from prior years of regulation of activities in the recharge zone. How do we know the controls imposed on the recharge zone have worked or have been cost effective?

For that matter, there may be alternate controls which may be more effective, but which have not been evaluated. In addition, Representative Krusee questioned what exactly is the problem that the commission is addressing with these rules? If the rules are addressing a water quality problem, where has there been a degradation in water quality and how will it be remedied by adoption of these rules? BMC asked why is the commission proposing these rule changes and what is wrong with the current regulations over the recharge area. Additionally, MLK commented that they commend the executive director and his staff for what has obviously been long hours in developing these rules and acknowledge that the Texas Legislature has charged the commission with taking a proactive approach to the Edwards Aquifer. That is, the agency's mission is to protect the quality of the aquifer prior to it becoming impacted. They continue that this mission is made more difficult because, as is stated in the preamble to the rules, "... the precise effect of specific water quality management practices upon groundwater quality has not been determined." MLK concurred with that statement and believes that it properly identifies the difficulty in designing and proposing water quality protection for the Edwards Aquifer and in complying with such a program. MLK continued that while the commission must and should be proactive in protecting the Edwards Aquifer, it is doubtful the Legislature intended for the agency to over-regulate the area. MLK continued that the agency should base any new regulations, or expansion of the current regulations, on sound science. MLK suggested that the first step in doing so should be to determine what problem exists or what indications that a problem may be forthcoming, and how to address that problem. MLK stated that it does not appear that the commission has any criteria for determining an incipient problem and hence, it is not possible to take that first step. They concluded that the preamble did not identify any likelihood that the current rules do not adequately protect the aquifer, but only state that the proposals apply to activities that "have the potential for polluting the Edwards Aquifer," a qualitative assessment. MLK urged the commission to consider the existing scientific evidence, what it shows and be persuaded only by hypotheses based on scientific or technical evidence. They emphasized that the issue is not that the "activities" mentioned in the proposals should not be regulated, instead, their chief concern is whether the expansion of regulation is needed to protect the aquifer. Finally, RECA commented that the proposed rules fail to identify any quantitative studies of the benefits to the Aquifer from the years of regulation of regulated activities in the recharge zone. How do we know the controls imposed on the recharge zone have worked or have been cost effective? For that matter, there may be alternate controls which might work better, but which have not been evaluated.

The commission responds that USGS and NURP studies indicate contaminated stormwater runoff from construction post development activities have the potential to impact water quality. At this time, much of the Edwards Aquifer Recharge, Transition Zone and Contributing Zone is undeveloped. The proposed regulations are a proactive step intended to regulate activities that can affect the quality of the groundwater in the Edwards Aquifer, thus protecting the existing and potential uses of these water resources before they are substantially impacted. Preventing pollution of the waters of the Edwards Aquifer is more economically feasible than trying to clean the waters after the water quality has been degraded to unsafe levels.

Commissioner Burnett questioned if there is any hard evidence that shows construction in the contributing zone causes pollutants in the Edwards Aquifer. SCW and RECA also stated that the proposed rules fail to justify, other than on a qualitative basis, the reasons for expansion of regulation into the Edwards Aquifer contributing zone, and due to the absence of concrete information that the current controls are effective, it is premature to expand the controls to the contributing zone. TxDOT expressed concern that the regulated area is being expanded without any indication that the existing rules have been insufficient in protecting the water quality of the Edwards Aquifer. WGP commented that before amending and expanding the scope of the current Edwards Rules, the commission should make a determination, based upon the results from water quality monitoring or other studies, that the existing Edwards Rules are in fact not working and that revisions are necessary in order to provide enhanced water quality for those projects covered by the rules.

The commission disagrees with these comments. Because of the relatively limited construction activity that has occurred so far in the contributing zone, the Edwards Aquifer does not yet show evidence of significant, long-term water quality degradation due to construction activities in the contributing zone. However, population and economic projections indicate that such development will begin to increase in the near-future. Currently, over 1.7 million people in eleven counties rely upon the aquifer to meet their water supply needs. The intent of the rules is to be proactive to protect public health by preventing the degradation of the Edwards Aquifer and its recharge waters, rather than reactive, responding to pollution after the aquifer has become contaminated. The Texas Water Development Board estimates that by the year 2000, almost 2.7 million people will reside within the regulated counties (almost a 30 percent increase from 1990). By 2010, more than 3.3 million people will have moved into the area, with their associated residences and businesses. Most of this explosive urban growth will be concentrated in Bexar, Comal, Hays, Travis and Williamson counties. Many of these people will be living and conducting business over the recharge zone and contributing zone of the Edwards Aquifer. The rules address this issue by using the requirements from the National Pollutant Discharge Elimination System (NPDES) general permit for storm water discharges during construction activities, providing a post-construction total suspended solids (TSS) design standard, and providing for the ongoing maintenance of best management practices during and after construction. The agency also has researched the relationship of the contributing zone to the aquifer and incidents of water quality degradation and has concluded that regulation of activities related to the urbanization of this area is necessary.

The commission is proposing these rules to protect the water quality in this vital resource by regulating certain activities having the potential for polluting the Edwards Aquifer and hydrologically-connected surface water. At the same time, the agency seeks to impose only what is cost-effective and reasonably necessary for this purpose in order to allow for continued economic growth for this region. In revising the rule to utilize the new EPA NPDES general permit for Storm Water Discharges from Construction Activities in Region 6 which was issued by the EPA on July 6, 1998, the commission conformed the requirements of these proposed Edwards rules with requirements that owners/operators of construction sites would have to meet during construction to satisfy EPA requirements both in the contributing zone and in the recharge zone. This will reduce both the complication and the costs associated with meeting the proposed rules. The only additional requirement under the proposed Edwards rules is that after construction is

completed, owners/operators would have to install controls to ensure that storm water coming off of a developed site meets water quality standards. This is often achieved by constructing settling basins or buffer zones of vegetation and is necessary to protect the aquifer long-term. This is a new requirement for the contributing zone but has always been required in the recharge zone.

BMC asked have engineering studies been prepared by the commission supporting the proposed changes?

The commission has not prepared additional engineering studies. Rather, the commission based the rules on existing studies, data and other relevant information.

RECSA asked the commission to carefully consider the full ramifications of these proposed changes before adopting them because there is no credible evidence that existing rules have not been completely successful in protecting water quality...a goal that no one challenges.

The commission agrees that the previous rules have been successful in addressing regulated activity in the Recharge Zone, but do not currently address potential impacts from future development in the contributing zone.

ASA commented that, regarding the statement made by the Real Estate Council of Austin that the rule does not identify studies showing the benefits from the years of regulation in the recharge zone and that local efforts undertaken to protect the aquifer may be inadequate for several reasons such as 1) protecting the aquifer to protect Barton Springs for the purpose of contact recreation exceeds that required for a source of treated drinking water; 2) Austin's jurisdiction does not cover enough of the Edwards Aquifer to effectively protect the entire resource; 3) earliest regulations were weaker than those in place now and many projects affecting the aquifer are grandfathered under the earlier, less adequate regulation; and 4) other home-rule cities within the aquifer region have adopted less stringent regulations than Austin, undermining the positive benefits of the efforts within Austin's jurisdiction. ASA continued that it is not surprising that the end result of Austin's efforts to regulate development within a fraction of the aquifer region are not easily quantifiable; however, neither has it been shown that development within the region can continue without serious harm to this natural resource; in fact, studies undertaken by USGS, the Edwards Aquifer District, the City of Austin and other lead to the opposite conclusion.

The commission agrees that the proposed regulations are a proactive step intended to regulate activities that can affect the quality of the groundwater in the Edwards Aquifer, thus protecting the existing and potential uses of these water resources before they are substantially impacted. Preventing pollution of the waters of the Edwards Aquifer is more economically feasible than trying to clean the waters after the water quality has been degraded to unsafe levels.

TxCABA questioned how can the whole City of San Antonio develop over the aquifer with no measurable change in water quality if there is a scientific basis to justify the cost of these controls?

The commission states that the vast majority of the City of San Antonio is developed over the confined portion of the Edwards Aquifer which is not as vulnerable to contamination as the recharge zone (an unconfined portion). The majority of the city overlies rock units that provide natural protection to the aquifer by not allowing the infiltration of surface water to the aquifer. In contrast, the area around the northern part of Loop 1604 is in the recharge zone and has been subject to recharge zone regulations since 1970. The City of San Antonio has recently adopted ordinances to protect the aquifer in this area as growth has intensified in this area.

BS/EACD stated that studies should be conducted to estimate the loading of pollutants and changes in recharge volumes to the aquifer from sites developed under the Edwards Rules.

The commission agrees the studies identified in the comment would be beneficial; however, the commission does not have the resources necessary to conduct these studies. The commission would welcome any assistance that may be provided by the local groundwater districts.

The COA suggested the development and enforcement of a Total Maximum Daily Load (TMDL) for the watersheds in the Edwards Aquifer Recharge Zone. If the commission does not adopt the nondegradation performance standard for permanent BMPs, then an approach similar to the TMDL process should be adopted for stormwater discharges to creeks that contribute to the Edwards Aquifer Recharge Zone. A TMDL-like process applied to the aquifer would establish criteria specifying maximum pollutant loads for watershed stormwater discharges by stream segment. TMDLs are needed to establish a framework for watershed-based and regional management of the Edwards Aquifer. COA also stated that the benefits of the TMDL approach would include simplifying the regulatory requirements for performance of BMPs and employing uniform standards for entire watersheds because currently there are multiple local, county, and state jurisdictions in operation in the affected area of this rule which have unique and sometimes inconsistent requirements for development. If a TMDL-like approach is adopted as part of the Edwards Rules, then applicants, regulatory entities and groundwater quality will benefit from the consistency and technical support for the resulting restrictions on development.

Similarly, TxDOT suggested that the Total Maximum Daily Loads (TMDL) initiative is an example of how a regulatory program should be implemented and should begin with a scientific, quantitative assessment to identify problem areas and their sources. They conclude that by using this method, limited resources can be targeted at priority pollution problems and therefore the results are achieved in the most cost effective manner.

The commission agrees that Total Maximum Daily Load (TMDL)-equivalent procedures would be a useful approach to managing water quality in the Edwards Aquifer. However, the commission does not have the resources necessary to implement a TMDL-type program beyond the state's existing obligations under the federal Clean Water Act. The commission currently has plans to develop TMDLs for four surface waterbodies which recharge the Edwards Aquifer over the next ten years. These waterbodies are: Lower Leon Creek, Salado Creek, Onion Creek, and Barton Creek. TMDLs are implemented through existing state, regional, and local programs.

COA stated that the agency is currently developing TMDLs for priority stream segments on the 303(d) list of impaired water bodies. The COA recommends that a TMDL also be developed for the Edwards Aquifer that is protective of biological resources that are dependent upon the aquifer, in addition

to consideration of public health effects. They suggest that nutrient concentrations be maintained at background levels in order to minimize impacts to aquatic organisms and to minimize potential nuisance growth of aquatic plants. The COA does not recommend that drinking water standards alone be considered because significant increases in nutrients may be permitted with deleterious effects on the aquatic biota. This application to aquatic life protection is consistent with the purpose statement in 30 TAC 213.1 and 213.20. The COA concluded that if an Edwards Aquifer recharge TMDL is not possible under the current commission program, then at least TMDL's for the primary recharge creeks designated as segments, Barton Creek (Segment 1430) and Onion Creek (Segment 1427) should be developed.

The commission responds that it currently has an obligation under the federal Clean Water Act to develop TMDLs in Barton Creek and Onion Creek. These studies will primarily address constituents which are responsible for impairing beneficial uses as defined in the state's Surface Water Quality Standards. According to the 1998 Clean Water Act Section 303(d) List for the state, the constituent of concern in Barton Creek is fecal coliform bacteria and in Onion Creek the constituent of concern is total dissolved solids.

An individual commented that the commission needed to establish a protocol for offering research grants for studies of permanent stormwater controls and BMPs that may be obtained by universities and other institutions. These data accumulation efforts could be integrated with regulatory agency monitoring at a comparatively low cost.

The commission notes that it does not currently have a program or protocol, nor does it have appropriated funds, specifically for offering research grants for studies of permanent stormwater controls and BMPs. Grants from the Environmental Protection Agency; however, are available for a wide range of environmental projects.

A number of individuals and entities commented on the adequacy of agency personnel resources to administrator and enforce the Edwards Aquifer program. Hays County stated that for the existing §213 to be effective, there must be adequate staffing to insure timely review of permit applications, and periodic field compliance reviews. Hays County further commented that presently this is a serious program deficiency. WPOA and fifty-nine Wimberley residents stated that the state offices that are currently in charge of regulations are understaffed and are unable to enforce the existing regulations. Additionally, SAWS, PDE, LWVSA, and LWA commented that the addition of the Contributing Zone will require a significant increase in staff at the regional level. SAWS continued that the Preamble states that the fiscal impact to the commission from the Contributing Zone will be an "increase in costs associated with the review of applications and plans" and from maps provided with the proposed rules and discussion with agency staff it appears that the addition of the Contributing Zone will approximately double the area currently regulated under the Edwards Aquifer Protection Program. SAWS recommended that additional staff be added, as needed, to the local commission offices to handle the increased workload to be generated by the addition of the Contributing Zone to the area regulated under the Edwards Aquifer Rules. In addition, RECSA commented that the development process in Bexar County, of which the commission often is an integral part, has slowed considerably. Staff is already overworked, and extended review times often cause costly delays to projects in the area, with no apparent offsetting benefit. For the commission to adopt new regulations, or revise existing ones, without adding the staff at the regional offices to carry out these changes, is counter-productive. SCW also commented that a key factor in the implementation of any new rule or regulation is the sufficiency of agency staff and resources to manage the additional workload and the commission has acknowledged the expected increase in workload – even making deletions and changes prior to publication of the proposed rules, in an attempt to deal with the problem. SWC continued that the agency's resources are fixed until the Legislature increases their appropriation. SWC concluded that increasing regulations while not being able to procure additional staff and resources exacerbates the problems associated with parties obtaining sufficient review and approval of plans in a timely manner so as to not delay construction.

The commission responds that a streamlined review process has been developed to allow the Edwards Aquifer Protection Program to operate more efficiently and to significantly reduce the plan review period. This includes the requirement that certain plans have the seal of a registered professional engineer. This process is in place and will allow for more field inspections to regulate compliance. In addition, the Texas Legislature has imposed a limit on the number of employees the agency may employ. The commission, like other state agencies, must operate within those legislatively imposed limits to provide staff to meet all its needs, including the Edwards Aquifer Protection Program.

SAWS, LWVSA, and LWA recommended the commission allocate additional staff for the San Antonio regional office. LWVSA and LWA commented that the four full-time Edwards staff members in San Antonio must handle 77 percent of the recharge zone, and that the addition of the contributing zone will only further dilute their efforts. SAWS commented that the commission regional staff is not equitably divided between the San Antonio and Austin regional offices. To provide the same level of service and compliance in both the Austin Region and San Antonio Region, SAWS stated that changes should be made in how staffing allocation decisions are made. They suggested that staffing allocations should reflect the following: the amount of the Edwards Aquifer Recharge Zone (EARZ) and Edwards Aquifer Contributing Zone for which each regional office is required to provide compliance activities; the number of Water Pollution Abatement Plans (WPAP) approved since permanent pollution abatement has been required (this number would reflect the volume of inspection and/or compliance work that needs to be done to assure compliance with existing plans); the total number of submittals, including technical requests, received annually; and the number of WPAP submittals received annually. SAWS continued that basing staffing allocation on more factors than just the number of WPAP submittals received by a particular region would more accurately reflect the total workload of each region and would allow for more equitable staffing between the regions. SAWS stated that for example, the Austin region has 6 full time Edwards staff members (and one TXDOT liaison) to cover approximately 23 percent of the Edwards Aquifer Recharge Zone while the San Antonio region currently has 4 full time Edwards staff members to cover approximately 77 percent of the Recharge Zone. They continued that the addition of the Contributing Zone area will only make these existing staffing problems more severe.

The commission notes that program staffing is based on program workload which is defined as the number of applications received by each regional office. For fiscal year 1997, the Austin Regional Office reviewed 68 percent of all Edwards Aquifer protection plans received by the agency and the San Antonio Regional Office reviewed 32 percent. While the ancillary duties enumerated above are generally directly related to the number of plan reviews, they are not specifically considered for staffing distribution.

GVA commented that the review of applications for regulated activities on the recharge and contributing zones should not be constrained to a particular time period so that the commission staff should have the option of taking as much time as needed to carefully review each application so as to assure water quality protection. The commission could raise fees for permit applications or other related fees to pay additional staff to assist in this process.

The commission responds that the proposed rule requires each Edwards Aquifer Protection Plan be certified by a Texas Registered Professional Engineer. This certification will greatly reduce the necessary plan review period by the executive director and will allow more time to be dedicated to field inspections and compliance monitoring.

MEC commented that they would like to see an evaluation of the costs for implementation of these rules with the impact on the commission staff identified.

The commission responds that the proposed rule is intended to streamline the review of Edwards Aquifer Protection Plan applications under Subchapter A and Contributing Zone Plans under Subchapter B by requiring a Texas Licensed Professional Engineer to sign, seal, and date technical portions of the applications thereby reducing the staff time spent performing technical reviews. This rule requirement will allow more time for the staff to conduct follow-up inspections at approved sites and pursue enforcement as necessary.

APA commented that they understand that the commission does not have adequate enforcement field personnel to adequately enforce the rules as they are written. They believe that enforcement needs to be from the perspective of assisting the private landowners to comply with the rules, not simply to discover noncompliance and to force people to hire specialists to provide guidelines or management plans.

The commission responds that staff are employed to work with individuals and companies to help them understand and comply with the many rules and regulations of the agency. In keeping with the public trust placed on the commission by the legislature, the agency has developed and is implementing a consistent enforcement policy, including regionally initiated orders which provides enforcement authority for field staff to directly address violations.

Public Notification

A number of persons and entities commented on the public notice provided for the proposed rule. BMC asked was public notification of the proposed rule changes sent out to affected property owners, and if not, what method of notification was utilized? BMC also asked if affected municipalities been notified of the rule modifications?

Two individuals commented that they were concerned that the hearings held on the proposed rules were not well publicized so the attendance was small and not representative of the entire community. They requested an extension of the deadlines so that more people could be informed. They commented that nothing should be done at present since the water quality problem is at least six months away. An individual commented that all of these proceedings have been kept very secretive and advertised in an extremely poor manner. An individual commented on his concern that everyone in his community found out about the hearing after it was too late to really make plans. He wanted to know how the agency goes about publicizing a hearing. Finally, JMARE commented that the commission appears to be "quietly" trying to enact this regulatory action without proper response from the public. OHBPA commented that the commission needed to have additional public comment periods. OHBPA continued that although, they understand the original comment period was published in the Register, it is their belief that most Texans do not read this publication on a regular basis and that every citizen should have the opportunity to be informed of the proposed rules and comment upon them.

The commission published the proposed rules in the Texas Register on March 27, 1998, 23 TexReg 3192. In addition, that Texas Register publication notified all interested persons that public hearings would be held in Wimberley on Monday, May 4, 1998, at 7:00 p.m., at Bowen Intermediate School, located at 14501 Ranch Road 12, Wimberley; in Austin on Tuesday, May 5, 1998, at 10:00 a.m.; in commission Office Complex, Building E, Room 201S, located at 12100 Park 35 Circle, Austin; and in San Antonio on Wednesday, May 6, 1998, at 7:00 p.m., in the City Council Chambers, located at 103 Main Plaza, San Antonio. The hearings were structured to receive oral and written comments by interested persons. The commission has also held work sessions to discuss the rules on July 16, 1998 and July 30, 1998. These sessions were open to the public and announced in the Texas Register on July 24, 1998 and July 10, 1998.

In addition, a press release was issued on March 4, 1998 announcing the proposed rules. On April 23, 1998, a press release was issued regarding the beginning of the hearings listed above. On May 8, 1998 a press release was issued regarding the extension of the comment period for another 30 days, in addition to the original 45 day comment period. Letters were also mailed to state legislators regarding the publication of the rules and the extension of the comment period.

Notice of these rules was consistent with the requirements of Texas Government Code §2001, Subchapter B, Rulemaking. The commission believes that these efforts provided the public with sufficient opportunity to be informed of the proposed rules and provide comment.

TEW stated that the public comment period ended the same day the only map of what areas are included ran in the newspaper.

The commission responds that the areas included in the recharge and contributing zones were identified in maps published in the Texas Register on the same day that the proposed rules were published, March 27, 1998 and have been available on the agency web site from the date the rule was proposed.

An individual commented that the commission needed to enlist the cooperation of stormwater control and BMP owners in a public relations campaign. Since many of the newly-constructed stormwater sedimentation basins are located in highly visible areas on commercial sites, it would be beneficial if well-known

businesses demonstrated their support for protecting the water resources by helping explain the purpose of these stormwater controls. This program would be voluntary and costs would be absorbed by businesses.

The commission recognizes that public outreach programs are essential for the success all environmental programs, including the Edwards Aquifer Protection Program. While the comments are quite valid and will be considered by the Edwards Aquifer Protection Program, there will be no rule change.

USFWS commented that in the preamble under the general explanation of the proposed rule for the new Subchapter B, they recommend changing "industrial and residential sites" to "residential and non-residential sites," to cover the broad spectrum of regulated uses covered under the rules and maintain consistency with wording throughout the remainder of the rules. USFWS commented that Texas Water Quality Standards need to be cited as Texas Surface Water Quality Standards (§§307.1-307.10). USFWS commented that under the discussion of other rules that provide protection to the aquifer the phrase "containment of USTs are provided in Chapter 213" is vague and should be broadened to containment of leaks from USTs.

The commission responds that corrections to the proposal preamble are beyond the scope of the adoption preamble. The definition of regulated activity covers the requested change and the rule provides for the clarifications requested.

§213.2 Definitions:

Hays County supported those changes redefining aquifer boundaries and most definition changes.

The commission acknowledges the comment.

COA suggested that in the definition for (1)(A) Abandoned well, the term "operable" should be added prior to the word "good." Additionally, an individual wanted to know how was a water well determined to be "abandoned" if not pumped for six months?

The commission responds that the definition is derived from Chapter 32 of the Texas Water Code regarding Water Well Drillers.

USFWS commented that the revised definition for best management practices appears to encompass only technology-based structural controls. They suggest that the definition be expanded to include non-structural controls, such as impervious cover limits and setbacks from creekbeds and other sensitive recharge features. These non-structural controls are known to protect water quality and require little or no maintenance. Although non-structural controls may not be mandatory under the rules, they warrant discussion as viable and efficient alternatives to structural controls.

The commission disagrees with the comment that the revised definition of BMPs encompasses only technology-based structural controls. The rule defines BMPs very broadly to include both pollution prevention and pollution control practices, including non-structural as well as structural controls.

The commission believes there are many valid BMPs, including structural and non-structural controls, which can potentially be used to meet the requirements of the rule. The commission will recognize BMPs which can be used to meet the requirements of the rule in technical guidance being prepared by the executive director. Applicants will be able to choose the BMPs which are best suited to their site conditions and circumstances to meet the requirements of the rule.

USFWS also recommended that the agency consider developing an incentive program (e.g., fewer regulatory requirements) to encourage the implementation of nonstructural controls.

The commission has included an incentive to encourage the implementation of non-structural controls by exempting low density development from requirements to implement other permanent stormwater BMPs.

USFWS commented that no mention is made of the types of structural controls (e.g., dams, silt fences) in defining BMPs. It would be helpful to give examples to help define the range of items that would qualify as structural controls.

The commission agrees that such examples would be helpful but would be more appropriately presented in the technical guidance being prepared by the executive director. However, §213.5(b)(4)(D) does list suggested stabilization practices.

USFWS commented that to be effective at protecting water quality, particularly during construction, temporary and permanent BMPs should be in place and fully operational prior to initiating construction.

The commission responds that the proposed rule requires that temporary erosion and sedimentation (E&S) controls or other controls described in the approved Edwards Aquifer Protection Plan must be installed prior to construction and maintained during construction. Temporary E&S controls may be removed when vegetation is established and the construction area is stabilized. The agency may monitor stormwater discharges from the site to evaluate the adequacy of temporary E&S control measures. Additional controls may be necessary if excessive solids are being discharged from the site.

BE commented that the definition of commencement of construction should also include sitework associated with such physical facilities, and that a statement should be added to insure that a sewage wet well is not included in this definition.

The commission agrees that the definition of commencement of construction should include any regulated activity/sitework associated with the construction of a project and that a lift station should not be included as a prohibited activity; therefore, the rules have been changed appropriately.

BS/EACD commented that in the definition for geologist, that "hydrology" implies surface water studies and should be changed to "hydrogeology" to indicate groundwater studies. BS/EACD commented that the proposed rules do not remedy one of the most significant problems of the existing rules - that many of the assessments currently submitted by "geologists" are either poorly trained, follow poor methodology in assessing recharge features, or for other reasons often fail to identify or properly assess potential recharge features on site. Greater accountability is necessary for geologists performing the geologic assessments. Geologists should be certified by the commission to be capable of performing the assessments and could be based on educational background and work experience. BS/EACD continued that as proposed, the definition of geologists has sufficient exceptions and is vague to the extent that anyone can submit an assessment, regardless of their ability or effort. AIPG, EE, RB, GVA and GEOS commented that the definition of "Geologist" as stated in the rules needs to be revised such that it includes

the completion of a baccalaureate degree in geology from an accredited university and practical experience to provide sound professional judgement required for identification of sensitive features located in the Edwards Aquifer Recharge and Transition Zones. RB and GEOS commented that the State of Texas Job Classification System requires those employees classified as geologists to have a degree in geology in order to conduct State business in a professional manner concerning water resources protection, planning, and management, and various fields of environmental geology; thus, the requirement of a degree in geology and a minimum of four years experience in the practice of environmental geology should be part of the official "Geologist" definition. JWS commented that he is pleased to see a definition for qualified geologist.' He agrees with the requirement of a degree, but recommends that the phrase "who have training and experience in groundwater hydrology and related fields; or have completed accredited university programs that enable individuals to make sound professional judgements" be added. TAPG commented that they support the addition of the term "Geologist" in 213.3 definitions; however, they would prefer to see the term geoscientist used rather than geologist because it more accurately describes the diverse backgrounds of individuals who are qualified to perform geologic assessments.

The commission has modified the definition of geologist to require both a degree in the natural science of geology from an accredited university and training and experience in groundwater hydrology and related fields or the demonstration of such qualifications by registration or licensing by a state, professional certification or completion of accredited university programs.

An individual commented that he wanted a list of people in his area that are "certified" and/or "qualified geologist" or "geological engineers" available to prepare the required geologic assessment. He also wanted to know what would be a realistic cost to prepare an accurate assessment.

The commission responds that there are many professional societies that have lists by county and speciality for geologists. The cost of an assessment is site dependent based on size and complexity.

BS/EACD stated that the role of underground water districts in working with the commission to assist with the Edwards Rules should be stated as in the previous Edwards Rules. Underground water districts can provide updated geological information, identify and track sensitive features, and monitor for possible impacts of approved sites. Information reported to the commission on sensitive features should be copied to the local water conservation district for tracking purposes and this procedure must be stated in the rules.

The commission responds that the section of the rules related to groundwater districts referred to by the commenter was not proposed for repeal, but was simply not republished in the Texas Register as no changes to the section were proposed. The commission further responds that information received by the commission related to the Edwards program is a public record and available for review. The commission does not have the resources to provide copies of this voluminous information to groundwater districts.

USFWS commented that the use of "temporary" and "permanent" BMPs in §§213.5(b)(4)(B) and (C) do not appear to be consistent with the revised definitions. "Temporary" is defined as BMPs used to control pollution from regulated activities before and during construction; however, in §213.5(b)(4)(B) it refers to during and after construction. "Permanent" is defined as BMPs used to control pollution from regulated activities after construction is complete, but is also described as during and after construction in §213.5(b)(4)(C). The definition of "permanent" is confusing and gives the impression that permanent BMPs are not used during construction, which is not the case, particularly for the non-structural controls mentioned above.

The commission has modified the definition for Temporary BMP to address the comment regarding the timing of the use of Temporary BMPs. The commission disagrees that the use of permanent BMPs is confusing. The use is that which is common practice and is tied to specific technical standards and maintenance requirements, rather than time specific usage.

COA commented that throughout the rules, the term "permanent BMP" is used primarily in the context of structural controls. The definition should include structural and nonstructural controls. In general, non-structural controls are lacking in the rules; however, they could be addressed in technical guidance provided the definition of "permanent BMP" is broad enough to include them.

The commission has revised the definition of "permanent BMP" in the final rule to include a reference to "preventing" pollution as well as "controlling" pollution. The commission believes there are many valid BMPs, including non-structural BMPs, which can potentially be used to meet the requirements of the rule. The commission will recognize BMPs which can be used to meet the requirements of the rule in technical guidance being prepared by the executive director.

PDE commented that the definition of "Private Service Lateral" includes the following phrase "or other place of disposal that provides service to one individual household or building." They suggested the definition be changed to allow a single family residence to have a detached garage that would include restroom facilities and other similar situations.

The commission agrees and the definition of "Private Service Lateral" has been changed accordingly.

USFWS stated that Bell County and the Jollyville Plateau portion of Travis County have been left out and recharge portions of these areas should be included and covered by the rules.

The commission responds that the Edwards Aquifer is defined in the TWC §26.046(a) as "that portion of an arcuate belt of porous, waterbearing limestones composed of the Comanche Peak, Edwards and Georgetown formations trending from west to east to northeast through Kinney, Uvalde, Medina, Bexar, Kendall, Comal, and Hays counties, respectively, and as defined in the most recent rules of the commission for the protection of the quality of the potable underground water in those counties." Based upon a petition to the agency from the City of Round Rock and the concurrence of county government, the regulations were extended to Williamson County in May 1985. Northern Hays County was added September 1985, as a result of a request to the agency from a local elected official with support from the community. A portion of Travis County entered the program in March 1990 based upon a petition to the agency from the City of Austin with support from others.

In effect, the counties that are included in the program were either mandated by legislation or added to the program based upon the request and/or concurrence of local elected officials.

Traditionally, the commission has responded to requests or petitions from local governments, in particular the County Commissioners' court, when adding counties within the recharge zone to the program. Local government has not supported a petition from citizens to expand the program into Bell County. Moreover, staff review of economic and demographic data from Bell County indicates little, if any, development is currently occurring in the Bell County recharge zone. There is some growth occurring in and around Salado, but this community is on the far northeastern margin of the recharge zone which minimizes the potential threat to groundwater quality in the area. In addition, legislation has been enacted providing for the establishment of a groundwater district in Bell County upon approval of the county commissioners court.

At the time of the inclusion of Travis County in the Edwards program in 1990, the area located north of the Colorado river and south of state Highway 183 (within Austin City limits) which contains outcrop of the Edwards Aquifer was effectively fully developed. The City of Austin's ordinance authority to protect public health and welfare for an area completely contained within their city limits was recognized. The city had adopted a proactive environmental protection ordinance including protection of water quality and petroleum storage tanks. In addition, the Edwards Aquifer in this small area provides only minimal contribution to the artesian portion of the aquifer which is used as public water supplies. Based upon the local control over a fully developed area and the small potential for impact on the confined portion of the aquifer, it was concluded that the area did not need to be included in the state's Edwards Aquifer protection program.

USFWS commented that in regard to the Edwards-Trinity Plateau Aquifer where groundwater flow is toward streams crossing the exposed Trinity Group formations, is this a "contributing" area for the streams that are involved? Conversely, percolation away from streams crossing Edwards Group formation would be a "losing" stream. If these concepts are true, it might help to elaborate on them.

The commission requires further clarification on this comment and its relevancy to the protection of the water quality of the Edwards Aquifer before a response can be made.

EAA recommends, for clarification purposes, the commission expand the definition of recharge zone as follows: "... that area designated as such, including the area represented by the boundary line itself, on official maps..."

The commission responds that the line is part of the Recharge Zone as depicted on the official maps adopted by referenced in the rules and, therefore, further clarification is unnecessary.

EAA commended the commission on proposing changes to the official maps referenced in the definition of "recharge zone," based on recent mapping conducted by the U.S. Geological Survey (USGS) and other studies. The EAA believes these changes accurately reflect the best scientific information available at this time on the geology of the Edwards Aquifer recharge zone.

SAWS commented that the changes in the Recharge Zone boundaries are a positive step forward in protection of the Edwards Aquifer and commended the commission for making this change. SAWS continued that the revisions to the Edwards Aquifer Recharge Zone boundaries proposed by the commission appear to adequately reflect the hydrogeologic characteristics of the areas that were changed.

The commission agrees with the comments and the need for utilizing the best available scientific information in administering the Edwards Aquifer Protection Program.

A number of individuals and entities commented on the need to make property owners better aware of whether their property fell within the designated boundaries of the recharge, transition, or contributing zones. CP expressed concern on what geologic studies determine whether or not a property is in the recharge zone. CP also expressed concern that landowners lack the ability to demonstrate that their property is not in recharge zone and should not be included with the area designated. The commentor also stated that there should be some way to allow landowners the opportunity to demonstrate that their property, in fact, is not included in the recharge zone and should not be included in the map area.

PC stated that some clearly defined method or procedure be established by the commission to provide property owners, in the future, an avenue for appeal of their properties designation as being over the Edwards when there is available geologic or other quantifiable data to indicate the reasonableness of such request. Further, that the location of the Recharge Zone boundaries, while based on the best current information, are inexact and approximate. The whole premise of the establishment of Edwards boundaries is that they be as accurate as possible and that they be supported by the best geologic information available, such as an on site assessment. Similarly, VA commented that after the commission's review of the comments, if subject properties in Bexar County are to be included in the Edwards Aquifer Recharge Zone, it is imperative that the commission immediately establish a procedure in which property owners are afforded the opportunity to present evidence contesting the designation of the subject property as part of the Edwards Aquifer Recharge Zone. Additionally, PC commented that past experience has shown that once a line is established placing property in a recharge zone etc. the commission does not appear to have the ability to make a map change even in the face of geological evidence; thus, he recommends that there be some type of mechanism or methodology be developed so that when a property which is included by the commission within the line is found not to be in the recharge zone it can be removed from the official maps. In addition, GVA commented that they support the effort to more accurately delineate the recharge zone, deleting areas which do not contribute recharge and including those which do; however, the rationale for some of the changes should be clearly stated. For example, how were these new boundaries determined? Are they based on potentiometric data or tracer tests? This would also help to answer why some peninsular outcrops of the Edwards Limestone Group are excluded while others are not.

The commission responds that it relies on the best available scientific studies in order to establish the boundaries of the Recharge Zone. Further, as new, additional or revised information becomes available, appropriate changes are made through the rulemaking process. The commission disagrees with the commenters that a specific landowner appeal process is needed for determination of changes to the Recharge Zone. Since such changes are done by rule, subject to public notice, comment and hearing, as well as adoption by the commission, §213.26 provides a procedure for requesting individual exceptions to the

provisions of the rules, including the applicability of the mapping to a specific site.

GE commented that since there are difficulties associated with assessing recharge features during dry weather conditions, they recommend that the commission consider all stream courses within the Recharge Zone to be significant recharge features unless the applicant provides stream flow measurements demonstrating that downstream reaches are not recharging, and that the commission develop maps of karst features similar to the water well inventory that is maintained by the State.

The commission disagrees with the comments. The methodology developed to assess sensitive features employed in the application and guidance documents is believed to be sufficient when prepared by qualified personnel. Further with regard to mapping karst features, the commission does not believe the additional resources that would be required to implement a mapping program would be justified by any additional benefit or protection provided to the aquifer. The rules specify the quality of the water leaving the site and should be of a quality to enter features encountered in stream beds.

MLK and MEC commented that a significant portion of the Edwards Aquifer recharge zone is not covered by the rules. This includes the area inside the city limits of Austin, south of 183 and North of the Colorado River. MLK stated that commission indicated that this was because studies have shown that this area of the aquifer discharges to the Colorado River and continued that they are not aware of this study. MLK stated that Barton Springs discharges to the Colorado River and that under this reasoning, the Barton Springs segment of the aquifer should not be covered. Nonetheless, it is unclear why an area inside the city limits of Austin be subject to the least restrictive rules. MEC state that if the absolute goal is water quality protection and not growth control, then these rules should be applied equally and not exempt areas in the recharge zone with the city limits of Austin north of the Colorado River.

The commission responds that the areas of the Edwards outcrop not included in the rules referred to by the commenter are not significant portions of the aquifer recharge zone because they do not contribute significantly to the artesian portion of the aquifer which supplies water for public drinking water systems nor to Barton Springs. Analysis of water levels and seeps indicate that groundwater discharges to nearby surface water drainages rather than to the downdip, artesian portion of the aquifer in the area south of Sate Highway 183 referred to by the commenter. The commission further believes that the other areas of Edwards outcrop within the City of Austin that are excluded from the rules, are areas where significant development has already occurred and which are completely contained within the City of Austin and subject to their rules for development and water quality protection.

SAWS commented that there are areas south of the Recharge Zone which flow onto the Recharge Zone that should be included within the Contributing Zone. The watershed delineation along the southern Recharge Zone boundary should include an area which would be subject to both Contributing Zone and Transition Zone regulations. They stated that this change would prevent sites just off the southern boundary of the Recharge Zone which have stormwater that drains onto the Recharge Zone from being totally unregulated with regard to stormwater runoff.

The commission agrees with the commenter. Two such areas which are south of the Recharge Zone but which drain back to areas of Recharge Zone on the Castle Hills Quadrangle in Bexar County and the Bracketville Northeast Quadrangle in Kinney County were proposed as Recharge Zone in the proposed rules. The commission has further considered the comment and has modified the proposed rules to require that the area on the Castle Hills Quadrangle in Bexar County meet the requirements of the Contributing and Transition Zones and not the Recharge Zone. These changes are illustrated on Appendix A1 and A2. No change is proposed for the Bracketville Northeast Quadrangle in Kinney County, because no Transition Zone has been delineated for the area.

BP commented that there is no basis for revising the Recharge Zone in the area (Castle Hills Quad.) which includes their 50 acre tract since an on-the-ground geologic study has been performed on the 50 acre tract which found no Edwards Recharge Zone geologic features and there are no recharge features downstream; thus, the proposed Recharge Zone boundary revision should be modified accordingly.

Additionally, BP commented that agency the commission had stated that the revision had been made to account for concerns regarding two faults lying in the recharge zone; however, their studies show no lineations on or adjacent to the property that would indicate the presence of geologic faults. Such studies have also found formations on their 50 acre tract so as to make it ineligible to apply to the present "Recharge Zone" definition; thus, the property appears to lie within the Edwards Aquifer Transition Zone as presently shown on official maps due to the identification and classification of rock type and fossil content. Similarly, KM commented that an on-the-ground geologic study has been performed for a 50 acre tract in Bexar County which found no Edwards Recharge Zone geologic features and there are no recharge features downstream. The commentor also requested that proposed Recharge Zone boundary revision be modified accordingly. PC commented that three properties with a combined acreage of less than 20 acres should be officially removed as being shown over the Edwards Aquifer Recharge Zone by the commission.

The commission disagrees with the comments. A second follow-up onsite investigation was performed in response to the comment which confirmed that the area in question drained to an area of mapped Recharge Zone along Huebner Creek.

PDE commented that they have spent a considerable amount of time mapping the area in the immediate vicinity of the Interstate Highway 10 and Loop 1604 intersection. Their information clearly shows that some of the areas proposed by the commission are not in the recharge zone. They are willing to provide this information to the commission and suggested they will reconsider their proposed boundaries.

The commission responds that it has considered this and similar comments and proposes that the areas which are south of the Recharge Zone but which drain back to areas of Recharge Zone be required to meet the requirements of the Contributing and Transition Zones and not the Recharge Zone.

VA contested the proposed amendments to §§213.3-213-10, and new §§ 213.20-213-28, concerning the Edwards Aquifer rules. They have submitted information based on onsite geologic investigations by Raba-Kistner Consultants, Inc., showing that the majority of these properties are not located on the Edwards Aquifer Recharge Zone and do not meet the criteria nec-

essary for inclusion into the Edwards Aquifer Recharge Zone. VA commented that based on conversations with the commission at the Austin office of the agency, no field related investigations, actual borings, excavations or substantiated scientific data was utilized in preparing the proposed Edwards Aquifer Recharge Zone limits that effect subject properties. It is proposed that these properties be included in the Edwards Aquifer Recharge Zone based upon the belief that drainage from the properties flows into the Leon Creek and passes over 2 mapped fault locations in the Leon Creek. One fault is located near Prue Road and the other is approximately one mile north of Prue Road. According to Austin commission staff, field investigations and measurements of stream capture have not been conducted at these two fault locations to determine sensitivity to recharge of the Edwards Aquifer. Nor has the commission presented water quality data that supports its position that the Edwards Formation may be degraded by stormwater runoff from subject properties.

The commission responds that sufficient justification was provided in the proposal preamble, but that the information utilized by the commission in developing the proposal was not provided in detail. The occurrence of mapped faults in the area of concern has been established in the geologic literature. The potential for hydrologic communication to the subsurface artesian aquifer through such faults is also well established. The high aquifer transmissivities and rapid travel times to public water supply wells is a significant concern to the commission.

These rules are intended to be proactive to protect public health by preventing the degradation of the aquifer and its recharge waters, rather than reactive, responding to pollution after the aquifer has become contaminated. The goal of the proposed rules is to require only those measures that are reasonable and necessary to protect water quality and to allow for continued economic growth in the region.

UDSC commented that the portion of Leon Creek that is currently part of the Edwards Aquifer Transition Zone is an area that has low to no porosity or permeability. Designating this area as part of the Recharge Zone will make it subject to the City of San Antonio's restrictions on future installation of underground storage tanks (USTs) in an area whose lithology is not conducive to lateral or vertical migration of hydrocarbons. The proposed designation of the above area as part of the Recharge Zone will impose added costs and regulatory burdens to be borne by the taxpayer and consumer, while providing no proven benefit to the Edwards Aquifer. Based on geologic and hydrogeologic studies, the area in question has little potential for recharge to the Edwards Aquifer and therefore should not be added to the Recharge Zone. This area of the Leon Creek watershed south of Loop 1604 currently within the Transition Zone should be designated part of the proposed Edwards Contributing Zone. This alternative provides the additional protection to the Edwards Aquifer intended by the proposed rule changes while avoiding imposition of unwarranted restrictions on future development.

The commission responds that underground storage tanks are regulated under these rules in the Transition Zone and that the actions of the City of San Antonio are not within the scope of these rules or the jurisdiction of the commission. Concerns regarding the actions of the City cannot be addressed through this rule adoption. The commission has considered this and similar comments and proposes that the areas which are south of the Recharge Zone but which drain back to areas of Recharge Zone be required to meet the requirements of the Contributing and Transition Zones and not the Recharge Zone.

VA commented that a review of the topography in this area, utilizing the USGS map clearly shows that approximately 10 percent of the 3500 acre area proposed to be added to the Edwards Aquifer Recharge Zone in Bexar County, in the vicinity of Interstate Highway 10 and Loop 1604, does not flow into the Leon Creek but rather flows into the Huebner Creek. Huebner Creek joins Leon Creek at a point approximately 5 miles south of Prue Road which is also five miles south of the Edwards Aquifer Recharge Zone. Another approximately 10 percent of the 3500 acres of the property proposed to be annexed into the a southeasterly direction to the Olmos Creek Edwards Aquifer Recharge Zone drains in to a watershed which does not connect to Leon Creek. The portion of the subject properties that actually drains into Leon Creek enters at a tributary located east of the main channel of Leon Creek and under first flush stormwater flow or low flow parallel to the Leon Creek in this tributary conditions, continues to flow east of and it enters the main channel of the Leon Creek at a point approximately 18,000 feet, where it is approximately 1,000 feet south of Prue Road. This flow condition completely by-passes the two fault locations on Leon Creek and traverses only a short 1,000 foot segment of the Edwards Aquifer. Based upon this actual watershed condition, the subject property does not appear to contribute flow to the reach of Leon Creek that passes over the two fault areas that are of concern to the commission. Their firm has many years of experience designing land development projects in compliance with commission rules and regulations.

The commission agrees with the conclusion that the certain areas referred to drain to Huebner and Olmos creeks. The commission notes that both of these areas drain to areas of mapped Recharge Zone along these two creeks. With regard to the comment regarding drainage of the other referenced area to a tributary of Leon Creek, analysis of the U.S. Geological Survey 7 1/2 minute topographic sheet clearly shows the tributary entering Leon Creek above the mapped Recharge Zone. The commission disagrees that drainage from any of these areas will not impact the aquifer.

VA commented in their opinion the proposed recharge zone designation proposed to be added to the Edwards Aquifer Recharge Zone in Bexar County, in the vicinity of Interstate Highway 10 and Loop 1604, will produce additional costs to the owners of the 3500 acres affected in the minimum amount of $50,000,000. Therefore, it seems a more reasonable and defendable approach by the commission is appropriate. Since the majority of the 3500 acre area is in fact not located over the Recharge Zone and two fault areas are the major concern, consideration should be given to other solutions that are more cost effective and that provide adequate protection of the Aquifer. One such approach suggests that the State consider constructing protection improvements at the two fault locations that might cost in the ballpark of $5,000,000. Should it be necessary, fees may be collected from the effected landowners to fund the protection improvements. This approach would not only protect the Aquifer from the areas being annexed but would also protect it from areas that have already been developed without being subject to commission regulation. They also believe it would be prudent of the State to perform an adequate field investigation of these two fault locations to make a proper assessment of need to justify inclusion of this 3500 acre area in the proposed new rules before forcing these property owners

to spend $50,000,000 in compliance costs. Under extremely conservative analysis, only small portions should be identified as a contributing zone and this designation should be limited to those areas that contribute stormwater runoff to the main channel of the Leon Creek which actually pass over the two mapped fault areas.

AGRA stated that the rule changes significantly penalize those developers and property owners maintaining properties in the current Recharge or Transition Zones which are currently in the early phases of feasibility and planning for development. They requested that such properties currently zoned as non-Edwards Recharge Zone be exempted from the proposed revisions or at the very least allow the owner(s) to develop these properties utilizing pre-revision Recharge Zone maps.

The commission responds that the costs to be borne by developers in this area are no different than the costs borne by other developers throughout the areas regulated under the rules. Furthermore, the commission has not been authorized nor appropriated funds to undertake the projects suggested by the commentors. The commission has added §213.4(a)(4) to address projects in progress on the effective date of the rule.

USFWS commented that oil and gas pipelines or piping systems are not addressed in the definition section or discussed adequately elsewhere in the rule, although they are at least as important as sewage systems, storage tanks, etc.

The commission responds that the construction of the type of pipelines that the commentor is concerned about is under the jurisdiction of the Railroad Commission of Texas.

USFWS commented that the change in the wording of the definition of a regulated activity from "clear land" to "clear land without disturbing soil", is a positive step. USFWS questioned if clearing vegetation on a massive scale with minimal soil disturbance but increased runoff (e.g., chaining) constitutes a regulated activity?

The commission responds that the proposed rule exempts clearing of vegetation provided no soil disturbance takes place, as is possible when clearing is accomplished by hand or with a chainsaw, however, this type of clearing typically does not occur on a massive scale. The use of equipment such as a bulldozer, or chains, to remove trees and vegetation is defined as a regulated activity and subject to the rules since this would result in soil disturbances.

WE and Smith commented in §213.3 (25)(B)(I) that the existing definition did not include the "without soil disturbance" clause; thus, they questioned what constitutes soil disturbance, if this is limited to just hand clearing, and if it is OK to grind up the brush with a hydroaxe which leaves tread or tire tracks, but not to utilize a bull dozer? FSMC commented that the change in definition for "regulated activity" alone is sufficient to impact business activities that are conducted in the Recharge and Contributing Zones since the definition is revised to indicate that "any clearing of vegetation without soil disturbance," rather than "the clearing for the purpose of surveying" is a regulated activity.

The commission has determined that the use of a hydroaxe may result in extensive soil disturbance; therefore, its use is considered a regulated activity. Clearing is allowed when it can take place without soil disturbance and is not a regulated activity. For the recharge zone several activities are exempt from the requirement of submitting an application for executive director approval prior to commencing construction. Clearing for agricultural purposes is not regulated. Exempted activities include the construction of utility lines which are not designed to carry and will not carry pollutants and the construction of an individual single-family residence on greater than five acres or an individual single-family residence utilizing less than 20 percent impervious cover. These activities are required to provide for temporary erosion and sediment control during construction. For the Contributing Zone activities which disturb 5 or more acres or disturb less than five acres but are part of a common plan that disturbs five or more acres are subject to clearing regulations under both Subchapter B and the EPA NPDES General Permit for stormwater discharges from construction activities. Therefore no greater impact to business activities will result from this rule than that already caused by the EPA NPDES General Storm Water Permit.

AGCT expressed some concern over the expansion of the definition of "regulated activities" and that the definition establishes that clearing a site using methods that disturb the soil without an Edwards Aquifer Protection Plan temporary erosion control is not allowed. The commentor elaborated that the definition provides that any and all construction related or post-construction activities included clearing land for surveying is regulated. AGCT commented that this is a violation of property rights and the expanded definition might be a "taking" and would be unconstitutional.

The commission believes that the activities described in the definition, including the clearing of a site using a method that disturbs the soil, may result in the potential for pollution leaving the site and that any activity that is not specifically excluded from this definition must receive an approval from the executive director prior to commencing the activity. Therefore, a landowner may still clear a site as long as it is done in a way that does not result in water pollution. Additionally, the intent of the existing rule was to allow clearing of land for determining the boundary of a tract and not to determine lot, street, and utility alignments. The commission also believes that current technology allows surveying for boundary determination with minimal site disturbance and that the surveying of land exempted from the rule is not regulated; therefore, the proposed change is not considered to be a taking. Clearing for agricultural purposes is not a regulated activity under this chapter.

PDE commented that the definition of "Regulated Activity" (213.3 (25)(A)(iii)) unnecessarily restricts aboveground storage tank facilities used for storage of water or other non-threatening improvements; thus, it should be revised to allow aboveground storage tanks that are used for storage of materials that do not adversely impact the environment.

The commission disagrees with the commentors interpretation of the definition of "regulated activity". The commission responds that the definition of "aboveground storage tank system" specifically designates that aboveground storage tanks are designed to contain an accumulation of static hydrocarbons or hazardous substances; therefore, the installation of aboveground storage tanks used for the storage of water or other non-threatening substances is not a regulated activity.

A number of individuals and entities commented on the need to regulate "minor" changes to roads and road maintenance. Hays County commented that the definition should be amended to clarify that the maintenance of, and minor changes to, existing roads is not a regulated activity. They continued that

agency staff have indicated this to be an appropriate interpretation, but the official definition is much narrower, allowing only the resurfacing of existing roads. In addition, Travis County recommended adding specifics to the definition criteria for minor improvements to existing facilities as much as possible. They continued that there are often projects performed on existing County roads and facilities which justifiably require temporary best management practices (BMPS) during construction and permanent revegetation of disturbed areas after construction, but do not significantly alter the impervious cover and permanent stormwater runoff characteristics of the site after completion. They suggested that this can include projects such as adding sidewalks to an existing road, replacing an existing low water crossing with a bridge, adding a turn lane or minor widening of existing roadway traffic lanes or shoulders, adding a small building or shed on an existing impervious site area, etc. Travis County commented that requiring these types of proposed actions to go through the same level of review and/or permitting as new or large acreage development is probably unnecessary and will add to the work burden of reviewers as well as the applicants without significant quality added to the project. Travis County suggested a category of project called "minor improvements to existing facilities" or "minor projects" for activities on existing facilities or right of way that are minor in scope and will not result in permanent changes to stormwater water quality and quantity after completion. They continue that the applicant should be able to demonstrate this to the executive director and employ temporary BMPs during construction and revegetation of all disturbed areas after construction.

The commission responds that in the definition of regulated activity, routine maintenance of existing structures that does not involve additional site disturbance and where there is little or no potential groundwater contamination is not included. If a small amount of site disturbance is required, the activity would be regulated; however, an exception from the requirement to submit a Edwards Aquifer Protection Plan may be requested from the executive director.

Representative Krusee, RECA, and TxCABA commented that in relation to some other activities, such as normal agricultural practices, the amount of stormwater discharge affected by residential construction is minute, yet residential construction seems to be specifically targeted in the rules. TxCABA commented that residential development uses a comparatively small amount of Texas' land. For example, there are 20 million acres of cropland in this state. Last year there were 75,000 new home starts and the average lot size is 1/3 of an acre. That works out to 25,000 acres of disturbed soil, or 1/10 of 1 percent of the land disturbed by agricultural operators. The amount of stormwater discharge affected by residential construction is minuscule. TxCABA questioned why the commission believe that new homes should exclusively bear the burden of these types of regulation. TxCABA asked that if TSS in stormwater is a problem, shouldn't state-wide resources, including those of current polluters and households be applied?

The commission disagrees that the proposed rule targets residential construction. As stated in the proposed rule, regulated activities are any construction or post-construction activity occurring on the recharge or contributing zones of the Edwards Aquifer that have the potential for contributing pollution to surface streams that enter the Edwards Aquifer recharge zone. These activities include construction or installations of: buildings (residential and commercial), utility stations, utility lines, underground and aboveground storage tank systems, roads, highways, or railroads. Also included is clearing, excavation or other activities which alter or disturb the topographic or existing stormwater runoff characteristics of a site and any other activities that pose a potential for contaminating stormwater runoff.

The commission disagrees with the comment that pollution from residential development is insignificant. Numerous studies conducted around the country have documented the level of pollution caused by construction activities and the water quality impacts caused by pollution from construction activities. In addition, significant initiatives are underway by federal and state agricultural agencies and agricultural interests in Texas to address water pollution which may come from agricultural activities in the state.

GDSCPP commented that the commission should look at impervious cover versus acreage as a means of addressing what segments of construction will be affected. GDSCPP also commented that all platted residential lots should be exempt.

The commission agrees with the comment in part and the rule has been revised to exempt an individual land owner who seeks to construct his/her own single-family residence or associated residential structures on a site from the submittal of an Edwards Aquifer Protection Plan and fee under Subchapter A, provided that he/she does not exceed 20 percent impervious cover on the site. In addition, construction of single-family residences on lots that are larger than five acres, where no more than one single-family residence is located on each lot, is not regulated in the recharge zone. The commission disagrees, however, that platting is an indication of a project in progress on the effective date of the rules and should therefore, be exempt. The commission notes that language has been added to 213.4(a)(4) and 213.21(f) as discussed, earlier in this preamble.

An individual commented that the preventive measures and requirements for BMPs are adequate; however, they should be applied to all construction activity, not just on five-acre or smaller lots. Developers will just move their lot sizes to 5.1 acres for those areas where run-off control would be expensive and difficult. The individual also commented that if the purpose of the existing and amended rules is to prevent/minimize stormwater run-off from polluting and degrading the quality of water in the Edwards, then the commission has failed. The rules, as proposed, only address the activity of a portion of the potential offenders because acreage is not the appropriate criterion to use to achieve the objective. He commented that the rules do not address any of the other potential offenders. The commission responds that the proposed rule exempts construction of single-family residences on lots that are larger than five acres, where no more than one single-family residence is located on each lot from requirements under Subchapter A. The proposed rule has also been modified to allow an exemption from the requirement to submit an Edwards Aquifer protection plan application and fees for an individual land owner seeking to construct his/her own single-family residence or associated residential structures on the site, provided that he/she does not exceed 20 percent impervious cover on the site. Temporary erosion and sedimentation controls are required to be used, however, no additional permanent BMPs are required). Additionally, where a site is used for low density single-family residential development and has 20 percent or less impervious cover, other permanent BMPs are not required, however a plan is required to be submitted and approved describing the temporary erosion and sedimentation controls to be used. This

exemption is required to be recorded in the county deed records, with a notice that if the percent impervious cover increases above 20 percent or land use changes, the exemption of the whole site may no longer apply and the property owner must notify the appropriate regional office of these changes. In addition, the executive director may waive the requirement for other permanent BMPs for multi-family residential development, schools, or small business sites where 20 percent or less impervious cover is used at the site. A plan is required to be submitted and approved describing temporary erosion and sedimentation controls to be used and the same deed recording requirements are required.

An individual commented that the rules do not clarify that pre-1830's land restoration is exempt. The rules do exempt land clearing for Agricultural use. It could be argued that land restoration includes floriculture and reforestation with native species, and thus is agricultural by nature. The purpose of pre-1800's land restoration is to enhance the aquifer recharge characteristic of the land and enhance native land productivity with respect to native flora and fauna; thus, these rules need to reflect that these activities are legitimate, necessary, and exempt from these fees and permits.

The commission responds that the clearing of land for agricultural uses is not included in the definition of regulated activity; therefore, the submittal of an Edwards Aquifer Protection Plan for executive director approval of this activity is not required.

BS/EACD commented that the definition for "sensitive feature" does not include springs that should be considered in assessing the impacts of proposed land disturbance activities. Similarly, the geologic assessment requirements should include the mapping of local springs. Additionally, COA commented that the definition for "Sensitive Feature" should specify the types of permeable geologic features that are most commonly identified within the recharge zone such as caves, sinkholes, faults, fractures, and vuggy rock outcrops. Also, COA suggested that discharge features should be added to the definition for sensitive feature because the protection of these features is necessary to sustain a unique habitat surrounding them and to enable wetland features that provide stormwater treatment to remain functioning. COA suggested the following definition for discharge feature: "A natural point of water discharge to the ground surface, such as a spring or seep, or an area that holds water and supports mesic vegetation for sustained periods."

The commission responds that discharge features such as springs do not contribute recharge to the aquifer and are therefore not included as sensitive features requiring assessment and protection under the rules. The purpose of the rules is to protect water quality and the public health and does not include the protection of unique habitat.

WGP commented that in §213.3 as presently drafted, the term "site" includes "the entire area included within the legal boundaries of the property described in the application." This definition could be construed to include land that is not intended for development. An applicant may, through other governmental requirements, or for other reasons, leave areas undisturbed. The applicant should not be required to calculate and apply BMPs to areas which are not going to be developed. The definition of "site" should be amended to exclude undisturbed areas or which are otherwise outside the limits of construction.

The commission responds that if undeveloped areas affect or influence treatment of stormwater from developed areas, these areas should be considered in the design of the Edwards Aquifer Protection Plan. If the stormwater runoff from undeveloped areas will not flow across newly developed areas, there would be no need to provide permanent treatment of this stormwater runoff. The commission clarifies that the only time an applicant is required to calculate and apply BMPs to areas which are not going to be developed is when the stormwater runoff from the undeveloped area cannot legally be diverted around the developed area and therefore flows across the new impervious cover.

AGRA requested that the proposed revisions include a mechanism for owners/developers of properties straddling the Recharge Zone boundary to perform detailed geologic evaluations to confirm or deny whether geologic conditions are consistent with the definition of the Recharge Zone as detailed in the current regulations. In the case where geologic conditions are not consistent with the definition, AGRA requested that the proposed revisions allow for exemptions to the current Water Pollution Abatement Plan requirements and/or a mechanism for modification of official Recharge Zone maps.

The commission acknowledges that geologic conditions for a site may not be consistent with the defined recharge zone boundary. Upon receipt of sufficient justification, the executive director will consider requests for exceptions to Edwards Aquifer Protection Plan requirements submitted in accordance with §213.9. Also, the commission states that modifications to the official recharge zone maps may be initiated through public comments received at the annual Edwards Aquifer Protection Program public hearings required under Texas statute.

§213.4 Application Processing and Approval

COA requested that the review period in which affected incorporated cities, groundwater conservation districts, and counties may comment on applications be extended to 45 days because it is difficult to conduct a site visit and prepare comments within 30 days for all applications submitted.

The commission responds that 30 days is a reasonable period of time to file comments without delaying application processing and approval. There will be no rule change.

OPIC commented that as §213.4(a) reads now, an application for construction of any regulated activity in an applicable Edwards Aquifer area must be filed with the appropriate regional office and must be reviewed and approved by the executive director. OPIC continued that the regional office must then provide copies to the following affected persons or entities: incorporated cities, groundwater conservation districts, and counties in which the proposed regulated activity will be located. OPIC continued that the rules provide that any person may file comments within 30 days of the date the application is mailed to local governmental entities and that the executive director is then required to review all comments that are timely filed.

The commission agrees with the commentor's interpretation of the rules.

OPIC commented that as proposed, the only way that affected members of the general public can obtain notice of an application is through local governmental entities which receive the applications. OPIC stated that unless the notice requirements are made clearer, it will be difficult for the public to know when the 30 day clock starts to run unless they obtain this information from the local governmental entity. OPIC requested that this subsection be changed to ensure that notice to the public

is effective and meaningful. OPIC suggested that the applicant should also be required to publish notice in the largest newspaper of general circulation in the county where the construction activities will be conducted to apprise members of the general public of any applications for construction of any regulated activity in the designated Edwards Aquifer area.

The commission responds that any person may obtain information regarding pending applications from the appropriate regional office and may submit comments within the provided time. The commission agrees in part with the comment and notes that the proposed rule has been modified to clarify when the 30 day comment period begins.

OPIC stated that §213.4(a)(2) only requires the executive director to review all comments that are timely filed. OPIC requested that this language be modified to require the executive director to also respond to all timely filed comments to inform the public that their comments have been received and considered and explain why a certain course of action was taken. OPIC concluded that this will not only aid the public, but also the agency by providing justification to the public for its actions on an application.

The commission responds that the rule requires the executive director to review all comments, however, the commission does not believe it is necessary to require the executive director to also respond to all comments, since this action could require significant commission resources and would result in unnecessary project delays.

BE commented that §213.4, Application Processing and Approval, should be changed to insure that only local governmental entities, which are on the distribution list, are allowed to file comments within 30 days.

The commission does not agree with this commentor. The commission believes that any person should be permitted to submit comments to the executive director within the provided timeframe.

RECSA commented that the rules allow "affected persons" to seek reconsideration of the Executive Director's decision to an approved plan, without clearly defining "affected person." Individuals or groups who may have no legitimate interest may be able to inappropriately interfere and unnecessarily delay executive director's issuance of plan approvals.

The commission disagrees with the comment. An "affected person" is defined in 30 TAC §55.29 and is made applicable to these rules. A motion for reconsideration filed by an individual who is no an affected person will not be granted. Filing of the motion will not affect the executive directors action unless expressly ordered by the commission.

JMARE commented that the deletion of a person having an option to purchase the property from the list of who can submit an application effectively means that prospective purchasers will not be allowed an opportunity to know what the potential costs or densities for projects will be prior to consummating a transaction. Without the opportunity to purchase property with the benefit of a feasibility study to determine potential cost versus density, many developers will have to negotiate substantially reduced prices of acreage to minimize their risk potential. Additionally, PDE commented that deleting from the list of who can submit an application a person having an option to purchase the property (§213.4 (c)(2)) will not "eliminate the use of staff to process speculative plans" since someone can always have the owner submit the plan for approval on their behalf, then when the property is later sold to the "prospective buyer," the commission will not know who to contact directly for construction or for maintenance concerns. SOS and ASC commented that the revision of the WPAP application regulations to disallow submittals by option holders will save the state time and financial resources, and will ensure that WPAPs are submitted when there is a real project, ready to build, and not for purely speculative reasons. They continued that more meaningful expiration dates or performance requirements would buttress this change.

The commission responds that the proposed rule allows for a person having an option to purchase a tract of property to submit an application for approval of an Edwards Aquifer Protection Plan if they receive authorization from the property owner to act as his agent. The commission agrees with the comment that disallowing submittals by option holders not operating as authorized agents of the property owners will reduce the number of speculative Edwards Aquifer Protection Plans received by the agency. The commission further notes that meaningful expiration dates are included in the rule in that an Edwards Aquifer Protection Plan will expire two years after the date of initial issuance, unless prior to the expiration date, more than 10 percent of total construction has commenced, or unless an extension is requested. In addition, an Edwards Aquifer Protection Plan approval or extension will expire and no extension will be granted if more than 50 percent of the total construction has not been completed within ten years from the initial approval of a plan.

WE and Smith commented that changes to §213.4 (g)(3), "Construction of a public street or highway is exempt from all deed recordation requirements," leaves a loophole in commercial subdivisions which develop infrastructure that complies with the rules through ponds or other structural means, dedicated the roads to the county or city (a normal process and requirement), and then is exempt from maintaining the controls. In addition, they questioned why these items should be exempt from the same rules private citizens are required to follow.

The commission responds that the exemption from deed recordation is not an exemption from all requirements of the Edwards Aquifer rules. Deed recordation is required by the proposed rules to provide a means of informing any purchaser of the property that it is covered by an Edwards Aquifer Protection Plan and the responsibilities associated with the purchase of the property. The commission also notes that public entities that receive the streets and highways are generally aware of the maintenance responsibilities. In addition, the proposed rule requires the transfer of maintenance responsibility to be assumed in writing.

WGP commented that the terms "total construction" and "substantial construction" under §213.4(h), should be clarified so that they refer to either the proposed BMPs or the amount of area to be disturbed contemplated by the application, whichever is the intention. Vertical construction should be excluded from the definition of "construction," since it has little relevance, if any, to the BMPs and water quality protection.

The commission responds that it does not regulate the method by which to determine ten percent of total construction, therefore, total construction can be demonstrated in many ways, such as by project budget, cubic feet of concrete, or square feet of disturbed area. It is the responsibility of the owner/applicant to

demonstrate substantial construction when requesting an extension approval. There will be no rule change.

PDE commented that they believe that the wording "An extension will not be granted if the proposed regulated activity or approved plan for the regulated activity(s) under this chapter has changed" does not allow any flexibility for insignificant changes; thus, they suggest adding the word "substantially" and the word "changed." Substantial change should be defined as any change which would adversely affect water quality from what was previously approved.

The commission disagrees and states that a change in regulated activity or change of an approved plan will require executive director review and approval. These categories of changes can significantly change best management practices that will be used at the site.

§213.5 Required Edwards Aquifer Protection Plans, Notification, and Exemptions:

BS/EACD pointed out a typographical error in (k) "Failure to comply ... is a violation of this rule and id (is) subject..." BS/EACD, GEOS, and BE pointed out a typographical error in Section 213.5(b)(3)(C), "the assessment, must determine (which) of these features are sensitive features."

The commission has corrected these typographical errors.

BS/EACD commented that the rules have no regional planning of disturbance activities necessary to protect the aquifer water quality and only consider protection on a site-by-site basis. One step in this direction would be to require the coordinates of the corners of the site, so that a regional map of many disturbance sites can be more easily located and plotted. EAA recommends this subsection specify USGS quadrangle maps required for submittal contain at least three 2 «-minute tic marks, representing latitude and longitude, for the purpose of accurately plotting the site location on a Geographic Information System.

The commission generally agrees with the comments and responds that the Edwards Aquifer Protection Plan applications will be revised to address specific site information, such as latitude and longitude, that is consistent with the requirements of the EPA NPDES General Permit for Storm Water Discharges from Construction Activities.

COA commented that §213.5(b)(2)(C)(ii) has been amended to permit layout maps showing 10-foot contour intervals rather than 5-foot. They state that the contour interval should remain 5-foot because that level of information is needed to determine the natural drainage patterns to sensitive features and to determine the area to be routed to temporary and permanent BMPs. At the 10-foot contour interval, it will be difficult to discern natural drainage patterns with any degree of accuracy. Additionally, SAWS recommended that the maximum contour interval remain at 5 feet. SAWS commented that the change in maximum contour interval from 5 feet to 10 feet would allow potentially important information to be obscured on the site plan. They suggested that a large amount of "cutting and filling" could be done without being shown on the plan and if 10-foot contour intervals are used on a relatively flat site, it is possible that no information may be shown regarding flow direction, flow to Best Management Practices (BMP), etc. SAWS continued that the proposed rule changes states that "appropriate" contour intervals should be used; however, it may be impossible for the reviewer to determine if the contour interval is "appropriate" if insufficient information is provided on the site plan to make the determination. GE commented that the proposed 10-foot contour interval would not provide necessary detail to design construction phase erosion/sedimentation control or to delineate contributing areas to temporary or permanent water quality controls; thus, the commission should require 2-foot contour intervals unless the applicant demonstrates that the proposed regulated activity and compliance with the requirements of this Chapter can be achieved with a larger interval. GEOS commented that since the contour interval necessary to adequately delineate drainage areas and the areas contributing to a recharge feature is largely dependent on local relief and the contour interval accuracy on these maps is only ñ one-half of the contour interval, resulting in possible elevation errors of up to 5 feet, then an alternative would be to require the geologic assessments to be performed using the contour interval of whatever site-specific topographic maps are developed for site engineering purposes, which are commonly in the 2 to 5-foot range.

The commission responds that applicants should use their best professional judgement in specifying contour intervals to be used in the planning materials to adequately delineate drainage patterns, as long as the interval is not greater than 10 feet. The commission also notes that identification of recharge features is the most significant piece of information to be submitted in the planning materials.

A number of individuals and entities commented on the need to identify and address recharge features down-gradient of a construction site. EAA commented that the amendments include deleting the requirement to extend the drainage plan beyond the boundary of the site and deleting the requirement for off-site geologic assessment for all plans because the quality of water leaving the site should meet the standards specified in the amended rules and should therefore not pose a water quality problem downgradient of the site. The EAA agrees with this but cautions that without the benefit of off-site, downgradient geologic assessments, it is essential the commission consistently ensure the quality of water leaving the site. Similarly, SAWS recommended that the downgradient geologic assessment be retained in the Rules. SAWS stated that the deletion of the requirement for a downgradient geologic assessment is a step backwards in Edwards Aquifer protection. They continued that the assumption that "the quality of water leaving the site ... should not pose a water quality problem downstream" does not address the possibility or probability that accidents, overflows and bypasses of the BMPs will occur and that spills of petroleum and/or hazardous materials are not addressed. Additionally, GEOS commented that the requirement for the offsite downgradient assessment should be retained for at least a nominal distance (500-1000 ft.) offsite, particularly if numerous or significant sensitive features are identified onsite and/or extended to the downgradient boundary of the site. SAOSAB commented that they strongly urge the commission to retain the requirement for a downgradient geological assessment. In addition, BS/EACD commented that the applicant and agency staff should have some means of assessing potential recharge features adjacent to and downstream of the applicant's site. The amendments reduce the geologic assessment of the site from one mile downstream to no offsite assessment. The need for off-site assessment may not be as necessary where the applicant can reference regional assessments that have been conducted, such as the location of recharge features and measurement of flow loss proposed by the BS/EACD within the Barton Springs

segment. However, until regional assessments are completed, assessments of at least 0.5 miles downstream should be conducted. These assessments will help make applicant's representatives and local authorities aware of downstream point recharge features and springs that could be impacted because in most cases some downstream impacts are possible regardless of the BMP in place. Finally, MH commented that deleting the need for a downstream walk in the geologic assessment is a welcomed change because this portion of the geologic assessment generally had no practical impact in the design or construction of a project.

The commission responds that requiring best management practices to meet required design standards during construction and to meet a minimum 80 percent reduction of post-development loadings of total suspended solids provides adequate protection for downgradient areas. Additionally, the commission recognizes that access to adjacent sites not owned by the applicant may not be easy to obtain but encourages the inclusion of references to regional geologic studies within the geologic assessment.

COA commented that the exemption from submitting a geologic assessment for single family residential subdivisions constructed on less than ten acres will be extended only to noncontiguous subdivisions and to those having a minimum lot size of 5 acres, as it is in the current Edwards Rules. No technical basis is provided for the reduction of this requirement; therefore, the lot size minimum of 5 acres should remain.

The commission responds that initial site inspections, including assessment of geologic features, are performed by agency field staff at every proposed project site. The commission is confident in the field staff's ability to assess features on sites less than 10 acres, therefore the commission will proceed with its proposal since it reduces application costs for small scale residential developments.

PDE commented that §213.5 (b)(3) includes the following phrase "Single Family residential subdivision construction on less than ten acres are exempt from this requirement." Executive Director staff on numerous occasions has interpreted "subdivisions" to mean just the residential lot areas and has ruled that the roadways built with the subdivision were not included under the "subdivision" work. They believe the word "subdivision" refers to more than just the residential lot areas and that roadways developed to provide access to the residential lot areas should be included in the exemption. Also, the matter of whether the 10 acre size refers to the minimum size of one single family lot or the "total" area of the entire subdivision needs to be clarified.

The commission clarifies that single-family residential subdivisions constructed on less than ten acres are exempt from the requirement of a geologic assessment. The commission also clarifies that construction of single-family residential subdivisions where all residential lots are greater than five acres and each lot has access to an existing road or street is not included as a regulated activity in this Subchapter. However, if new roads or streets are required to provide access to the lots of the proposed single-family residential subdivision, the new roads or streets are a regulated activity by definition and an Edwards Aquifer Protection Plan must be submitted and approved by the executive director prior to commencing construction of the new road or street.

WGP commented that the geologic assessment requires the development of a great deal of site specific information, some of which will be at a substantial cost to the applicant. WGP continued that language should be added to provide that areas which are not intended for development may be excluded from the geologic assessment. WGP concluded that at a minimum, the areas not intended for development should be distinguished with respect to the type of information which is required because areas intended as open space or undisturbed buffer zones should require far less technical information than those areas to be disturbed and developed.

The commission responds that a geologic assessment is necessary in order to protect any sensitive or potentially sensitive features on property to be developed. Although features may be located in areas not intended for immediate development, the commission maintains that it is important to identify these features in a geologic assessment in order to address possible runoff flows into these features as a result of development. The commission notes that open space areas should be designated as undeveloped on the applicant's site plan.

SAWS recommended that the determination of sensitive features be made by executive director staff during their field investigation in conjunction with the information provided in the geologic assessment and by the applicant and/or their agent during any field investigations. SAWS stated that the requirement that the determination of the sensitivity of geologic and/or manmade features be made in the geologic assessment will cause some sensitive features to be categorized as not sensitive. They continued that the commission is trying to expedite plan reviews and is therefore likely to be spending less time both reviewing and field checking geologic assessments. SAWS suggested that because of these changes, it is imperative that the information provided in the geologic assessment indicate both sensitive and potentially sensitive features to allow for the field checking of all features which may be considered sensitive. SAWS continues that if the geologist makes the determination that a feature is not sensitive and the commission field investigator only checks sensitive features during the field visit, some potentially sensitive features may be missed.

The commission responds that a streamlined review process has been developed to allow the Edwards Aquifer Protection Program to operate more efficiently and to significantly reduce the plan review period. This process is in place and will allow for more field inspections to regulate compliance with the rules. The commission notes, however, that the streamlined review process still provides for initial site inspections, including assessment of geologic features, to be performed by agency field staff at every proposed project site. Interested parties are encouraged to bring their assessment of specific features to the attention of the commission within the 30 day comment/review period.

BS/EACD suggested that to meet requirements under §213.5(b)(3)(C), a revised guidance document and assessment form be provided for the geologic assessments and should be prepared with input by persons experienced with karst terrains. The guidance document should specify minimal standards and should encourage the utilization of information such as creek flowloss observations, airflow, subsurface cave development in the assessments.

The commission intends to issue revised geologic assessment instructions and a report form that will include additional infor-

mation such as predominant feature type and the presence of airflow.

GEOS commented that since each assessed site is not an isolated, independent, hydrogeologic regime, neither affecting nor being affected by the bounding framework, the geologic assessment requirements §213.5(b)(3) should be expanded to include an evaluation of the hydrologic interaction of the assessed site and the local and regional hydrogeologic frameworks. This expansion should also include an evaluation of how well the current assessment agrees with previously performed assessments of adjacent or nearby tracts.

The commission responds that water pollution abatement plans, including geologic assessments, are on file and are available to the public for reference and comparison. The commission expects geologists preparing assessment reports to research and report any previous studies that are relevant to the project site. Concerning the hydrologic interaction of the site, the commission intends to issue revised geologic assessment instructions and a report form that will include additional information such as predominant feature type and drainage area which are related to the hydrologic interaction of features and surface water runoff.

TAPG commented that they support replacing the language "assessment of area geology" with "Geologic Assessment." In addition, they support the format and general content proposed for geologic assessments in 213.5 Required Edwards Aquifer Protection Plans, Notification, and Exemptions (3)(A) thru (E).

The commission appreciates the comment provided by TAPG.

A number of individuals and entities commented on the need for a complete underground survey and assessment of caves on the property. GVA commented that although the proposed geologic assessment rules (213.5(b)(3)) are superior to the existing regulations, they can still be substantially enhanced by requiring underground survey and assessment of caves to determine their sensitivity and the sensitivity of surrounding areas, excavation of karst features to accurately assess their sensitivity, and assessment evaluation forms that accurately determine feature sensitivity. Additionally, SAOSAB commented that due to their concern about the evaluation and treatment of karst features they recommend that a complete cave survey be required prior to determination of feature sensitivity.' The level of sensitivity of karst elements in the Recharge Zone cannot be determined without adequate information as to the nature of their subsurface characteristics. They feel this information must be obtained and considered before any decisions are made relative to filling or other site development, for the following reasons, among others: 1) cavernous elements could extend beneath planned structures or infrastructure, undermining their integrity and resulting in unplanned costs and/or liability problems; 2) without understanding the nature of the feature, both at the surface and beneath, its real function relative to quantity and quality of the recharge related to it cannot be determined adequately; and 3) occasionally, the surface feature may be only a small component of a significant aesthetic and/or historical natural resource. SAOSAB recommended that a cave survey by a qualified karst geologist, be a required component of a water pollution abatement plan and that this requirement should extend to any caves subsequently discovered during the development process. In addition, BS/EACD commented that the geologic assessment should require subsurface assessment of caves on the site. Most of the assessments are relatively superficial in that caves and sinkholes are typically examined only from the surface and valuable subsurface information is overlooked. The passable length of any caves on the site should be mapped in both cross section and plan view. Some excavation by hand may be necessary for an adequate examination of caves.

The commission acknowledges the need for accurate assessment of sensitivity of geologic and manmade features and intends to issue revised geologic assessment instructions and a report form that will include additional information such as predominant feature type and the presence of airflow. The instructions for geologic assessments will be updated to include a clarification that hand excavation and probing is necessary for an adequate assessment of the features characteristics such as the amount of sediment infill.

An individual commented as to how the geologic assessment requiring "identification of caves, faults, and potentially permeable fractures" was to be accomplished without seismic lines or other sophisticated engineering, and what is a "solution zone?"

The commission responds that it accepts a geomorphological approach to the on-site data gathering aspect of the geologic assessment because geophysical techniques are expensive. A solution zone is a zone of rock outcrop where those rocks have been subject to a chemical weathering process called solution and provides an avenue to the aquifer from the surface. The process removes calcium carbonate in limestone by carbonic acid derived from rainwater containing carbon dioxide.

The COA commented that the geologic assessment should require site specific soils data be obtained and reported for the soil profile. Characteristics affecting the transmissivity of site soils such as the tendency to form desiccation cracks, the thickness and type of existing vegetative cover, and changes in soil composition within or immediately adjacent to sensitive features should also be required. They continue that this information will aid in evaluating sensitive features and determining appropriate protective measures.

The commission responds that site specific soil thickness and characteristics, such as relative transmissivity, are required under §213.5(b)(3)(E) as part of the geologic assessment. The commission also considers that rock type is more significant than soil type as it has not been shown that changes in soil composition provides a definitive way to evaluate karst features.

BS/EACD commented that for the geologic assessment, the excavation of recharge features using backhoes and other heavy machinery may be necessary in some cases for assessments, and should not require a formal Edwards Aquifer Protection Plan submittal to excavate, but rather 10 days notice should be given to the appropriate regional office. BS/EACD recommended that these notification, excavation, and mapping requirements be stated in the Edwards Rules or in a companion guidance document.

The commission responds that few Edwards Aquifer Protection Plans for the sole purpose of assessing features by excavating with heavy machinery are received because this activity takes place during the preparation of the technical report. The commission welcomes the opportunity to discuss additional ways to improve the response time for the review and approval of Edwards Aquifer Protection Plans.

RECA and TxCABA commented that geological assessments engineered water pollution abatement plan using best management practices reports, and technical report are costly and com-

plicated to prepare. There is no provision to exempt small scale projects except those which are smaller than the 10 acre trigger for the rules. TxCABA commented that the commission should provide an alternative process on technical reports for projects smaller than 10 acres.

The commission responds that a geologic assessment is not required for a single-family residential subdivision construction on less than ten acres. In addition, subchapter A provides that construction of single-family residences on lots that are larger than five acres, where no more than one single-family residence is located on each lot, are not regulated under the subchapter. An individual land owner who seeks to construct his/her own single-family residence or associated residential structures on the site is exempted from the Edwards Aquifer protection plan application requirements and fees, provided that he/she does not exceed 20 percent impervious cover on the site. Temporary erosion and sedimentation controls are required to be used; however, no additional permanent BMPs are required.

In response to these and similar comments, the commission has also provided in the rules that other permanent BMPs are not required when a site used for low density single-family residential development has 20 percent or less impervious cover. However, a plan is required to be submitted and approved describing the temporary erosion and sedimentation controls to be used. In addition, the executive director may waive the requirement for other permanent BMPs for multi-family residential development, schools, or small business sites where 20 percent or less impervious cover is used at the site. As mentioned previously, a plan is required to be submitted and approved describing the temporary erosion and sedimentation controls to be used.

PDE commented that in §213.5(b)(4)(A)(iii) the requirement for "volume" should be eliminated since there is no criteria defining how volume is computed, and that their experience has been that this information has not been used by the commission staff in the WPAP review process.

The commission responds that the determination of mass loading requires quantity and quality of storm water, and these are inherent to assessing the hydrology of a watershed and basin. The executive director will consider requests for exception to Edwards Aquifer Protection Plan requirements submitted under §213.9 and upon providing sufficient justification for the request, the executive director may approve an exception to these requirements.

SAOSAB commented that they support the use of BMPs as being a critical element in protecting the Edwards.

The commission agrees with the comment.

CECT points out that performance standards as a regulatory tool are significantly different from design standards. Thus, they recommended that the commission should delete subdivision (i), (ii), (iii), and (v) of §213.5 (b)(4)(B) and the same subdivisions in §213.5 (b)(4)(C).

The commission has modified the rule language to clarify the intent of the regulations. The requirements for both temporary and permanent BMPs will be implemented through the executive director's review and approval of water pollution abatement plans. Compliance with the requirements of these regulations will be determined through inspection of regulated activities to determine if they are implemented in accordance with the approved water pollution abatement plan.

However, the commission disagrees with the comment that the subdivisions should be deleted and has retained a revised version of subdivisions (i), (ii), and (iii) of §213.5(b)(4)(B) and §213.5(b)(4)(C) in the final rule because these provisions provide guidance necessary to the achievement of the goals of the rule. Subdivision (v) has been retained in §§213.5(b)(4)(B) and (C) because the specification of requirements for BMPs provides guidance necessary to facilitate the site planning and plan review process.

In addition, CECT commented that §213.5 (b)(4)(D) should be revised to delete the proposed new language and retain generally the same language that is contained in the existing rule. They concluded the that effect of these changes would be to remove performance standards but leave the commission with the ability to promulgate appropriate guidelines for design.

The commission disagrees with the comment and has retained revised language in §213.5(b)(4)(D). The commission believes specifying requirements for BMPs provides clear guidance necessary to facilitate the site planning and plan review process.

BS/EACD commented that the rules should include setback requirements for sensitive features. The current and proposed rules offer little or no special protection of sensitive features once identified except that BMPs must maintain flow to these features to the extent practical. In many past instances, the agency has encouraged the filling of sensitive features without consultation with local agencies that were familiar with the features to discuss possible alternative measures. The Edwards Rules should state a specified setback, such as 100 to 150 feet from sensitive features so that developers, planner, and regulators will know expectations in advance and plan for protection. In addition, COA commented that the rule should include as temporary BMPs and permanent BMPs the requirements to designate setbacks from sensitive features. They continued that the Land Development Code of the COA requires a 150-foot setback from critical environmental features, such as caves, sinkholes, springs, seeps and wetlands. This setback establishes an undisturbed, vegetated area surrounding a feature in order to mitigate potential impacts to the feature from the effects of construction and changes in runoff quality, quantity and intensity following construction. This ordinance requirement is similar to those applied in a number of other municipalities, counties, and states in the U.S. For example, Monroe-Randolph Bi-County (Illinois) Health Department has adopted the use of 75-foot radius setbacks from sinkholes in order to protect groundwater from septic system seepage and Greene County, Missouri, has adopted a setback of 200 feet from a mapped lineament for any proposed septic system. Additionally, TCWA commented that the rules must require setbacks from streams and sensitive environmental features, including recharge features. TCPS also commented that the rules should add specific construction project measures to preserve water quality in the contributing, recharge, and aquifer itself. For example, the rules should require setback requirements from streams and sensitive environmental features, including recharge features.

The commission disagrees with the comment that the proposed rule offers little protection for "sensitive features." The rule includes a requirement to prevent pollution of ground water. Temporary and permanent BMPs are required to prevent or control pollutants from regulated activities from entering sensitive features and possibly contaminating groundwater.

The commission disagrees with the comment that setback requirements should be imposed for areas around sensitive features. The commission believes there are many valid BMPs, including setbacks and the vegetative buffer areas created by setbacks, which can potentially be used to meet the requirements of the rule. Practices recognized by the commission which can be used to meet the requirements of the rule will be presented in technical guidance being prepared by the executive director. Applicants will be able to choose the BMPs which are best suited to their site conditions and circumstances to meet the requirements of the rule.

GEOS commented that the rules should mandate development setbacks or buffer zones along streams in the recharge zone and from significant recharge features. SOS, ASC, LWVSA and LWA commented that the rules must require setbacks from streams and sensitive environmental features, including recharge features.

The commission disagrees that such setbacks should be mandatory. Rather, BMP selection to achieve the performance goal should be left to the applicant in devising the most cost effective plan.

GVA commented that specific guidance should be provided on what levels of pollution BMPs can release and still "prevent pollution."

The commission has adopted a programmatic-based approach for specifying requirements for BMPs in the final rule. Temporary BMP requirements specified in the final rule are based upon requirements in the NPDES general permit for construction activities. Permanent BMP requirements specified in the final rule are based upon historical practice in the commission's Edwards Aquifer Protection program. BMPs which are constructed, operated, and maintained in accordance with the water pollution abatement plan for the site approved by the executive director will be deemed to be in compliance with the requirements of the rule, including requirements to "prevent pollution."

USFWS commented that the language "to the maximum extent practicable" and "where reasonable and practicable alternatives exist" should be omitted from §§213.5(b)(4)(B)(iv)(I), regarding protection of flow to naturally-occurring sensitive features that accept recharge to the Edwards Aquifer and avoiding the temporary sealing of these features. These actions should be mandatory unless an exception is granted. Setbacks from these features to avoid their surface and subsurface drainage basins should also be mandatory to protect water quality in the aquifer. In addition, SAWS stated that the requirement that flow to naturally occurring sensitive features be maintained to the maximum extent practicable is a positive step in preserving recharge to the Edwards Aquifer and commended the commission for making this change.

The commission has modified the wording to reduce redundancy in this section and eliminated the phrase "if reasonable and practicable alternatives exist" from subclause I.

GVA commented that specific guidance should be provided on what constitutes a reasonable need to seal recharge features. SAWS stated that strengthening the protection of sensitive features by requiring a justification for sealing features is a positive step in protection of the Edwards Aquifer and commended the commission for making this change. SAWS stated that it is interested in what guidelines will be used by the executive director to evaluate these requests because based on current practices, significant pressure will be placed on the staff to approve the closing of most features. SAWS continued that considerations other than financial must be included in the evaluation of these requests, such as connectivity within the Edwards Aquifer, estimated amount of recharge and potential impacts, or lack of impacts, from surrounding land uses.

The commission responds that it has provided guidance to applicants on the contents of an exception request under §213.9, and through that process, evaluates the reasonableness for the sealing of a feature.

SAWS commented that the term "recharge" should not be used without providing a definition for "recharge" because the variations in meaning for the term are too numerous to use this word without providing a definition. Based on the current Geologic Assessment Table which uses "less than one acre" as the smallest recorded drainage area, SAWS recommended that the commission consider using flow to sensitive features from a drainage area of one acre or greater as a starting point for defining recharge.

The commission responds that it has defined this term on its Geologic Assessment Tables which are submitted as part of the Technical Report required under §213.5(b).

One hundred twenty-two individuals with Clean Water Action urged the commission to prevent the further loss of recharge features. Barrett commented that she urged the commission to prevent future loss of the recharge features

The commission acknowledges these comments and has provided for the need to justify the sealing of features under §213.5(b)

COA commented that a description of temporary and permanent BMPs that will be used to protect Sensitive Features should be included in the rule. COA stated that they have encouraged more stringent requirements to protect the flow to naturally occurring sensitive features in previous iterations of these rules and appreciate their inclusion in this version. However, COA recommended more explicit descriptions and/or examples of acceptable specific BMPs such as protective buffers adjacent to sensitive features, prohibiting discharge from permanent BMPs directly to sensitive features, and diversion berms to direct untreated stormwater runoff away from sensitive features.

The commission responds that the technical guidance document being developed by the Executive Director will contain temporary and permanent BMPs that will be suitable for use to protect a sensitive feature. To allow for flexibility, these approvable BMPs will remain in guidance and not included within the rule other than as suggestions under §213.5(b)(4).

COA commented that the process to request to seal a naturally-occurring sensitive feature should be revised to require submittal of a description of the potential impact to terrestrial and aquatic biological resources.

The commission responds that the purpose of the rule is restricted to the protection of water quality and the realization that such protection would be beneficial to affected biological resources does not require the submittal of additional studies.

COA commented that exception requests and proposals to seal naturally-occurring sensitive features should be reviewed by local governments. They suggested that a review period of 15 days would provide an opportunity for inspection of the site and evaluation of the potential impact to water quality resulting

from the exception request activities or the sealing of a sensitive feature.

The commission responds that local government has a 30 day review period for the plan and the included requests to seal a feature under §213.4(a).

BE commented that on §213.5(b)(4)(B)(v) add the words "be designed to" between the words "must" and "meet".

The commission disagrees with the comment and has not made the recommended change. §213.5(b)(4)(B)(v) makes reference to §213.5(b)(4)(D). The requirements for BMPs specified in §213.5(b)(4)(D) do not necessarily require engineering design.

PDE commented that in regards to §213.5(b)(4)(B)(v) any reference to performance based standards should be accompanied by backup material which explains the basis for the standards.

Specific references to "performance standards for BMPs"have been deleted in the final §213 rule and replaced with the term "requirements for BMPs." Temporary BMP requirements specified in the rule are based upon requirements in the NPDES general permit for construction activities. Permanent BMP requirements specified in the rule are based upon historical practice in the commission's Edwards Aquifer Protection program.

BE commented that on §213.5(b)(4)(B)(vi) delete the words "and, if necessary, retrofit" from the end of the paragraph and add the word "and" between the words "maintenance" and "repair".

The commission responds that retrofitting may be required if the performance of BMPs and measures, especially innovative technologies, are not adequate to protect water quality. There will be no rule change.

CPS stated that §§213.5(b)(4)(B) and (C) require all construction plans and design information, including the design and construction of BMP measures be prepared, certified, signed, sealed and dated by a Texas Licensed Professional Engineer and that this means that every applicant must bear the expense of hiring a Licensed Engineer for any development on the Recharge and Transition Zone regardless of project size and development complexity. They stated that this is an unnecessary financial burden, especially for small business owners with very limited resources, and it does not guarantee the effectiveness of the selected BMPs in a submitted protection plan. CPS stated that licensure (i.e., a Licensed Professional Engineer) is not a necessary prerequisite to the proper evaluation of BMP performance.

The commission responds that the certification of BMPs by a Professional Engineer is an indication of the construction quality control and therefore, performance. Engineers are not required to certify the performance of, but rather the design of, best management practices. Since engineers, typically certify the installation and testing of sewer collection system components, such as sewer pipes and manholes, it is not unreasonable for engineers to certify the installation and testing of BMPs.

SAWS stated that strengthening of the pilot-scale field testing requirements for innovative technology is a positive step in protection of the Edwards Aquifer and commended the commission for making this change.

The commission appreciates the comment provided by San Antonio Water System.

One hundred twenty-two individuals with Clean Water Action, Barrett, SOS, ASC, LWVSA, and LWV urged the commission to limit the amount of impervious cover. TCWA commented that they are concerned over the amount of impervious cover that is allowed to be developed on top of the contributing and recharge zone; thus, they encourage the commission to stand strong in enforcement of these rules regarding impervious cover. SOS, ASC, LWVSA and LWV commented that scientific research indicates that damage occurs to the streams on which the aquifer depends at any impervious cover level greater than 10 percent.

EAA recommended design criteria and specifications for impervious cover limits for all projects. In 1995, the San Antonio City Council passed City Ordinance #81491, "Aquifer Recharge Zone and Watershed Protection" that restricts impervious cover of construction projects on the Edwards Aquifer recharge zone. EAA stated that it believes successful implementation of these controls will significantly reduce the risk of polluting our water supply. EAA and TCPS urged the commission to amend the Edwards Aquifer Rules such that similar restrictions on impervious cover are included, so pollution mitigation measures can be applied uniformly across the recharge zone, irrespective of political boundaries.

COA commented that impervious cover limits for site development are not included as a permanent BMP in the proposed rules. They stated that the best resource protection strategy for the Edwards Aquifer would include limiting impervious cover rather than relying upon engineered controls to treat contaminated runoff. The COA suggested that the commission evaluate the prescription of maximum impervious cover limits for specific land uses and adopt impervious cover limits that will minimize water quality degradation. They concluded that, nationwide, studies have indicated that the water quality and biologic integrity of creeks are negatively impacted at impervious cover levels near 10 percent and that nondegradation is best achieved through a combination of reduced impervious cover and permanent BMPS.

GE commented that Structural Best Management Practices cannot substitute for impervious cover limits; thus, they recommend an impervious cover limit of 15 percent for the recharge zone, as required by ordinances in the Cities of Austin and San Antonio, and similarly strict impervious cover limits not higher than 25 percent for the Contributing Zone.

Bassett commented that he strongly encouraged the agency to use impervious cover as the criteria for establishing preventive action. A developer can build a dense house pattern on 10 percent of the acreage and leave the remainder for run-off BMPs and other non-constructed site use. Or, the developer can use large lot sizes, which will allow for the BMPs and rules to protect the Edwards Aquifer to be applied. If a developer or individual wants to construct a building on 100 acres, then the following should apply: 1) the building and associated surfaces should not create an impervious cover greater than 10 percent of the total property (in this example it would be 10 acres), and 2) BMPs et al should be applied to the 10 acres that lie downstream from the construction site.

The commission disagrees with the comment that limits on impervious cover should be imposed on regulated activities. The commission believes impervious cover limits are one among many valid best management practices which can potentially be used to meet the requirements of the rule.

These practices will be included in the technical guidance being prepared by the executive director. Applicants will be able to choose the BMPs which are best suited to their site and circumstances to meet the requirements of the rule.

COA commented that the preservation of baseflow quantity and quality within creeks in the recharge zone and the contributing zone would be enhanced with the inclusion of specific BMPs to require protective buffers that border drainage ways. This approach is crucial to attaining non-degradation standards and is an efficient method for preserving the riparian vegetation and the shallow alluvial perched water tables frequently occurring near the natural stream channel. The COA recommended the commission develop stream buffer requirements for drainage ways. The COA suggested that an appropriate buffer system for the Edwards Aquifer watersheds would include a setback of 400 feet from major stream channels, 200 feet from major tributaries, and 100 feet from minor tributaries.

The commission disagrees with the comment to require protective buffers that border drainage ways. The commission believes there are many valid BMPs, including protective buffers that border drainage ways, which can potentially be used to meet the requirements of the rules. The commission will recognize BMPs which can be used to meet the requirements of the rules in technical guidance being prepared by the executive director. Applicants will be able to choose the BMPs which are best suited to their site conditions and circumstances to meet the requirements of the rules.

SOS, ASC, LWVSA and LWV commented that the rules must also include requirements to preserve stream base flow and aquifer recharge volume. TCWA commented that the rules must also include requirements to preserve stream base flow in aquifer recharge zones.

The commission responds that it will take into consideration the impacts to groundwater in its review and action on a related water right application in accordance with the Texas Water Code §11.134.

Representative Shields asked who will be responsible for constructing these pollution control measures?

The commission responds that the owner(s), the owner(s) authorized agent(s), or a person having the right to possess and control the property which is the subject of the contributing zone plan is responsible for insuring that the pollution control measures as described in their application (and approved by the executive director) are constructed as proposed or to get a modification of a previously approved plan if changes are needed. An engineer must certify in writing that a permanent control measure was constructed as designed.

With regards to the prevention of pollution in water that originates upgradient from the regulated activity, TxDOT commented that it has little or no authority to regulate stormwater entering the right-of-way. TxDOT stated that the purpose of this requirement is unclear and TxDOT recommended the applicant be responsible only for stormwater originating onsite and that the language "...or upgradient from the site and flows across the site" be deleted. TxDOT continued that if this phrase can not be deleted, TxDOT requests the ability to comment on WPAP's where the discharge enters State right-of-way.

The commission responds that its general rule is that the water should be discharged at the same point where it would have discharged naturally. TxDOT is not obligated to accept stormwater discharges from sites that did not naturally discharge to their property in accordance with Texas Water Code §11.086. The executive director will notify TxDOT of projects that will discharge into their right of way.

BE asked who would determine if the performance standards are not being met and who is responsible for monitoring/testing to determine this? If the agency is so uncertain about the methodology that it thinks a retrofit may be necessary, then BE stated that it seems premature to impose a performance standard at this time.

The commission responds that it and any other authorized agency could monitor/test to determine performance of BMPs, however, it is the intention of the commission to require BMPs that are assumed to remove 80 percent of the post-development loadings of total suspended solids. Use of an agency approved BMP would negate the need for monitoring of the BMP provided the BMP is constructed as designed. System retrofits become necessary for various reasons. The executive director requires documentation (photographs, as built drawings, etc.) as special conditions to applications to develop this information. Uncertainty does not lie in the methodology of the BMPs but instead with the construction quality control.

USFWS commented that maintenance plans for sediment detention ponds should identify where removed sediments will be stockpiled. Stockpiles should be prohibited from areas near creeks and other recharge features.

The commission generally agrees that sediment removed from ponds must not be stockpiled near creeks and other recharge features. The sediment removed from ponds or basins is considered a waste and must be treated as such. This would include characterization, classification and proper disposal of the waste.

BE commented that on §213.5(b)(4)(C)(vii) delete the words "and, if necessary, retrofit" from the end of the first sentence and add the word "and" between the words "maintenance" and "repair".

The commission responds that retrofitting may be required if the performance of BMPs and measures, especially innovative technologies, are not adequate to protect the water quality. There will be no rule change.

SAWS stated that strengthening of the pilot-scale field testing requirements under §213.5(b)(4)(C)(viii) for innovative technology is a positive step in protection of the Edwards Aquifer and commended the commission for making this change.

The commission appreciates positive responses to the proposed rules.

COA commented that pilot-scale field testing of BMPs is needed to verify that innovative water quality control structures will operate as intended. However, there should also be provisions within the rules requiring that sufficient land area be set aside for the installation of more commonly used permanent BMPs in the event of failure of the pilot-scale testing. COA stated that current wording does not specify what actions must be taken should the pilot testing fail.

The commission agrees that pilot-scale field testing is necessary to verify innovative water quality control structures will operate as intended and thereby provide the required protection of the aquifer as is designated in §213.5(b)(4)(C)(viii). The commission notes that §213.5(b)(4)(C)(vii) specifies that the techni-

cal report submitted with the Edwards Aquifer Protection Plan must include retrofit of permanent BMPs and measures if necessary. The commission agrees that retrofit action should be specified should the pilot testing fail and the rule has been changed to clarify this requirement.

WE and Smith commented that on §213.5(b)(4)(C)(viii)(III) if innovative technology is demonstrated, meets with the commission guidelines, and is approved, then the commission should let others utilize it without limitation because the "case by case" approval requirement will create delays and more paperwork. They also commented that since the commission does not have an approved list of BMPS, then a great deal of uncertainty is left as to what exactly is "innovative technology."

The commission agrees and the rule has been modified.

LCRA commented on the appropriateness of using the same approach and standard on both the contributing and recharge zones, and stated that the LCRA saw no reason that a different approach or standard is needed for the two areas. The bulk of the water entering the aquifer originates in the contributing zone, not the recharge. On that basis one could easily argue that the performance standard for the contributing zone should be more stringent than for the recharge zone. Further, as suggested in the explanation of the rules, the understanding of the long term effectiveness of BMPs as well as the understanding of the relationship between surface water quality and groundwater quality in this area is limited. Given these constraints, LCRA saw no benefit in adding the complication of different standards for the contributing and recharge zones.

The commission agrees with the comment and has specified the same requirements for BMPs in the contributing zone and the recharge zone.

EAA and SAWS commended the commission for amending this subsection to require temporary and permanent Best Management Practices (BMPs) to meet performance standards and for incorporating these performance standards into these rules. SAWS commented that the commission should continue to find ways to strengthen the performance standards proposed under the Edwards Aquifer rules.

The commission agrees with the comment. Although specific references to "performance standards" for BMPs have been deleted in the final rule, the "requirements" for BMPs specified in the final rule will provide the same guidance in the site planning and plan review process. The commission will refine the requirements for BMPs when there is sufficient information to determine the effect of water quality management practices on water quality in the Edwards Aquifer.

SAWS commented that they would like to work with the commission to strengthen the required performance standards as more technical information becomes available concerning the quality of stormwater runoff. They continue that information available in the near future will be the result of cooperative studies currently underway which include the United States Geological Survey (USGS) and SAWS Pollutant Loading Study and the USGS and EAA National Water Quality Assessment. They concluded that since the Pollutant Loading Study is specific to the Recharge Zone, it may prove to be a more suitable study than the National Pollutant Discharge Elimination System (NPDES) studies.

The commission believes these studies may provide useful information and looks forward to their completion.

GSACC commented that the current rules are based on design standards while the proposed rules call for performance standards. They continued that performance standards may be appropriate in situations where it is convenient and simple to consistently measure performance, where the reason for failure to meet the performance standard can be reasonably determined, and where achieving the performance standard is reasonably within the control of the regulated community. GSACC concluded that in this case, there are no identified or established protocols considered to be the definitive measurement of performance and furthermore, failure to meet the performance standard can clearly be caused by several factors, some of which are outside the control of the regulated community.

GSACC commented that the performance standards require that the design and operation of the system actually performs 100 percent of the time, whereas design standards require that systems be designed to comply with criteria that have been determined to be effective in achieving a desired outcome. One problem with applying performance standards to most of the regulated activities is that most of them are non-point sources of potential pollution. The number of variables associated with non-point sources is too great to consistently relate performance to effectiveness. Variables such as the size of the watershed, the duration of the rainfall event, and when samples are taken, compounded by the activities of contractors, homeowners and others, will all affect what is measured. Complicating matters further, the rules do not specify the protocols for data collection, or the use of that data in establishing the necessary background pollution levels for a site.

The commission agrees with the comment. Provisions in the final rule delete references to "performance standards for BMPs" and replaced the phrase with "requirements for BMPs." The commission will implement the requirements for BMPs through the review and approval of the water pollution abatement plan for regulated activities. Compliance inspections will be performed to verify regulated activities are conducted in accordance with the approved water pollution abatement plan.

TxDOT agreed that a single indicator parameter be used as a performance standard and that the parameter be total suspended solids (TSS). The reason for their preference is that most BMPs are designed primarily as a technology to remove particulate matter. TxDOT added that many other pollutants occur as particulates and a direct correlation can be made between their occurrence in stormwater and the occurrence of TSS.

The commission agrees with the comment.

GE commented that while the commission's proposed design standard based on total suspended solids works well for pollutants that adhere to soil particles, it is a poor measure of the effectiveness of the controls to remove nutrients; thus, they recommend that water quality controls be required to meet a design standard based on nutrients, including nitrogen, as well as total suspended solids. GE continued that the commission should require applicants to base water quality control designs on existing and available information as to their effectiveness based on the monitoring programs of the commission, Center for Research in Water Resources, the City of Austin, and other reputable and qualified entities.

The commission agrees with the comment that BMP requirements to remove TSS will work well for particulate matter and materials attached to particulate matter. The commission also

recognizes, however, that certain structural control BMPs, such as extended detention wet ponds, can be effective in the removal of both TSS and nutrients. The commission will recognize BMPs, such as extended detention wet ponds, which can be used to meet the requirements of the rule in technical guidance being prepared by the executive director. Applicants will be able to choose the BMPs which are best suited to their site conditions and circumstances to meet the requirements of the rule.

The commission disagrees with the comment relating to the inclusion of specific BMP requirements for nutrients. The commission does not have sufficient information to determine the effect of water quality management practices, including requirements to meet a design standard based on nutrients, on water quality in the Edwards Aquifer. Accordingly, the commission has adopted a programmatic-based approach for specifying requirements for BMPs in the final rule. Permanent BMP requirements specified in the final rule are based upon historical practice in the commission's Edwards Aquifer Protection program.

SAOSAB commented that if the TSS standards are not adequate to address hydrocarbons and heavy metals, performance standards for these must be included in the next revision of the rules.

The commission does not have sufficient information to determine the effect of water quality management practices to the control of hydrocarbons or heavy metals on water quality in the Edwards Aquifer. Accordingly, the commission has adopted a programmatic-based approach for specifying requirements for BMPs in the final rule. Temporary BMP requirements specified in the final rule are based upon requirements in the NPDES general permit for construction activities. Permanent BMP requirements specified in the final rule are based upon historical practice in the commission's Edwards Aquifer Protection program.

TCWA commented that they are concerned about the emphasis on the best management practices on total suspended solids. They think more emphasis needs to be placed on other contaminants to surface water rather than just on total suspended solids.

GEOS commented that water quality control design standards should be expanded from solely TSS, to also include NO3/NO2 and chemical oxygen demand, plus possibly herbicides and pesticides. SOS, ASC, LWVSA and LWV commented that design standards for water quality controls should be based on a requirement of no increase in the average annual load of total suspended solids, total nitrogen, chemical oxygen demand, toxic metals, pesticides and herbicides above naturally occurring loads.

USFWS concurs that total suspended solids is probably the most significant indicator parameter during construction. However, other parameters (such as petroleum hydrocarbons, metals, nutrients, pesticides) would be more appropriate following completion of construction.

TCPS commented that while it is reasonable to adopt controls on construction projects based upon maintaining background total suspended solid loads, other parameters; including total nitrogen, chemical oxygen demand, toxic metals, pesticides and herbicides must be included in the rules. Otherwise, the rules are merely protecting the stream and the related aquifer from one type of pollution.

The commission does not have sufficient information to determine the effect of water quality management practices, on contaminants other than TSS, on water quality in the Edwards Aquifer. Accordingly, the commission has adopted a programmatic-based approach for specifying requirements for BMPs in the final rule. Temporary BMP requirements specified in the final rule are based upon requirements in the NPDES general permit for construction activities. Permanent BMP requirements specified in the final rule are based upon historical practice in the commission's Edwards Aquifer Protection program.

COA commented that both the COA and the LCRA have monitored other constituents extensively enough to warrant incorporation of additional performance standards beyond TSS into the proposed Edwards Rules. A multitude of other state, regional and municipal monitoring programs have provided similar data documented in the technical literature and are readily available in recent compilations.

The commission disagrees with the comment that there is sufficient justification to incorporate additional requirements for BMPs. In the preamble to the proposed rule, the commission sought information on the environmental need for BMP requirements. Specific water quality information demonstrating the effects of BMP requirements on water quality in the Edwards Aquifer was not received in comments on the proposed rule and the commission is not aware of additional sources of information which would help clarify this issue. Therefore, the commission does not believe there is sufficient information to determine the effect of water quality management practices on water quality in the Edwards Aquifer and has adopted a programmatic-based approach for specifying requirements for BMPs in the final rules.

COA further comments that the in-stream dynamics of TSS, which account for over 75 percent of the annual average TSS load in Austin-area creeks, are certainly too poorly understood to support the commission's assertion that there is more data and more reliable information on TSS constituents in the scientific literature than other constituents.

The commission agrees with the comment that the in-stream dynamics of TSS is a potentially significant factor in water quality management and that these dynamics are poorly understood. The commission's statement in the preamble to the proposed rules that "there is more data and more reliable information" on TSS in the scientific literature than other constituents pertained to the pollutant removal efficiency of BMPs treating storm water, not the in-stream dynamics of TSS. The commission continues to believe its assessment of the pollutant removal efficiencies of BMPs is correct.

RLM commented that the proposed amendments to 213.5(b)(4)(D)(ii) do not consider the quality of effluent from the sedimentation/filtration structures as an indicator of performance, but rather there is a proposal to use Total Suspended Solids (TSS) as a measure of performance. This suggestion is made "because there is more data and more reliable information on this constituent (TSS) in the scientific literature." Data, besides TSS, has been collected from various sedimentation/filtration structures in the San Antonio area. This data is obviously sketchy and because there has not been an area wide mandatory sampling program in place, a meaningful database has not been developed.

The commission agrees with the comments and states that this is the basis for the BMP technology based standard as provided by the rules.

RLM supplied data on both the influent and effluent quality from various sedimentation/filtration structures in the San Antonio area, as well as significant data derived from analyses of sediments removed from these respective structures. Their review of the water quality influent and effluent data, indicated that insignificant levels of pollutants are entering these water quality structures. Their analyses of sediment samples for these respective basins indicates that a wide range of pollutants are, in fact, entering these basins and the pollutants are concentrating in the sediment as the water level in the basin draws down. They further indicated that pollutants are concentrating in the sediments at levels considered to be hazardous, i.e., a discrete sediment sample failed the RCI analysis in that the sulfide level was elevated to the point of being reactive in a landfill. RLM concluded that without analyses of both the sediments and liquid fraction moving through these structures, it is impossible to determine if pollutants are being generated on-site and are then being transported into the structures via stormwater runoff and that if TSS would had been used as an indicator of performance, little would have been understood about the levels of pollutants entering these basins.

The commission agrees with the comment that TSS does not provide a complete assessment of water quality issues associated with storm water. However, it serves as a good indicator of significant pollutants of concern, such as oil and grease and water quality in general.

RLM commented that as a consultant who manages approximately twenty-five of these water quality abatement structures, the use of TSS as an indicator will provide no insight into what pollutants are washing off developed areas and entering abatement structures.

The commission disagrees with the comment. TSS does correlate with other water quality constituents, including but not limited to, oil and grease.

SAWS commented that the only constituent for which permanent BMP performance standards have been proposed is Total Suspended Solids (TSS), and that studies reported by the Center for Watershed Protection indicate that parking lots and streets have measurable amounts of hydrocarbons and heavy metals present in their stormwater runoff. SAWS suggested that since performance standards have only been set for TSS, an investigation needs to be conducted to determine if BMPs which meet the removal standards for TSS also provide adequate removal of hydrocarbons and heavy metals. SAWS continued that if testing does not verify that hydrocarbon and heavy metal removal is equivalent to TSS removal, then the rules should be revised to include performance standards for hydrocarbons and heavy metals. SAWS recommended that the removal efficiency for hydrocarbons and heavy metals be investigated for all types of permanent BMPs that may be approved by the commission.

The commission agrees the recommended studies could potentially provide useful information on the determining the requirements for BMPs necessary to protect water quality in the Edwards Aquifer. However, the commission does not have the resources to conduct these studies.

COA commented on the proposal to use a single parameter, Total Suspended Solids (TSS), as a performance standard for permanent BMPS. They estimated that under the proposed standard which limits the increase of TSS to 20 percent above background, increases of 50 to 8000 percent of nutrient loads in stormwater runoff will occur in the recharge zone for single family (SF), multifamily (MF), and commercial (COM) development.

The commission agrees with the comment that the BMP requirement to remove TSS will have a wide ranging effect on nutrient loadings from regulated activities. The commission believes, however, that the comment significantly overestimates the nutrient loadings that would likely result from the referenced BMP requirement.

COA concluded that nutrient concentration increases of this magnitude could cause severe impairment to water quality and biological habitat in creeks in the recharge zone and to the Edwards Aquifer. The COA proposed that, at a minimum, performance standards be developed for the parameters Total Phosphorus (TP), Total Nitrogen (TN), Nitrite + Nitrate (NO2 + NO3), and Chemical Oxygen Demand (COD).

The commission does not have sufficient information to support the inclusion of performance standards for the constituents referenced in the comment. Accordingly, the commission has adopted a programmatic-based approach for specifying requirements for BMPs in the final rule. Temporary BMP requirements specified in the final rules are based upon requirements in the NPDES general permit for construction activities. Permanent BMP requirements specified in the rules are based upon historical practice in the commission's Edwards Aquifer Protection program.

The COA also stated that the alternative proposal to achieve TSS removal efficiency similar to LCRA methodology would allow increases of TSS of more than 20 percent above background and is less justifiable than the first standard.

The commission does not have sufficient data or supporting information to adopt the recommended strategies. Neither a strategy to limit TSS loadings to no more than 20 percent greater than background levels or a strategy to remove 80 percent of the TSS loading from regulated activities can be justified based upon an analysis of water quality in the Edwards Aquifer. The commission does agree with the comment that a strategy to remove 80 percent of TSS loading from regulated activities does allow for higher constituent loadings from moderate to intensely developed areas than the strategy to limit TSS loadings to no more than 20 percent greater than background levels..

RECSA, RECA and TxCABA commented that the rules require a performance standard on temporary Best Management Practice's (BMP) that remove 80 percent of Total Suspended Solids (TSS) and permanent BMPs that remove all but 20 percent of background TSS. RECA and TxCABA continued that there is no scientific basis to establish that the incremental difference between 20 percent, and any other level is economically justified. For example, why not a 50 percent, standard? RECSA stated that there is no clear scientific evidence to justify the cost to achieve the incremental deference or a technical guidance manual that standardizes removal methods. TxCABA suggested that the commission adopt EPA standards for structural controls.

The commission agrees with the comment and has adopted requirements for BMPs which are consistent with the NPDES

General Permit for construction activities and with the management measure for new development in the EPA/NOAA guidance for sources of nonpoint pollution in coastal waters.

TxDOT stated that since the main purpose of a performance standard is to guide the design of the BMPs, they recommend that performance standards not be adopted in rule form but used only in the guidance manual. They continued that adopting the performance standard as guidance only would allow for flexibility and the opportunity to make changes as the technologies progress.

The commission responds that design standards have included in the rules and that any applicant preferring to propose a treatment method not included in the proposed Technical Guidance Manual will have the option to propose an innovative technology with the required monitoring and evaluation.

Representative Krusee asked is there any scientific basis for the performance standards on temporary and permanent BMPs?

The proposed standards were based on engineering studies but, to provide consistency with NPDES requirements, the commission has deleted references to performance standards in the final rule.

MLK commented that the preamble did not identify any studies or scientific data to support the new proposed performance standards for permanent BMPS. The preamble states that the connection that specific water quality practices have upon groundwater quality are not determined and that information from EPA stormwater permits for the cities of Austin and San Antonio may provide useful information. Nowhere was any scientific justification for specifying performance standards for permanent BMPs presented. MLK commented that requiring performance standards for permanent BMPs marks a substantial change in stormwater management regulation and such a change should only be approved if there is a demonstrated need, or at least an indication, that the current rules are inadequate. BE and PDE commented that the agency should not implement performance standards when the standard necessary to achieve the goal is unknown, and that the agency should take steps to obtain the data prior to implementing any performance standards. Additionally, BE commented that it seems to be premature to require a performance standard at this time "in the absence of water quality information," e.g. a properly installed water quality basin will trap sediments especially if well maintained and the necessity for extensive performance standards does not change this fact. The institution of performance standards also pushes the regulated community into the zone of uncertainty regarding future testing to confirm standards are being met and then even a retrofit that is based on failing to meet such a test; thus, the more testing that is required the less money can be spent on maintenance and this will hurt the performance of more basins than the lack of a performance standard.

The commission disagrees with this comment. However, to provide consistency with NPDES permitting requirements the commission has adopted a programmatic-based approach for specifying requirements for BMPs in the rules. Temporary BMP requirements specified in the rules are based upon requirements in the NPDES general permit for construction activities. Permanent BMP requirements specified in the rules are based upon historical practice in the commission's Edwards Aquifer Protection program.

The commission has deleted references to "performance standards" in the final rule. Requirements for BMPs will be implemented through the executive directors's review and approval of the water pollution abatement plans for regulated activities. Compliance will be determined through site inspections to verify regulated activities are implemented in accordance with the approved water pollution abatement plan.

GSACC commented that performance standards require a mechanism and funding to monitor performance and to establish when a violation has occurred. The proposed rules do not specify any such mechanism. GSACC concluded that attempts to comply with these proposed rules will be difficult, and will create unrealistic liabilities upon all principals associated with any future development initiatives.

The commission responds that the performance standard contained in the rule can be attained by implementing any number of Best Management Practices (BMPs) which vary in their cost of implementation. The commission has changed the rule to clarify this issue.

GDSCPP commented that the proposed rules lack sufficient technical merit for establishment of performance standards for BMPs (e.g., minimum acreage restrictions and TSS removal efficiencies) MLK commented that performance standards are more properly utilized with end of pipe discharges from a wastewater treatment facility because, in general, there is a more predictable influent or inflow which can be calculated and a system designed to handle variations. The required performance standard does not, by itself, provide any more environmental protection to the existing Edwards Aquifer Rules. The current rules, in essence, require protection measures in place to maintain surface water quality in compliance with the Texas Surface Water Quality Standards and to protect existing and potential groundwater uses. The BMPs are designed to meet that goal. Performance standards merely create more regulatory burden in requiring monitoring, among other matters, the stormwater discharges. It unfairly burdens a homeowner, a resident or developer by placing the risk of being penalized for a one-time excursion from a rain event. Again, unlike organized wastewater collection and treatment systems where inflow and outflow can be regulated, storms have no such governors–an inch of rain could occur in ten minutes or over a period of two days. Further, storm frequency has an impact on the amount of runoff, and the longer between rain events the less runoff there would be. For these reasons, we would recommend that commission delete and remove performance standards that certainly lead the commission's ability to have the guidelines for design criteria.

The commission disagrees with the comment but has deleted references to "performance standards" in the final rules to provide consistency with applicable NPDES permit requirements.

GE stated that the design standard should be no increase in the average annual pollutant load above undeveloped levels, and such a standard should be applied through both the recharge and contributing zones.

The commission does not have sufficient information to adopt the requested change. Accordingly, the commission has adopted a programmatic-based approach for specifying requirements for BMPs in the final rule. Temporary BMP requirements specified in the final rule are based upon requirements in the NPDES general permit for construction activities. Permanent BMP requirements specified in the final rule are based upon

historical practice in the commission's Edwards Aquifer Protection program.

Additionally, the recommendation presumes the Edwards Aquifer System has no capacity to assimilate constituent loadings without causing degradation of water quality. Although the assimilative capacity of the system has not be determined, it is likely not zero. Therefore, to allow no increase in constituent loadings would place a potentially unnecessary burden on regulated activities. In the absence of specific water quality information as to the effect of water quality management practices on water quality in the Edwards Aquifer, the commission has the commission has adopted a programmatic-based approach for specifying requirements for BMPs in the final . SAWS stated that requiring temporary BMPs to meet performance standards is a positive step in protection of the Edwards Aquifer and commended the commission for making this change.

The commission agrees with the comment. Although specific references to "performance standards" for BMPs have been deleted in the final rule, the "requirements" for BMPs specified in the final rule will provide the same guidance in the site planning and plan review process.

WGP commented that §213.5(b)(4)(D)(I)(II) and (III) refer to regulated activities disturbing between 5 and 10 acres and 5 acres, respectively. It is not clear whether the acreage is that which is contained in the application or whether it also includes areas outside of the application which may be subject to other water quality protection plans or even remain undeveloped. WGP continued that language should be added to clarify that in calculating the disturbed area, only these areas within the application and which are to be developed shall be included and that undeveloped areas shall be excluded.

The commission responds that the language in §213.5(b)(4)(D)(I)(II) and (III) has been modified to be consistent with the requirements of the NPDES general permit for construction activities.

WGP commented that the rule should allow for a removal efficiency of 70 percent rather than 80 percent because published data suggests that 80 percent represents the upper range of sedimentation pond efficiency and therefore may not be attainable on a consistent basis. WGP commented that the standard for construction, operation and maintenance of sedimentation ponds utilized for Temporary BMPs for projects over ten acres should be modified to provide for a removal efficiency of 70 percent suspended solids "or" 0.5 ML/L peak settleable solids rather than "and" 0.5 ML/L peak settleable solids because either standard provides appropriate protection and application of both may render compliance impracticable.

WGP commented that the 0.5 ML/L peak settleable solids standard should be clarified as to whether it refers to inflow or outflow concentrations and an explanation of the laboratory procedures to be used for establishing compliance with the standard should be specified.

The commission responds that temporary BMP performance standards for TSS and peak settleable solids have been deleted from the final rules to provide consistency with applicable NPDES permitting requirements.

WGP commented that the computational procedure for determining the design and event mean concentration for disturbed conditions should be explained or clarified.

The commission responds that computational procedures for BMP requirements in the final rule will be specified in technical guidance being prepared by the executive director.

WGP commented that the rules should employ a weight per unit volume measure rather than the proposed volume per unit volume measure because the more common practice is to utilize the weight per unit volume standard; conversion from this more common standard to the per unit volume proposed by the rules requires knowledge of the unit weight of the settled solids, a value which will vary depending on the solids in question.

The commission responds that the references for the measures identified in the comment have been deleted from the final rules.

WGP commented that the return period of the design storm should be related to the proposed construction schedule rather than an arbitrary number of years such as ten, and that the design duration of the storm event should be on the order of six hours.

The commission responds that provisions in the final rules for specifying the design storm for sizing temporary BMPs were adopted from the NPDES general permit for construction activities.

WGP commented that the rules should establish guidelines with respect to how sedimentation concentrations are to be distributed through a storm event because without this information it is not possible to calculate removal efficiency and outflow concentration.

The commission responds that the provisions for calculating removal efficiencies in temporary BMPs have been deleted from the final rules.

BE commented that on §213.5(b)(4)(D)(I)(I) delete the words "constructed, operated and maintained" from the 4th sentence.

The commission responds that the language in §213.5(b)(4)(D)(I)(I) has been modified to be consistent with the requirements of the NPDES general permit for construction activities.

CPS stated, that for temporary BMPs for regulated activities disturbing ten acres or more, they agree that a uniform performance standard is needed to ensure the effectiveness of certain BMPs; however, the rule should allow the applicants the flexibility to choose the measures most appropriate to the nature of the project, equally protective of water quality, and in accordance with the technical guidance accepted by the commission.

The commission responds that the provisions for temporary BMPs in the final rules have been adopted from the NPDES general permit for construction activities. The rule allows alternative sediment controls in circumstances where the required BMPs are not attainable.

MLK expressed concerns regarding the temporary BMPs because studies have not been cited which indicate that these new temporary BMP standards are merited. Instead, the staff indicated that the standards are chosen because they are currently utilized by the State of South Carolina for control of stormwater pollution. Assuming that South Carolina does employ these requirements, it does not translate as a reason, in and of itself, that Texas should use the same standard: what do the other 48 states do for stormwater protection, in what areas is it used in South Carolina, in what situations is it used, how similar is

this region to South Carolina? It appears that South Carolina, receives significantly more rainfall than does Central Texas.

FSMC commented that there have been no scientific studies presented to support a comparison between Texas Geology and the geology of South Carolina, nor any documented studies of any nature presented to support the claim that these measures would result in any reasonably predictable pattern of benefit to the environment. BE wanted to know if the standards from South Carolina are directly applicable to this area of South Texas or will adjustments be made in the various procedures. BE commented that the regulated community needs to see a copy of these standards and the proposed "background levels" in order to comment on those aspects of the proposed rules.

The commission responds that provisions for utilizing the requirements for temporary BMPs which are employed by the State of South Carolina have been deleted from the final rules to provide consistency with applicable NPDES permitting requirements.

USFWS recommended increasing the size of the design event for sediment basins (§213.5(b)(4)(D)(I)) from 10 year 24 hour to 25 year 48 hour event.

MLK stated that the "10 year 24 hour" design event would require a very large detention/retention pond that make little economical and environmental sense. Digging a temporary pond to meet this standard disturbs quite a large area of land. For a ten-acre development, a pond sized to contain a 10 year 24 hour event would require a pond of approximately five acre-feet which can be very costly and disturbs land which otherwise might not be disturbed. MEC commented that the requirement on projects greater in size than 10 acres be constructed with a sedimentation pond to capture the runoff from a 10 year - 24 hour storm will result in huge basins, creating liabilities for human health and safety with no known or justified benefit.

The commission responds that provisions in the final rule for specifying the design storm for sizing temporary BMPs were adopted from the NPDES general permit for construction activities.

In lieu of performance standard based sediment calculations and removal efficiencies, TxDOT recommended that the performance standard for sediment basins be based on storage volume. They provided, as an example, that the Environmental Protection Agency requires that a sediment basin provide storage for the volume of runoff from the 2-year, 24 hour storm (NPDES - Construction General Permit). TxDOT concluded that such a standard would assist the applicant by being consistent with existing regulations.

The commission agrees with the comment and has adopted the requirements of the NPDES general permit for construction activities in the final rule.

COA commented that as impervious cover increases, the amount of baseflow generated will tend to decrease, resulting in possible reductions in aquifer recharge rates. COA suggests that at a minimum, the water quality volume specified for treatment by BMPs should be increased as site impervious cover increases.

The commission disagrees with the comment to require and increase in the volume of water treated as the site impervious cover increases. The volume of water treated by BMPs is one parameter applicants must considered in developing water pollution abatement plans for regulated activities. This parameter will be addressed in the technical guidance being prepared by the executive director. Applicants will be able to choose the BMPs which are best suited to their site and circumstances to meet the requirements of the rule.

Representative Krusee asked what is the justification (both economically and environmentally) for standards that mandate a removal of 80 percent total suspended solids versus a removal of 50 percent or lower?

The commission responds that the performance standard for temporary BMPs to remove 80 percent of TSS has been deleted from the final rules to provide consistency with applicable NPDES stormwater permitting requirements.

Hays County commented that the proposed performance standard generally requiring 80 percent removal of suspended solids is unreasonably restrictive.

The commission responds that the performance standard for temporary BMPs to remove 80 percent of TSS has been deleted from the final rules to provide consistency with applicable NPDES stormwater permitting requirements.

COA commented that the new dual technical criteria of 80 percent removal efficiency for suspended solids and maximum 0.5 mL/L settleable solids concentration as calculated for disturbed conditions and the ten-year 24-hour event has several practical problems in application. They continued that the commission should develop clear guidance for implementation of this criteria, because as written, engineers cannot design systems to comply with this without additional information or making gross assumptions. Both criteria require some knowledge of particle size distribution and particle weight density. The COA suggested that the commission should specify a target particle size for the 80 percent removal (e.g., 20 micron particle, which the City of Austin has used for sizing sedimentation ponds).

The commission responds that the performance standards for temporary BMPs pertaining to the removal of TSS and the concentration of total settable solids have been deleted from the final rules to provide consistency with applicable NPDES stormwater permitting requirements.

WE and an individual commented that on 213.5 (b)(4)(D)(I)(I) they are unfamiliar with the reference (not even in the ASCE Manual No. 54- "Sedimentation Engineering") similar to "...and 0.5 ML/L peak settleable solids concentration...for disturbed conditions and 10 year 24 hr. design storm." The manual did note that concentrations can be expressed as MG/L based on a specific formula. They stated that a limitation of 0.5 ppm is a very small amount and likely to be unobtainable in the real world. Not only is laboratory analysis required to show this level, it is quite subjective since sediment load will vary throughout the 24 hour design period and time related samples would have to be corrected to meet the second portion of the rule which specifies a particular design storm. Thus, enforcement will require another 5 or 10 pages of rules to clarify sampling and laboratory standards. WE and Smith therefore proposed that 80 percent removal efficiency (by weight) is more than adequate and the other portion is poorly conceived and probably unenforceable.

COA commented that regarding the proposed 0.5 mL/L criteria, that they use an assumed particle size distribution that the EPA developed from the National Urban Runoff Program (NURP) for planning and estimating purposes. COA further suggested

that the Edwards Rules or the technical guidance that is to be developed to support the Rules should provide an assumed particle size distribution and particle density by predominant soil types in the recharge and contributing zones or require determination of particle size distribution and particle weight density for site conditions.

The commission responds that the performance standards for temporary BMPs pertaining to the concentration of total settable solids have been deleted from the final rules to provide consistency with applicable NPDES stormwater permitting requirements.

WE commented that the method suggested for the temporary sedimentation BMP is not practical. The stated storm would generate approximately 8 inches of rainfall. Subsequently, the attendant retention volume would be extremely high and possibly create a structure of greater disturbance than the proposed development itself. Incumbent in this proposed rule is a removal efficiency that lacks a technical basis. As such, the criteria for background load data and the data supporting the removal efficiency should be provided for review by the professionals that will ultimately be required to provide for same in design; thus, WE recommended that the staff provide a more detailed report as to the justification of the referenced requirement.

Provisions in the proposed rule for construction activity BMP performance standards and design storm have been deleted. The requirements for construction activity BMPs included in the final were adopted from the NPDES general permit for construction activities. Staff will provide supporting technical information necessary to meet the requirements for construction activity BMPs in technical guidance being prepared by the executive director.

COA commented that an issue that is not addressed by the proposed criteria for temporary BMPs is the water quality volume of sedimentation basins and that the lower the volume the more likely overflow events (that would discharge untreated runoff) will occur. The City of Austin criteria specifies a « inch Water Quality Volume (WQV) while the EPA requires one inch WQV for drainage areas over 10 acres. COA suggested that because a 10 acre drainage area would automatically invoke EPA regulations pertaining to nonpoint source pollution control on construction sites, then the Edwards Rules should specify a WQV of 1 inch (Federal Register Vol. 63 No. 31 - 2/17/98 NPDES General Permit for Storm Water Discharges from Construction Activities Part VI.D.2.a(3)(a)).

WE commented that the statement of a five acre/single outlet appears in conflict. This exemption has always been reasonable. However, the limitation does not meet with the other desired criteria establishment. The standards as proposed, and the basis of computation therein, appear to be overly aggressive.

The commission has adopted the applicable technical requirements of the NPDES general permit for construction activities for regulated activities in the Edwards Aquifer Recharge and Contributing Zones.

COA stated that for areas between 5 and 10 acres the proposed rules state that other BMPs can be used but that their removal efficiency must be calculated, unless waived by the executive director. The COA continued that removal efficiencies may be calculated for sedimentation basins but not for other temporary BMPS, such as silt fences, rock berms, etc. COA suggested that instead of requiring calculations of removal efficiencies the rules should require that BMPs be located in the appropriate places and orientation, that proper site management is done, that maintenance is conducted at appropriate intervals, and that the commission enforce maintenance requirements. The COA concluded that construction sites are not static operations and efforts to engineer the best controls through calculations should be supported by requirements for proper placement, adequate maintenance, and prompt correction of deficiencies.

The commission has adopted the applicable technical requirements of the NPDES general permit for construction activities for regulated activities.

USFWS commented that the wording in the proposed performance standards for temporary BMPs (§213.5(b)(4)(D)(I)) allows too much room for noncompliance; "where space and other factors allow" and other similar wording should be omitted. If circumstances prohibit installation of a temporary BMP, this could be handled through the exception process.

The commission disagrees with the comment. Although the provisions for temporary BMPs specified in the proposed rule has been modified to be consistent with the NPDES general permit for construction activities, the final rule still contains language which allows alternative BMP requirements where site conditions do not allow attainment of the specified BMP requirements. Circumstances justifying the use of alternative BMP requirements will be addressed in the technical guidance being prepared by the executive director. Commission staff will work with applicants on a case-by-case basis to determine the feasibility of specified BMP requirements and satisfactory alternatives.

Permanent BMPs

TxDOT stated that there are advantages in developing performance standards for permanent best management practices (BMPs) and continued that it will give the applicant specific criteria which need to be met in the development and design of BMPs.

The commission agrees with the comment. Although specific references to "performance standards" for BMPs have been deleted, the "requirements" for BMPs specified in the final rule serve the same purpose as described in the comment.

Hays County commented that designs based on standard engineering practices are adequate in establishing performance standards.

The commission disagrees with the comment. Although references to BMP "performance standards" have been deleted from the final rule, the BMP "requirements" specified in the final rule provide guidance that will facilitate the implementation of the commission's Edwards Aquifer Protection program by supporting applicants site planning activities and the commission's review of water pollution abatement plans.

SAWS stated that requiring permanent BMPs to meet performance standards is a positive step in Edwards Aquifer protection. SAWS commended the commission for making this change.

The commission agrees with the comment. Although specific references to BMP "performance standards' have been deleted from the final rule, the BMP "requirements" specified in the final rule provide benefits to the commission's Edwards Aquifer

Protection program by providing guidance on the site planning and plan review process.

LCRA concurred with the need to establish a performance standard for runoff from new development on the recharge and contributing zones. They stated that the approach, relating to the efficiency of BMP design and operation, appears to have the drawback of allowing a higher intensity development to discharge a significantly higher loading than a lower intensity project. In fact, a low density project could be required to discharge higher quality water than background conditions if a removal efficiency approach is used. Consequently the approach in the rule as drafted being a standard limiting the increase in annual loading to a specific percentage above background levels, is preferable. However, given the large increases in pollutant loadings for urban intensities of development, either approach would yield a significant level of protection.

The commission agrees with the comment that either of the approaches discussed in the preamble to the proposed rule provide an environmental benefit to protecting water quality in the Edwards Aquifer. The approach relating to BMP removal efficiency was adopted by the commission because it is consistent with the historical practice of the commission's Edwards Aquifer Protection program. Although it is true this approach potentially allows regulated activities to discharge significantly higher constituent loadings, the commission lacks specific water quality information necessary to determine if these higher loadings will degrade water quality in the Edwards Aquifer. The requirements for BMP removal efficiency has been clarified to only address the incremental loading due to regulated activities and thus avoids the possibility that low density projects would be required to achieve higher water quality conditions than existed at the site prior to the initiation of regulated activities.

TxDOT recommended that the commission follow the lead of the LCRA and adopt technology-based performance standards.

The commission agrees with the comment and has adopted requirements for permanent BMPs which are very similar to those specified in LCRA's nonpoint source pollution control program.

COA supported the general approach of establishing a performance standard for treatment BMPs because the validity of this approach has been demonstrated both nationally and locally. However, the COA strongly disagrees with the effectiveness and reasonableness of the commission proposed performance standard to limit increases in annual TSS loadings to not greater than 20 percent above the background level approach because control of TSS alone will not meet nondegradation goals.

The commission disagrees with the comment that control of TSS alone will not meet nondegradation goals because TSS is an indicator of other contaminants.

COA commented that the need to limit impervious cover over the aquifer is not recognized in the proposed TSS performance standard and the rules place an over-reliance on treatment BMPs, which must be designed, constructed, and maintained properly. The COA stated that experience with treatment BMPs has shown that, in sensitive watersheds, reliance on them is an inadequate and high risk strategy which should be subordinate to limiting impervious cover.

The commission disagrees with the comment that impervious cover limits are not considered in the permanent BMP requirement to control TSS loadings from regulated activities. Impervious cover percentages are one factor that will have to be considered in the development of water pollution abatement plans. The specific means by which impervious cover will be considered in the development of water pollution abatement plans for regulated activities will be specified in the technical guidance being prepared be the executive director. Applicants will be able to utilize impervious cover limitations among other factors to identify BMPs necessary to meet the requirements of the rule.

COA proposed a nondegradation goal as the performance standard for Permanent BMPs for all contributing watersheds. They state that the best protection of the Edwards Aquifer will be afforded if a non-degradation goal is set as a performance standard for all new development. This goal is implied by the purpose statement of the rules in 30 TAC 213.1 and 312.20 but not fully explained or implemented in the rules. Adoption of a nondegradation goal would be consistent with goals stated in other agency rules (30 TAC 216) and by the City of Austin Save Our Springs Ordinance (1992). The application of a nondegradation goal to all watersheds contributing to the Edwards Aquifer regardless of county or other artificial jurisdictional boundaries is necessary to the effectiveness of these rules.

The commission agrees with the comment that the goal of the commission's Edwards Aquifer Protection program is to regulate activities to the degree necessary to prevent degradation of water quality in the Edwards Aquifer. The commission has adopted a programmatic-based approach for specifying requirements for BMPs in the final rules to meet this goal. Permanent BMP requirements specified in the final rules are also based upon agency experience in their application and effectiveness in the commission's Edwards Aquifer Protection program.

COA suggested that the components of a nondegradation strategy for the aquifer would include the following: eliminate adverse water quality impacts from new development by limiting post-development loads, or pounds of pollutants discharged per acre per year, to pre-development background levels; and achieve zero increases in pollutant loads by limiting impervious cover to levels at which remaining loads from development could be reduced to background levels by an expanded group of stormwater treatment processes.

TCWA commented that the design standards for water quality control should be based on the requirement of no increase in the average annual load for total suspended solids, total nitrogen, chemical oxygen demand, toxic metal, pesticides and herbicides above naturally occurring loads.

The commission disagrees with the comments that zero increases in pollutant loads from regulated activities is necessary to prevent degradation of water quality in the Edwards Aquifer. The recommendation presumes the Edwards Aquifer system has no capacity to assimilate constituent loadings without causing degradation of water quality. Although the assimilative capacity of the system has not been specifically determined, it is unlikely to be zero. Therefore, to allow no increase in constituent loadings would potentially place an unnecessary burden on regulated activities. In the absence of specific water quality information as to the effect of water quality management practices on water quality in the Edwards Aquifer, the commission has adopted a programmatic-based approach for specifying requirements for BMPs in the final rules. Permanent BMP requirements specified in the rules for storm water are based

upon experience in the application and effectiveness of these BMPs in the commission's Edwards Aquifer Protection program.

COA further comments that the commission should strengthen regulatory restrictions by limiting exceptions and variances to the Edwards Rules and establishing clear performance standards based on water quality criteria.

The commission disagrees with the comment that the provisions for exceptions specified in the rules need to be strengthened. The provisions for exceptions require a demonstration that equivalent levels of water quality protection be achieved. The rules do not have provisions for variances.

COA further comments that the commission should reduce impacts of existing and "grandfathered" development through incentives for retrofitting stormwater control measures where appropriate.

The commission responds that it lacks specific water quality information necessary to determine if new regulations or other initiatives are needed to address water resource impacts from existing development in order to meet the water quality objectives for the Edwards Aquifer.

COA further comments that the commission maintain and preserve existing baseflow rates in contributing creeks in order to preserve aquatic habitat and recharge rates to the aquifer. COA also commented that for the segment of the Edwards Aquifer which discharges to Barton Springs, a nondegradation approach should be adopted in both the recharge and contributing zone unless a lower standard can be justified through technical studies. COA stated that the rationale for this standard is primarily the unique quality and vulnerability of the Edwards Aquifer resource and based on discussions with the EPA and USFWS related to NPDES, a non-degradation pollution control strategy for endangered species protection is appropriate. COA concluded that at a minimum the Edwards Rules should adopt a nondegradation approach for the recharge zone, which is the portion of the aquifer most vulnerable to pollution.

The commission agrees with the need to maintain such baseflows if necessary for water quality protection and will assess groundwater impacts in its review and action on a related water right application in accordance with Texas Water Code §11.134.

RLM recommended that: 1) all new sedimentation basin approvals should contain a requirement that for a reasonable period of time each basin should have the influent and effluent and the sediment analyzed, for Total Petroleum Hydrocarbons (TPH), BTEX, and the 8 RCRA metals

The commission disagrees with the comment that new basin approvals contain a requirement to monitor influent, effluent, and sediment quality. The design and other requirements of sedimentation/filtration basins will be specified in technical guidance being prepared by the executive director. These requirements will be determined based upon relevant available data. Applicants will not be required to monitor BMPs if they follow BMP guidance in the technical guidance.

RLM also recommends the commission should make a determination regarding the sediments removed from these basins, as to whether they require special handling and this determination should be part of the Edwards Rules.

The commission disagrees with the comment that the commission has a responsibility to make determination regard management of sediments removed from sedimentation/filtration basins. Applicants are responsible for maintaining BMPs including the proper management of sediments removed from control facilities. Disposal of these materials must be accomplished in compliance with all applicable waste management regulations.

GSACC commented that the specific performance standard proposed is inappropriate because it is based on an invalid assumption that the background condition is stable and sufficient to prevent pollution. Background conditions can vary widely from site to site, within a site, and even from time to time for the same site. Thus, establishing a performance standard for a site on the basis of a single or small number of observations is arbitrary and meaningless.

USFWS questioned if "background levels" are defined for this rule? In Texas Senate Bill 1017, background levels were defined for the Texas Water Code in Chapter 26, Subchapter E with a limited number of constituents: total suspended solids, total P, total N, Chemical Oxygen Demand, and Biological oxygen Demand. The definition also minimally requires four samples of rainfall events exceeding one-half inch per year. The definition may not be adequate for TSS and other pollutants under all circumstances.

Hays County commented that requiring removal to a percent of background levels is impossible when studies have not been conducted to establish background levels.

The commission has deleted references to "background levels" in specifying requirements for permanent BMPs in the final rules.

USFWS states that determining background water quality levels as a standard on which to base the design of BMPs is problematic, given the high variation of TSS and other parameters during stormflows under pre-development conditions. Removal efficiencies for specific parameters (i.e., TSS during the construction phase) above and below BMPs may be a more realistic goal in terms of monitoring.

The commission has adopted a requirement for permanent BMPs based upon TSS removal efficiency consistent with the recommendation in the comment.

USFWS further recommends a 70-90 percent removal on an event basis rather than average annual load, since improperly functioning BMPs may discharge large amounts of sediments and other pollutants during one event that may not be obvious when averaged into the annual load.

The commission disagrees with the comment that permanent BMPs should be evaluated on a single event basis. Data used to determine the constituent removal efficiencies of BMPs are generally reported on an average annual basis. This data accounts for excursions which may occur during individual storm events. The executive director is preparing technical guidance on the removal efficiency of BMPs using data which includes average annual performance evaluations.

GVA questioned that to insure that total suspended solids do not exceed 20 percent of the background levels will require preconstruction monitoring, or will the background be calculated? If calculated, what is the tested precision of the calculation?

The commission has deleted provisions for BMP performance standards pertaining to limiting TSS loadings in storm water to no more than 20 percent above background levels in storm water discharged from regulated activities in the final rules.

RLM commented that the use of "technology-based requirements similar ... in the Lower Colorado River Authority Technical Guidance" should be reconsidered because the LCRA Technical Guidance Manual deals specifically with removing sediments and attempting to prevent sediment build-up in the streams and lakes in the Lower Colorado Basin. The use of this document should be restricted as a guide for the design of BMPs to protect *groundwater quality,* especially with regard to the Edwards Aquifer.

The commission disagrees, that the use of the LCRA Technical Guidance Manual is inappropriate. The intent of the rule is to remove TSS prior to stormwater leaving a site and entering streams that recharge the aquifer. The executive director is preparing technical guidance on BMPs which will be applicable to circumstances in the Edwards Aquifer system.

LCRA commented on the appropriate level of performance to be achieved and stated that the standard should ultimately be determined by the water quality goal. They continued that unfortunately the correlations between development, pollutant loading, BMP efficiency, surface water attenuation and groundwater attenuation are far from precise and therefore it is difficult, if not impossible, to start with a water quality goal and create a program meeting that goal with a high level of technical confidence. The LCRA stated that they approached this problem by seeking a balance between water quality protection and economic feasibility. LCRA concluded that cost effective BMPs were available which could limit increases in TSS and phosphorous loading to a range of 20 to 30 percent above background levels. At the same time this standard also provides a level of water quality protection which meets our goal of protecting the water quality of the Highland Lakes.

The commission agrees with the comment that information on the effect specific water quality management practices have on water quality in the Edwards Aquifer is largely lacking. Accordingly, the commission is unable to determine a water quality-based requirement for permanent BMPs and has adopted programmatic-based approach to specifying requirements for BMPs in the final rule.

TxDOT-A and TxDOT-SA both requested that since they will be spending taxpayer dollars to comply with the proposed rules, they recommend that these rules contain cost effectiveness as part of the compliance sections for temporary and permanent BMPs.

The commission responds that a fiscal note was prepared for the proposal preamble and is discussed earlier in this preamble which addresses the fiscal impact of the final rules.

USFWS recommends that BMPs be monitored a minimum of 4 times per year to ensure proper function.

The commission agrees that unproven BMPs designs should be monitored. The executive director is preparing technical guidance for the selection of BMPs which meet the requirements of the rules. This guidance is being prepared based upon a large body of monitoring data collected from BMPs. Section 213.5(b)(4)(C) requires the engineer who designs the permanent BMP to provide a plan for the inspection, maintenance, repair, and, if necessary, retrofit of the BMP.

COA commented that TSS is not an adequate parameter to use as a single performance standard. First, there are other pollutants of significant concern, such as nutrients and toxics, which TSS-based BMPs may provide a much lower level of treatment, and the sedimentation-sand filtration systems now widely used for compliance with the current Edwards Rules are not effective at removing dissolved nutrients. The COA continued that it has conducted an analysis of the proposed performance standard using standard methods of non-point source (NPS) load estimation which demonstrates that, while limiting upland TSS increases to 20 percent, other pollutants would be allowed to increase from 50 percent to over 8000 percent on a per acre basis.

The commission disagrees with the comment that TSS is not an adequate parameter to use as a single performance standard for permanent BMPs. Specific water quality information on the effect water quality management practices on water quality in the Edwards Aquifer, including control requirements for various constituents, has not been presented to the commission in response to the commission's solicitation for such information in the preamble to the propose rule, nor is the commission aware of such information from other sources. In the absence of specific water quality information on the Edwards Aquifer, the commission has adopted programmatic-based approach to specifying requirements for BMPs in the final rule. BMP requirements specified in the final rule for storm water are based upon historical practice in the commission's Edwards Aquifer Protection program.

COA stated that its analysis of the proposed performance standards included calculations for several development scenarios whereby a sedimentation-sand filtration BMP has been installed for treating runoff. Four development scenarios were evaluated for each of the two zones (i.e., Contributing Zone and Recharge Zone): 1) Undeveloped (5 percent Impervious Cover), 2) Single-family Development (20 percent Impervious Cover), 3) Multi-family Development (40 percent Impervious Cover), and 4) Commercial Development (60 percent Impervious Cover). Annual average pollutant loads were evaluated for five constituents: 1) Total Suspended Solids (TSS), 2) Total Phosphorus (TP), 3) Total Nitrogen (TN), 4) Nitrite + Nitrate (NO2+NO3), and 5) Chemical Oxygen Demand (COD). Stormwater rainfall-runoff coefficients, pollutant concentration values, and pollutant loading equations came from the COA's Environmental Criteria Manual (1995). The removal efficiencies for a sedimentation-sand filtration system are based on Evaluation of Nonpoint Source Controls, an EPA/Commission Section 319 Grant Report (City of Austin, 1997). COA calculated removal efficiencies for non-TSS constituents as the product of the required TSS removal efficiency (to meet the commission's 20 percent performance standard) and the ratio of reported constituent-to-TSS removal efficiencies from the 1997 report. A "Barton Ridge" type sedimentation-sand filtration system achieves estimated average removal efficiencies for TSS and TN of 71 percent and 20 percent, respectively. The ratio of TN to TSS efficiencies is thus (0.20/0.71) = 0.28. If a sedimentation-sand filtration system must achieve a 75 percent TSS removal efficiency in order to comply with the Edwards Rule performance standard, the estimated TN removal efficiency would be 75 percent * 0.28 = 21 percent. The analysis indicates that, for the scenarios evaluated, the proposed performance standard would allow pollutant loads to increase by 63 percent to 4476 percent in the Contributing Zone and 108 percent to 8474 percent in the Recharge Zone. COA stated that this analysis supports the need to have a stricter performance standard in the recharge zone if a less than non-degradation standard is adopted. It also indicates that using TSS alone is inappropriate.

The commission believes the methodology described in the comment significantly overestimates the nutrient loadings that would likely result from the BMP performance requirement used in the analysis. The analysis presumes that the ratio of constituent removal efficiencies calculated from the City's 1997 study is representative of conditions which would be expected to occur throughout the Recharge and Contributing Zones of the Edwards Aquifer. However, the City has published other data which shows the TN/TSS removal efficiency ratio calculated from the 1997 study is significantly lower than TN/TSS removal efficiency ratios calculated from this other data. The lower TN/TSS ratio used in the analysis has the effect of overestimating the estimated nutrient loadings from regulated activities that would likely result from the implementation of the BMP requirement used in the analysis. Furthermore, irrespective of the accuracy of the nutrient loadings estimates that might be expected from regulated activities, this analysis does not address the potential impact nutrient loadings might have on water quality in the Edwards Aquifer. Therefore, the commission disagrees with the comment that the analysis presented in the comment supports a need for stricter performance standards in the rule.

COA commented that the currently proposed performance standards are not adequate because the majority of the TSS load will not be treated by onsite BMPs as this TSS is generated through channel processes with 75 percent or greater of the TSS load results from in-stream processes (i.e., erosion, bedload movement). The COA concluded that a performance standard that only applies to uplands TSS loads will be addressing just a portion of the problem. COA stated that in-stream TSS loading processes are not well understood and appear to be correlated to both watershed characteristics and stream geomorphology. COA continued that recent geomorphic studies indicate the importance of controlling channel-forming flows to reduce in-stream aggradation and/or degradation, which are indicators of sediment loads. The COA suggested that these studies demonstrate the need for watershed-based strategies to control erosive flows and maintain stream physical integrity. The COA continued that the Edwards Rules approach does not address either of these fundamentally important needs and, thus, the rules, cannot be considered to support nondegradation.

The commission agrees with the comment that the requirements in the rules for permanent BMPs address the TSS loadings discharged from regulated activities and do not directly address potential TSS loadings originating from in-stream processes. The commission also agrees that in-stream processes are a potentially significant factor in water quality management practices. General requirements to minimize changes in the way in which water enters a stream as a result of regulated activities are specified in §213.5(b)(4)(E). These requirements address the in-stream processes referenced in the comment. The means by which applicants can meet the requirements of §213.5(b)(4)(E) will be specified in technical guidance being prepared by the executive director.

BE commented that on §213.5(b)(4)(D)(ii)(I), to delete the words "constructed, operated and maintained" from the second sentence.

The commission disagrees with the comment. The requirement to construct, operate, and maintain permanent BMPs is consistent with the commission's objective of implementing a comprehensive as well as effective program to protect water quality in the Edwards Aquifer. Without such actions, no measures would be installed or remain in place to protect water quality from polluted stormwater runoff.

TxDOT agreed with TSS as being the target constituent, but recommended amending the language to read "...to insure that the annual loading or mean concentration of TSS is not greater than 20 percent above background levels."

The commission disagrees with the comment. Constituent mass loadings are the generally accepted measure of pollutants in water quality management programs as provided under EPA guidance.

TxDOT stated that it is their presumption that the calculation of loadings creates a bias against development projects with high runoff coefficients, as opposed to high pollution potential and the use of average, or mean, concentration could correct this bias. TxDOT-A and TxDOT-SA commented that in regard to BMPs, the proposed rules for permanent BMPs are premised on a loading content and that they feel that loading is not the most appropriate measure of the impacts runoff may have on receiving waters. They continued that loading cannot be measured in the field, rather it is a mathematically estimated quantity and there are a number of inaccuracies inherent in the calculation of loading. They continued that these inaccuracies can easily lead to a number that may falsely distort and exaggerate impacts on receiving waters. They concluded that in their situation, this could lead to the expenditure of possibly large amounts of public funds that result in no added value to protecting the aquifer.

The commission disagrees with the comment that high runoff coefficients do not represent a high pollution potential. The increased build-up of pollutants and runoff flow rates from areas with high runoff coefficients indicates these areas have a high pollution potential which is properly reflected in using constituent mass loadings as the appropriate measure of pollutants. The commission disagrees with the comment that constituent mass loadings are not the most appropriate measure of impacts runoff may have on receiving waters. Constituent mass loadings to a receiving water allows the total amount of the constituent to be known and the resultant water quality conditions in the receiving water to be determined. The effect of the inaccuracies involved in calculating constituent loadings are minimized by establishing BMP requirements using average conditions from a large body of data. The commission notes that it does not have the specific water quality information necessary to assess potential impacts on water quality in the Edwards Aquifer.

In response to the request for suggested approaches to setting performance standards, the EAA urges the commission to consider using results of a land-use study currently underway by the USGS in cooperation with the EAA as a tool for determining the impact of various regulated activities on the recharge zone and for setting performance standards. The USGS is drilling a 30-well monitoring network randomly located across the recharge zone in Bexar County as part of a federal National Water Quality Assessment (NAWQA) Program. The primary objective of this project is to statistically correlate the quality of recently recharged groundwater in the Edwards Aquifer with urban land uses on the recharge zone. The USGS will sample each well once to provide a "snapshot" of water quality associated with various land uses in a relatively short period of time. Water-quality analysis will include major ions, nutrients, pesticides, trace metals and volatile organic carbons. Following

the initial sampling events, the USGS will periodically sample several wells within the NAWQA network, and the EAA will develop a water-quality sampling program for many of the wells.

The commission agrees this study may provide useful information and looks forward to the opportunity to review the results of the study when the information becomes available.

TxDOT recommended an alternative approach, the applicant be given a choice of meeting a performance based on constituent loading or average concentration. TxDOT-A commented that they feel that a BMP that is based on a concentration concept offers a more scientifically supported as well as a more financially prudent method of determining the impacts on receiving waters.

The commission disagrees with the comment. BMP requirements based upon constituent loadings are well supported scientifically as evidenced by the large body of scientific data developed to evaluate the performance of BMPs based upon the removal of constituent loadings. The effect of the inaccuracies involved in calculating constituent loadings and the possibility of spending funds that result in no added value to protecting the aquifer are minimized by establishing BMP requirements using average conditions from a large body of data.

If a standard is based on the BMP design, TxDOT recommended that a permanent performance standard based on removal efficiency not exceed 80 percent. The reason for this recommendation is based on cost-efficiency. The additional cost to construct a BMP to remove an additional 5 or 10 percent (beyond 80 percent) is significantly greater than a comparable increment below 80 percent.

The commission has adopted the recommended permanent BMP requirement to remove 80 percent of the average TSS loading.

COA commented that the definition of background TSS level is important because it determines the allowable pollutant load. The COA continued that its current definition of background is 5 percent impervious cover with a TSS concentration of 55 mg/L. They stated that LCRA uses a less stringent runoff coefficient of 0.10 to background and the COA's runoff coefficient values for undeveloped sites are 0.049 in the non-recharge zone and 0.025 in the recharge zone. COA recommends that to achieve a nondegradation goal, the background TSS be defined as 5 percent impervious cover, 55 mg/L concentration, a runoff coefficient of 0.049 in the contributing zone and a runoff coefficient of 0.025 in the recharge zone. They continue that this definition and calculation method should be provided in the technical guidance developed for the proposed Edwards Rules.

The commission has deleted reference to background TSS levels from the final rule.

COA commented that grassy swales have successfully been used to treat stormwater runoff at several installations across the United States and may be a beneficial component of an overall stormwater treatment system if they are designed properly and installed in a suitable location. COA continued that the commission should review site conditions that are necessary to ensure that grassy swales will provide reliable treatment of stormwater runoff and prescribe those conditions within the Edwards Rules or accompanying guidance documents. COA suggested that factors that contraindicate the application of grassy swales as a BMP include thin soils, soils with a low organic carbon content, soils with a high percentage of gravel or larger size particles, steep slopes, a shallow depth to groundwater, and proximity to recharge features or mapped faults. They concluded that these factors could allow rapid recharge of contaminated stormwater runoff to the water table rather than slow, beneficial infiltration of stormwater.

The commission agrees with the comment that grassy swales may be a beneficial component of an overall water pollution abatement plan for regulated activities. The commission believes grassy swales are one among many valid best management practices which can potentially be used to meet the requirements of the rule. These practices will be included in the technical guidance being prepared by the executive director. Applicants will be able to choose the BMPs which are best suited to their site and circumstances to meet the requirements of the rule.

SACA commented that they would like to see changes in the commission regulations for stormwater quality to address what is considered a very important shortcoming of these regulations—the lack of information and specifications to meet the commission regulations with non-structural facilities that preserve the integrity of the environment. By using a typical design from engineer specifications where all existing vegetation is removed including large trees and riparian understory, an artificial area is created; however, the commission review process is much less and, therefore, easier and less costly than using natural preserve areas. SACA requested the commission take a proactive course in developing regulations and specifications that will preserve natural areas and their environmental components including the trees, understory and wildlife.

The commission believes that non-structural facilities that preserve the integrity of water quality can be used to meet the requirements of the rule and the goals of the program. Specific requirements for non-structural (and structural) facilities to meet the requirements of the rule will be presented in technical guidance being prepared by the executive director.

BE commented that on §213.5(b)(4)(D)(ii)(II) delete the words "and function" from the first sentence.

The commission disagrees with the comment. The commission believes it is appropriate that applicants be responsible to insure that permanent BMPs, upon completion of construction, are fully functional so that they may operate in a manner necessary to achieve their design performance levels.

LCRA stated that it is highly appropriate for the Edwards Aquifer rules to incorporate provisions requiring that runoff velocities, stream flashing and increased erosion be controlled; however, the proposed language is rather vague beyond requiring the technical report describe how these issues will be addressed. They suggested that a clear standard, such as no increase in the two year peak runoff rate, would be a very helpful clarification in the proposed rules. They continued that as written, it is implied that these impacts must be mitigated, but there is considerable ambiguity in the proposed language. LCRA stated that they have found that such a standard imposes a very minimal impact on most developments and that practically any BMP sized to control TSS at the level proposed will simultaneously provide much of the storage volume needed to reduce peak runoff rates to an acceptable level. LCRA continued that a requirement of this nature imbeds an important concept in the rules while imposing a minimal burden on development and that the concept and associated standard should be laid out more explicitly. Normal drainage practice is to move the water off the

street, parking lot, etc., and into a storm sewer as quickly as possible. The result is that the receiving stream sees a dramatically higher peak runoff after development for normal rainfall events compared to predevelopment runoff patterns, and that peak runoff rates can increase by a factor of five or more for the one year storm event. They stated that the result of this radical change in runoff patterns is to set up a potentially severe and prolonged process of erosion, thus dramatically increasing TSS loading, while the stream cuts a new channel to adapt to the altered flow patterns. They continued that erosion and attendant TSS last for many years following the development of an area. They concluded that there are a lot of other pollutants generally attached to sediment, so setting up a long term erosion pattern has water quality impacts extending beyond increased TSS loadings.

The commission agrees with the comment that it is appropriate to incorporate provisions addressing runoff velocities, stream flashing, and increased erosion in the rule. However, the commission does not have the information necessary to determine "a clear standard" for these provisions in the rule. The means by which applicants can meet the requirements of §213.5(b)(4)(E) will be specified in technical guidance being prepared by the executive director.

COA stated that the alteration of flow to a stream following construction may cause water quantity and quality degradation and that changes in baseflow, bed load, and nutrient load should be minimized. COA suggested that instream erosion is a specific concern that should be addressed in the Edwards Rules because it can increase instream TSS loads drastically and contribute to loss of ecological habitat as well as increase loading of adsorbed pollutants. The COA continued that it has conducted technical assessments of 17 watersheds in the Austin area, including 5 creeks that are partially within the Recharge Zone of the Edwards Aquifer. These technical assessments found that 24 percent of the Recharge Zone stream reaches are "Stable," 23 percent are "In-Adjustment," and 54 percent are "In-Transition." The COA stated that it is developing improved hydrological control criteria to determine how to prevent instream erosion, and that BMPs to prevent instream erosion due to "channel forming" flow events will be developed as part of the COA stormwater management program.

The commission responds that it does not have the information necessary to determine specific requirements for controlling runoff velocities, stream flashing, and increased erosion from regulated activities because the actual effect of such practices on water quality in the Edwards Aquifer is not known. The means by which applicants can meet the requirements of §213.5(b)(4)(E) will be specified in technical guidance being prepared by the executive director.

GEOS commented that the rules should require that all development activities atop the aquifer be done in a manner that ensures that stream base flow and maximum aquifer recharge rates are maintained.

The commission responds that it does not have the information necessary to determine the specific impact to water quality in the Edwards Aquifer by maintaining stream base flow and maximizing aquifer recharge. Therefore, the commission has adopted a programmatic-based approach to specifying requirements for permanent BMPs in the final rule. In addition, the commission shall assess the ground impacts related to the review and action on a surface water right in a hydrologically connected surface stream pursuant to Texas Water Code §11.134.

SAOSAB commented that in terms of enforcement of BMPs, they agree that certification by an appropriately trained engineer is an important requirement.

SAWS stated that requiring an Engineer to certify that BMPs are constructed as designed is a positive step in protection of the Edwards Aquifer. Because, changes in BMP design may occur during the plan review process, SAWS recommended that the Engineer certify that the BMP was constructed as approved by the Executive Director.

The commission appreciates positive responses to the proposed rules.

COA commented that this section requires submittal of a certification regarding proper design and construction of permanent BMPS within 30 days of site completion. COA also stated that there is a need for reporting of the monitoring results to verify the operable condition of permanent BMPS. COA suggested that if the commission does not have sufficient staff and funds available to conduct inspections and monitoring in order to independently verify operation of BMPS, then self-monitoring and reporting should be required and the monitoring data should be provided to local entities. The COA also suggested that guidelines for reporting and penalties for failure to monitor and report should be developed for this strategy for BMP operation verification. MLK commented that the commission does not currently require engineers to certify to performance standards for wastewater treatment plants, yet the technology for the design of wastewater treatment plants is much further refined than what currently exists for stormwater treatment, and numerous studies have been done that show a very wide variation in removal efficiencies for stormwater treatment systems. MEC commented that the proposed rules require professional Engineers to certify to performance standards that cannot be practically met. The new rules are impossible to achieve without clear definitions and design criteria, no design criteria being proposed, and references to a Technical Guidance Manual that doesn't exist. CECT commented that the use of performance standards, coupled with other aspects of the rules, is inappropriate and not technically valid, and will create difficulty and liability for engineers attempting to comply with the rules.

The commission responds that the agency and any other authorized agency could monitor/test to determine performance of BMPs, however, it is the intention of the commission to require BMPs that are assumed to remove 80 percent of the post-development loadings of total suspended solids. Use of an agency-approved BMP would negate the need for monitoring of the BMP provided the BMP is constructed as designed. The commission notes that the certification of BMPs by a Professional Engineer is an indication of the construction quality control and therefore, performance. Engineers are not required to certify the performance of, but rather the design of, best management practices since the proposed rules set forth design standards and not performance standards for stormwater treatment systems.

USFWS asked if the aquifer rules address septic tank systems that are independent of one another?

The commission responds that the Edwards Aquifer rules refer to 30 TAC Chapter 285 (On-Site Sewage Facilities) which have

special requirements for systems installed on the recharge zone.

BE commented that on §213.5(b)(4)(F)(ii) add the words "or Texas registered professional engineer" after the word agent in the first sentence.

The commission responds that 213.5(b)(4)(F)(ii) refers to the appropriate "authorized agent" responsible for implementation of the local on-site sewage facilities program (30 TAC Chapter 285) and not the authorized agent for the Edwards Aquifer protection plan, therefore no rule change is necessary.

An individual commented that if the commission wanted to control sources of pollution of the aquifer, it should consider reasonable measures for correcting past laxness rather than merely regulate future development over the recharge and contributing zones. Thus, she suggests requiring municipalities to provide sewer service to all areas both in their city limits and in their ETJ's where development has dotted the land with numerous septic tanks on very small lots. This rule should require sewer service extension to new developments and that San Marcos, as well as other municipalities, should be required to provide sewer service.

The commission responds that this comment addresses issues which are outside the scope of this rulemaking. Whether a city chooses to extend such service is, by law, a matter of local decisionmaking with input from affected tax and rate payers.

WE and an individual commented that on §213.5(b)(4)(G), a simple rule requiring containment structures for any temporary storage of hydrocarbons or hazardous substances greater than 250 gallons would be appropriate, and that a rule requiring that any spill (not just of more than 250 gallons) on a highway, job site or from a pipeline must be contained, cleaned up, and reported to the commission would be appropriate. Also, stated that the permit narrative about a contingency plan is useless since only the design engineer and the commission staff read the technical report, and the actual contractors working on the site who might be in a position to implement such a plan are not privy to it's contents.

The commission responds that the technical report for a water pollution abatement plan need only to describe the measure that will be used to contain any spill of hydrocarbons or hazardous substances from any source, not just for 250 gallons or more from a temporary aboveground storage tank. The commission also notes that an aboveground storage tank facility plan application must be submitted in conjunction with a water pollution abatement plan for facilities proposing to utilize aboveground storage tanks. The aboveground storage tank facility plan application requires more specific information to be submitted for executive director review. In addition, 213.5(e) specifies that any spill from storage tank facilities must be removed from the controlled drainage area for disposal within 24 hours of the spill. The commission also responds that the contingency spill plan should be shared with operators on the site.

USFWS commented that the assignment of responsibility for water quality structures to the appropriate builder or agency is a positive step. SAWS stated that the clarification of the responsibility for maintenance of permanent BMPs is a positive step in protection of the Edwards Aquifer and commended the commission for making this change.

The commission appreciates these positive responses to the proposed rule.

A number of individuals and entities commented on the need to maintain post-development BMPs. Representative Shields asked who will be responsible for maintaining these pollution control measures once construction on the house is completed?

An individual commented that although the amendment requires developers to build sedimentation ponds to prevent solid from washing off a property, who is going to maintain it? What happens when the ponds become contaminated? Will the EPA provide funds to clean up the contamination or will the original developer?

Representative Krusee commented that, in addition to the initial fixed costs for development requirements, some owners will become solely responsible for any continuous maintenance or retrofit of BMPs which will be excessively burdensome.

RECA and TxCABA commented that the posting for future maintenance is costly to establish (property owner associations) and not likely to be effective in the case of residential construction. They continued that municipalities which have mandated the installation of sedimentation filtration structures have determined those structures should be maintained by a governmental entity for the following reasons: residential responsibility is not dependable, residential quality controls vary, continuity of ownership cannot be assured, and assignment of liability for enforcement is more difficult. They stated that in the 1980's, the City of Austin required formal assignment of responsibility for structural controls to home owner's associations, but amended the rule later in the decade with adoption of the lower watersheds portion of their comprehensive watershed ordinance. TxCABA suggested that the commission delegate to municipal or county government the responsibility for control maintenance.

The commission responds that Edwards Aquifer protection plan applicants are responsible for maintaining the pollution control measures after construction is completed until such time as the maintenance obligation is assumed in writing by another entity. The commission also notes that the proposed rule has been revised to allow an exemption from the requirement for other permanent structural controls for low density single-family residential developments that utilize less than 20 percent impervious cover, provided sensitive features are protected in the recharge zone. In addition, individual land owners seeking to construct their own single-family residences or associated residential structures on sites are exempted from the Edwards Aquifer Protection Plan application requirements under Subchapter A (that requires a plan to be submitted and a fee paid), provided that they do not exceed 20 percent impervious cover on the sites. By default, no additional permanent BMPs are required for these instances. The commission agrees that the cost of maintenance for permanent BMPs could be high. However, the commission believes that proactive measures are required to prevent degradation of the water quality of the Edwards Aquifer and that permanent stormwater controls are not effective at protecting water quality if the controls are not properly maintained. The US EPA does not fund the maintenance of permanent BMPs.

WGP commented that this provision allows the applicant to transfer the maintenance responsibility for BMPs to another entity and although, implicit, the language does not clearly provide that the applicant will be relieved of further liability or responsibility for the maintenance obligations after the transfer.

WGP suggested that language be added to clarify that once the applicant has made a transfer to one of the entities and in the manner provided by the rules, the applicant will automatically be released from any further maintenance responsibility.

The commission agrees that the language should be clarified to show that applicant will no longer be responsible for the maintenance of BMPs once another entity submits a written acceptance of that responsibility to the executive director at the appropriate regional office. The rules have been modified to clarify the transfer of responsibility in both §§213.5(b)(5) and 213.23(k).

WE commented that reference is made to the ultimate maintenance of BMPs. In consideration of a single-family development, the creation of an entity responsible for same is made. The previous rules required the municipality to provide for maintenance of the facilities. If the commission was unsuccessful in implementing this requirement with a governmental jurisdiction, are they simply seeking a lesser financially substantial corporation? WE stated that it is difficult to understand why a municipality can be conveniently excluded for the interjection of a smaller, more susceptible entity.

The commission agrees that the language should be clarified to show that applicant will no longer be responsible for the maintenance of BMPs once another entity submits a written acceptance of that responsibility to the executive director at the appropriate regional office. Sections 213.(b)(5) and 213.23(k) of the rules have been modified.

Underground Storage Tanks

SAWS recommended that the Underground Storage Tank (UST) standards should include, at a minimum, a requirement for tertiary containment of all the components of a UST system, including tanks and piping. SAWS also recommended that the commission work with SAWS in prohibiting all new USTs on the Recharge Zone because the potential impact to the Edwards Aquifer of even one release from a UST system located on the recharge or transition zone could significantly impact the water quality of the Edwards Aquifer. SAWS concluded that the City of San Antonio has had an ordinance in effect which has prohibited new USTs on the Recharge Zone since December 1994.

A number of individuals and entities commented on the need to address underground storage tank requirements. SAWS recommended that the Underground Storage Tank (UST) standards should include, at a minimum, a requirement for tertiary containment of all components of a UST system, including tanks and piping.

LWVSA and LWA urged the commission to consider banning all underground storage tanks in the recharge zone. The San Antonio City Council banned all such tanks in the recharge zone in the city's ETJ in 1995. SAWS also recommended that the commission work with SAWS in prohibiting all new USTs on the Recharge Zone because the potential impact to the Edwards Aquifer of even one release from a UST system located on the recharge or transition zone could significantly impact the water quality of the Edwards Aquifer. SAWS concluded that the City of San Antonio has had an ordinance in effect which has prohibited new USTs on the Recharge Zone since December 1994. Patterson commented that she is concerned over the possibility of MTBE with its carcinogenic effects ending up in their wells from underground tanks leaking from gas stations. She has read about the difficulties that California is having with this problem and wants the commission to take a proactive stance in this area.

EAA recommended that the rules require tertiary containment for all new underground storage tanks rather than only for those within 150 feet of a well or sensitive feature, in order to provide an additional level of protection against contamination of the aquifer.

TCPS commented that the requirement for tertiary containment for underground storage tanks within 150 feet from a well or sensitive feature is positive, although it should be expanded to include all underground storage tanks in the recharge and contributing zone.

The commission has made no rule change in response to these comments. To address the most immediate threat to groundwater, the current §213.5(d)(1)(B) requires tertiary containment for any new underground storage tank system that is within 150 feet of a domestic, industrial, irrigation, or public water supply well without a sanitary easement, or other sensitive feature. The commission believes that double containment along with other tank standards adequately prevents releases to the environment in areas not adjacent to a sensitive feature. Commission rules require that existing underground storage tanks which contain hazardous substances (as defined in Chapter 334 of this title), be upgraded to secondary containment by December 22, 1998. Such secondary containment can be, but does not have to be, double wall construction. Existing underground storage tanks are those which were installed prior to December 22, 1988. Commission rules have required that all regulated underground storage tanks installed over the Edwards Transition or Recharge zones be double walled with continuous interstitial monitoring since September 29, 1989. Commission rules required that all existing regulated underground storage tanks be upgraded to meet requirements for release detection monitoring (by December 22, 1993), spill/overfill prevention (by December 22, 1994) and corrosion protection (by December 22, 1998). Owners of a single walled tank and piping system have already spent a significant sum of money to meet current requirements and will be spending another $6000 to $15,000 per 3-tank site to meet corrosion protection requirements. If those same owners are then required to further upgrade to double or triple wall containment, all monies spent to that point to maintain compliance will be lost, as the upgraded single wall tanks will have to be removed and completely replaced. This imposes an unreasonable hardship on tank owners who have complied with existing regulations and would be especially damaging to small business owners. The commission also notes that the agency adopts rules establishing the minimum requirements for the programs over which the legislature has given the commission responsibility and that local counties, cities, and regulating entities may establish regulations which meet or exceed them.

EAA recommended that the commission require aboveground storage tank systems utilize secondary containment for underground piping. Underground piping associated with aboveground storage tanks should be regulated by rules that are equivalent to the rules that regulate piping for underground storage systems.

The commission responds that it does not have the statutory authority to establish such piping standards for aboveground storage tanks, pursuant to the Texas Water Code Section 26.3441(b). Under the current provisions of the Texas Water Code Chapter 26, Subchapter I, the commission is only

authorized to implement registration, annual fees, release reporting, corrective action, and remediation-cost reimbursement requirements for certain petroleum aboveground storage tanks, and no federal statues or EPA regulations have been implemented to authorize other requirements.

COA commented that §213.5(d)(1) pertaining to leak detection systems refers to "alerting the system's owner of possible leakages." COA suggested that the reference to owner should be changed to owner/operator and include a statement that the operator be the first contact. They continue that the operator is the best point of contact because he/she is on site and can control mechanical equipment and initiate clean up, as necessary.

The commission responds that the underground storage tank system's owner is ultimately responsible for containment of any leakages from his/her system. The commission notes that it is the system owners responsibility to coordinate response measures with the system operator. There will be no rule change.

EAA recommended that the rules include specifications for minimum acceptable construction and performance standards for liners and vaults.

The commission responds that secondary containment specifications are identified in the commission's Underground Storage Tank rules (30 TAC Chapter 334).

DRA commented that the proposed rules do not require that a licensed engineer prepare the plans and specifications for inclusion in the permit application for underground static hydrocarbon storage facilities. Since these facilities constitute the greatest potential for catastrophic contamination of the aquifer, the involvement of qualified engineers would reduce the risk rather than the traditional reliance on qualified registered tank contractors, which are only involved in underground storage tank systems. DRA continued that the commission should meet with the Board of Professional Engineers prior to finalizing these rules and address this issue as the Board deems appropriate.

The commission responds that the proposed rule requires only that a Texas Licensed Professional Engineer certify the temporary and permanent best management practices and measures that will be used during and after construction. Based on explicit requirements of Chapter 26, Subchapters I and K, of the Texas Water Code, the commission requires aboveground and underground storage tank installations, repairs, and removals to be performed by agency-registered contractors, and supervised by agency-licensed installers and on-site supervisors.

BE commented that the transition zone does not merit temporary and permanent BMPs since the surface is generally not where the interconnections occur. They think a UST and SCS application is needed with inspection of the tankholds, wet wells and/or sewer trenches but not the expense of a treatment pond is warranted. BE commented on §213.5(d)(2)(D) the words "either" and "transition zone" should be deleted from the first sentence.

The commission disagrees and has not made the suggested changes because the transition zone is defined as an area where faults, fractures, and other geologic features present a possible avenue for movement of contaminants to the Edwards Aquifer. Because of this connection, the geologic assessment and requirements for treatment of stormwater are necessary to protect the quality of water entering the aquifer.

WE and an individual stated that the permit narrative about a contingency spill plan is useless since only the design engineer and the commission staff read the technical report, and the actual contractors working on the site who might be in a position to implement such a plan are not privy to it's contents.

The commission responds that federal Spill Prevention Control and Countermeasure (SPCC) rules (40 CFR Part 112) require that written spill control and response measures be maintained on site and that key site personnel be knowledgeable of such measures. There will be no rule change.

WE and an individual questioned on §213.5(f)(1)(B), that if the director is notified that work will start on a particular date, then why require a second notice to confirm the first notice?

The commission agrees that written notification only needs to be received by of the appropriate regional office once and has modified the wording of this section.

PDE commented that in §213.5(f)(2)(C)(i) contains the phrase "Upon completion of any lift station excavation, a geologist must certify that the excavation has been inspected for the presence of sensitive features" should be expanded to allow a licensed engineer with experience in identifying Edwards Aquifer geologic features to make the inspection as well as a geologist. Additionally, PDE commented 213.5(f)(2)(c)(i)(III) states "Construction may continue if the geologist certifies that no sensitive feature or features were present," and should be revised to include a licensed engineer.

The commission disagrees and has not made the suggested changes. The training of an engineer does not provide the necessary skills to conduct a geologic assessment for sensitive features. If an engineer meets the definition of a geologist provided in the rules, then the engineer can conduct the inspection.

GJA commented that in order to avoid undue delays and financial burdens on projects which have already gone through the subdivision platting, construction plan review and approval, and WPAP review and approval process, §213.5(h)(1) should be amended to include those projects which have achieved one or more of the following statuses: 1) projects for which a preliminary subdivision plat for the project has been files and approved by the city and/or county sharing jurisdiction over the project; 2) projects for which a final subdivision plat for the project has been filed and recorded in the plat records for the county within which the project is located; 3) projects for which construction plans for the proposed improvements have been approved by all applicable governmental entities with regulatory authority including cities, counties, and the commission, as applicable; and 4) projects which have received an approved WPAP that has not expired. GJA continued that otherwise, under the proposed rules, these projects would be required to be resubdivided, redesigned and resubmitted for approval after the effective date of the proposed rules to address additional aquifer protection requirements as set forth in the proposed rules.

The commission responds that language has been added to §213.4(a)(4) that addresses projects in progress on the effective date of the rules. For regulated activity occurring in the proposed redefined recharge zone, activities will be considered to have commenced prior to the effective date of the rules (and therefore not subject to the rules) if the applicant has obtained all federal, state, and/or local approvals or permits required to

begin physical construction, and if either on-site construction directly related to the development has begun, or construction commences within six months of the effective date of the rule.

§213.6 Wastewaer Treatment and Disposal Systems

BS/EACD commented that the proposed amendments allow wastewater discharges onto the recharge zone that were previously prohibited. The proposed rules prohibit "new municipal and industrial wastewater discharges into or adjacent to water in the state that would create additional pollutant loading." How will the additional loading be determined? What are the standards for acceptable discharges? Considering the nature of the Edwards Aquifer and its current use as a sole source drinking water supply, is it practical to allow large wastewater discharges onto the recharge zone? In addition, PDE commented that the regulation §213.6(a)(2), which includes the statement "Increases in existing discharges into and adjacent to water in the state that would increase or add new pollutant loading are prohibited on the recharge zone," needs to be clarified to answer the following questions: does "increases in existing discharges" apply to permitted discharges or to flows occurring at the time these regulations are adopted; if only the first phase of a treatment plant has been constructed, will the new regulations prohibit planned expansions that are already permitted; and will the commission use the proposed regulations to cutback on permitted treatment plant capacity that is not currently being used? Finally, PDE stated that it is inappropriate for the commission to limit or reduce permitted discharges even if the full amount of the permitted discharge is not currently being used, and they suggest that as long as a new phase of a treatment plant can meet the current regulations for discharge purposes, they should be allowed to be built and put into operation.

The commission disagrees with the comment that the proposed language allows new and increased discharges on the Recharge Zone and therefore allows discharges that were previously prohibited. Any new discharge could not increase pollutant loading or must be offset by the cessation of an equivalent existing loading/discharge within the same watershed. The commission further responds that the assessment of a new or increased discharge is based on the permitted discharge at the time of rule effectiveness and not current wastewater flows.

LSUC commented that they read the proposed rules to say that existing wastewater discharge permits will be renewed for the same discharge volumes and with the same conditions and authorizations specified in the permit if the wastewater treatment facility is in compliance with its existing permit. LSUC questioned if this is a correct reading of the rule, and if not, how will this rule be interpreted in future renewal proceedings involving Leon Springs' wastewater discharge permit?

The commission agrees with the commenter's assessment of the rules. Comments on specific permits are not relevant to this rule proposal.

BS/EACD commented that the plugging of abandoned wells and borings in some areas is delegated to local water conservation districts. The proposed rules must acknowledge their delegation of authority to reduce the confusion that results when applicants are unsure which rules must be followed. Within the Barton Springs segment of the Edwards Aquifer, the BS/EACD has delegated authority to insure that abandoned wells are properly plugged.

The commission disagrees with the commenter that these rules should address authorities provided to districts by the legislature under laws not specifically related to this rule. Rules currently proposed by the Texas Department of Licensing and Regulation provide procedures and guidelines for closure of abandoned water wells, including the requirement to meet the applicable rules of local government.

EAA commended the commission for adding a requirement for abandoned injection wells to be closed pursuant to Chapter 331 and for adding standards for plugging borings to prevent the movement of pollution from the surface to the Edwards Aquifer through open borings.

The commission agrees with the comment, and responds that this new requirement should provide better protection of the Edwards aquifer.

COA recommended changing the depth criteria for plugging borings to 5 feet because many geotechnical borings are greater than 5 feet deep but not as deep as 20 feet. They continued that it is important that all borings deeper than 5 feet be plugged with grout due to the artificial vertical migration path that they create.

PDE commented that §213.7 should be revised to read as follows: "All borings with depth greater than 20 feet must be plugged with a non-shrink grout from the bottom of the hole to within three feet of the surface. The remainder of the hole must be backfilled with cuttings from the boring or gravel. All borings 20 feet or less must be backfilled with cuttings from the borings or gravel. All borings must be backfilled or plugged within four days of completion of the drilling operation. Voids may be filled with gravel."

The commission has not made the suggested change to the 5 foot depth criteria because the threat of connection to the aquifer is not significant. The commission also disagrees with the comment on greater than 20 feet, noting that the difference between greater than or equal to 20 feet and the change suggested by the commenter is not justified. The protection provided by the proposed rule will cover a typical boring of 20 feet rather than excluding these potential connecting pathways to the aquifer.

§213.8 Prohibited Activities

EAA commended the commission for adding new municipal and industrial wastewater discharges to the list of activities prohibited by these rules. TCPS commented that the prohibition against new municipal and industrial wastewater discharges will help protect the aquifer. SAWS commented that the prohibition on the Recharge Zone of "new municipal and industrial wastewater discharges into or adjacent to water in the state" is a positive step in protection of the Edwards Aquifer and commended the commission for making this change. SAOSAB commented that they support the proposed prohibition of new industrial and municipal wastewater discharges over the Recharge Zone. However, they feel that the qualifier "into or adjacent to water..." weakens the intent of the prohibition. The recharge zone is a karst area of great complexity and the potential for wastewater discharges to contaminate the aquifer exists whether or not the discharge is at or near a typical drainage feature.

The commission acknowledges the comments.

EAA commended the commission for specifying no exception will be granted for a prohibited activity.

The commission acknowledges the comment.

§213.10 Enforcement USFWS states that the proposed rules should specify how the commission determines compliance for each site (e.g., what the full range and scope of oversight are, how frequently inspections are conducted, etc.).

The commission responds that the rule identifies what activities are regulated under the Edwards Aquifer Protection Program and the requirements for compliance. During field inspections, agency staff observe and document compliance or noncompliance with all rule requirements. The agency's homepage (www.tnrcc.state.tx.us) and the Edwards Aquifer Protection Program homepage located on the Internet (www.tnrcc.state.tx.us/EAPP) provides information concerning the Edwards Aquifer Protection Plan application submittal and review processes, inspection program, and enforcement program.

GEOS commented that the rules should incorporate strict provisions for their enforcement, including substantial civil penalties, to ensure a high level of compliance. SOS, ASC, LWVSA, LWV, and TCWA commented that the rules must provide strict provisions for enforcement to achieve a high level of compliance. TWCA continued that this high level of compliance is need to protect our drinking water.

The commission believes that the rules, as proposed, provide for sufficient enforcement. Penalties are addressed in the rule and are subject to guidelines in the Texas Water Code, including amount. By utilizing the measures provided for in the rule and TWC Chapter 7, the commission believes that a high level of compliance will be achieved.

USFWS comments that the rules should include a provision for the retrofit of older developments (existing prior to adoption of the rules) where water quality problems occur.

The projected urban/suburban growth in the recharge and contributing zones over the next 10 years along with the additional pollutant loading to the aquifer recharge waters is the subject of the proposed rule. The commission believes that retroactive application of these rules to existing projects would be unfair to individuals who build prior to the regulation being in place at the time of construction. The commission does not believe it is reasonable to retroactively apply these regulations, which would include the requirement that older developments be retrofitted.

SAWS recommended the commission allocate additional staff for the San Antonio regional office to allow for proper coverage of the counties west of San Antonio. SAWS commented that the counties located west of San Antonio are not being adequately monitored by the current Edwards Aquifer Protection Program and that the lack of adequate staffing in the San Antonio region makes it difficult for the existing staff to educate the development community and conduct compliance inspections in counties other than Bexar County. SAWS submitted a table which illustrates that no aboveground storage tank or underground storage tank plan applications have been submitted for review and approval in Kinney, Medina, and Uvalde counties in the three-year period from 1994 to 1996. The table also indicates that only one WPAP was submitted each year in Medina County and no WPAPs were submitted for Kinney and Uvalde counties during the same time period. SAWS stated that this demonstrates an apparent lack of compliance with the Edwards Rules in the counties west of San Antonio and that the number of application submittals for Medina County does not accurately reflect the amount of development occurring over the Edwards Aquifer Recharge Zone in that area. SAWS concludes that since the water supply for the citizens of San Antonio comes primarily from recharge which occurs in Uvalde and Medina Counties it is imperative that these counties be properly regulated under the Edwards Aquifer Rules.

The commission responds that a streamlined review process has been developed to allow the Edwards Aquifer Protection Program to operate more efficiently and significantly reduce the review period. This process allows for more field inspections to regulate compliance with the rules. The commission is working within legislatively imposed limits on the number of employees the agency may employ to provide staff to meet all its needs, including the Edwards Aquifer Protection Program. In addition, the commission notes that program staffing is based on program workload which is based upon the number of applications received by each regional office. For fiscal year 1997, the Austin Regional Office reviewed 68 percent of all Edwards Aquifer protection plans received by the agency and the San Antonio Regional Office reviewed 32 percent. The commission acknowledges the comment of San Antonio Water System regarding consistent regulation of all areas regulated by the rules. While the duties enumerated above are generally directly related to the number of plan reviews, they are not specifically considered for staffing distribution.

DHA commented that regarding §213.9 that consideration be given to providing municipalities a waiver from the exemption fee since the requirement for a fee of $500 for an exemption will mean a municipality that has a questionable compliance will expend public funds for a resolution or may decide to proceed on their own interpretation of the regulations with a possible violation.

SAWS commented that the establishment of a fee for the review of exception requests is a positive step in providing adequate funding for the Edwards Aquifer program; however, no change is shown in the proposed rules covering this new fee. SAWS stated that the fee proposed for the review of exception requests on the Contributing Zone is $500. If workload considerations indicate that a $500 fee is necessary to adequately cover the cost of the review of these requests, then the fee on the Recharge Zone should not be set at $100. SAWS recommended that the appropriate section of the 213 Rules be modified to make the fee for reviewing exception requests on the Recharge Zone and Transition Zone equal to the fee for reviewing exception requests on the Contributing Zone. Additionally, SAWS commented that the fee for the review of extension requests should be the same for Contributing Zone plans as for Recharge Zone plans. They continued that if workload considerations indicate that a $500 fee is necessary to adequately cover the cost of the review of extension requests for the Contributing Zone, then the fee on the Recharge Zone should not be set at $100. SAWS recommended that the appropriate section of the 213 Rules be modified to make the fee for reviewing extension requests on the Recharge Zone and Transition Zone equal to the fee for reviewing extension requests on the Contributing Zone.

The commission responds that the proposed rule has been revised to add a section indicating that the fee for submitting an exception for projects on the recharge zone is $250 and the fee for any contributing zone plan or exception is also $250.

In addition, the proposed rule has been revised by changing the fee for an extension of time to commence projects on the contributing zone to $100.

Subchapter B: Contributing Zone to the Edwards Aquifer

SAWS, Travis County, SAOSAB, EAA, LCRA, and USGWS commented that they supported the addition of the Contributing Zone to the Edwards Aquifer rules. SAWS, Travis County, SAOSAB, EAA, and LCRA commended the commission for making this change. Travis County commented that it will be important in protecting and maintaining high water quality in the aquifer. LCRA commented that while it is critical to protect the recharge zone of the aquifer, the vast majority of the water entering the aquifer originates in the contributing zone, not the recharge zone. A program which is limited to only the recharge zone has little chance of long term protection of the resource. Barrett commented that she wanted the commission to extend the protections of the contributing zone through the Edwards rules. BS/EACD commented that the inclusion of the Contributing Zone was an improvement. TCPS commented that while the rules represent progress towards ensuring water quality protection and that the decision to extend the rules to the contributing zone of the watersheds is a good one. COA stated that the evolution of the Edwards Rules to include more comprehensive protection of the Edwards Aquifer has been recommended for several iterations of these rules. Including the proposed protection of the Contributing Zone, where most of the water in the aquifer originates, is a major improvement to the commission's strategy for protection of the aquifer.

The commission acknowledges the positive comments on the necessity of new Subchapter B.

BW stated that they do not need the Edwards people coming in and telling them that "because there is water flowing across your land, in some percentage, and probably a low percentage that Edwards benefits from, we will therefore impose these rules upon you." An individual disapproves of the rules and stated that if the environmental groups want to control the land in the contributing zone, then they only need to purchase as much as they want to control. BE commented that all of Subchapter B should be deleted in its entirety and reconsider the need for any regulation or at worst some selective regulation which is tied to specific problems. An individual commented that he finds Subchapter B both unnecessary and offensive as there is no reason to include individual residences since there just isn't a substantial amount of particulate matter that runs off such a site.

An individual opposed the proposed rules and regulations that would extend the commission's current requirements for the recharge zone of the Edwards to the contributing zone since there is no sustaining evidence to show that the rules and regulations are necessary in the contributing zone. FSMC commented that this document has failed to justify the need for doubling the land area to be included in the regulated area (with added contributing zone). An individual commented that he is opposed to the proposed rules regarding the Contributing Zone as a study done by a Hays County environmental specialist shows that the proposed zone is not contributing to pollution in the aquifer at this time. BADC commented that the envelopment of unaffected areas will be a bureaucratic nightmare and it will be impossible to prove any cause and effect relationship on pollution in the aquifer by areas within the 10 mile radius. An individual commented that he finds it difficult to see how a person building a home out there is going to pollute the Edwards Aquifer.

The commission acknowledges these negative comments regarding the proposed Subchapter B. As stated earlier, currently, over 1.7 million people in eleven counties rely upon the aquifer to meet their water supply needs. The intent of Subchapter B is to be proactive to protect public health by preventing the degradation of the Edwards Aquifer and its recharge waters, rather than reactive, responding to pollution after the aquifer has become contaminated. At the same time, through its regulations, the agency seeks to impose only what is reasonably necessary for this purpose. The Texas Water Development Board estimates that by the year 2000, almost 2.7 million people will reside within the regulated counties (almost a 30 percent increase from 1990). By 2010, more than 3.3 million people will have moved into the area, with their associated residences and businesses. Most of this urban growth will be concentrated in Bexar, Comal, Hays, Travis and Williamson counties. Many of these people will be living and conducting business over the recharge zone and contributing zone of the Edwards Aquifer. The Subchapter B address the potential contamination from this urban expansion by utilizing the requirements from the National Pollutant Discharge Elimination System (NPDES) general storm water permit during construction, providing a post-construction total suspended solids (TSS) design standard, and providing for the ongoing maintenance of best management practices during and after construction. The agency seeks to impose only what is cost-effective and reasonably necessary for this purpose in order to allow for continued economic growth for this region.

As a result, the commission has revised the proposed rule to utilize the requirements under the Federal EPA NPDES general permit for Storm Water Discharges from Construction Activities in Region 6 which was issued by the EPA on July 6, 1998. In doing so, the commission conformed the requirements of these proposed Edwards rules with requirements that owners/operators of construction sites would have to meet during construction to satisfy EPA requirements both in the contributing zone and in the recharge zone. This will reduce both the complication and the costs associated with meeting the proposed rules. The only additional requirement under the proposed Edwards rules is that after construction is completed, owners/operators would have to install controls to ensure that storm water coming off of a developed site meets water quality standards. As discussed earlier the commission has also provided waivers related to permanent BMPs for activities where 20 percent or less impervious cover is used. The rules also only apply to regulated activities disturbing at least five acres, or activities disturbing less than five acres which are part of a larger common plan of development or sale.

An individual stated that the new rule will simply increase costs for homeowners and won't benefit anyone except for creating new jobs for those who review the permits; thus, he recommends removing single family residences from the list. A second individual commented that no one will or should abide by laws requiring permits to add on garages, toolsheds, or additions to their homes. He continued that people will just move elsewhere, ie. the Hill Country. Another individual commented that the commission imposes rules where there is low probability of impact and where there is little or no benefit such as the regulations on the so-called "non-attainment" air pollution cities. He continued that, if a metropolitan area is considered a non-attainment city, the EPA says that the entire

"Standard Metropolitan Statistical Area" must then comply with stricter air pollution rules; however, the commission has argued to exclude portions of the SMSAs that contribute little to the problem and will be unfairly penalized if they must meet the stricter rules. He continued that this has occurred in the Houston-Galveston area, where only residents of Harris County are required to undergo smog tests as part of their annual inspection program, despite the original plan for the multi-county SMSA to be included. He concluded that this same type of consideration should be granted for the proposed rule change on water runoff in the so-called "drainage area" of the Edwards Aquifer.

The commission's position is to be proactive in protecting the water quality of the Edwards Aquifer. The commission has, however, provided for certain exemptions in the proposed rule for developments that are not anticipated to have potential, long-term water quality impacts to the Edwards Aquifer. For instance in the contributing zone, construction of single-family residences on lots that are larger than five acres, where no more than one single-family residence is located on each lot, is not regulated under Subchapter B. The proposed rule applies only to regulated activities disturbing at least five acres, or regulated activities disturbing less than five acres which are part of a larger common plan of development or sale with the potential to disturb cumulatively five or more acres. If a single-family residence is part of a common plan of development or sale with the potential to disturb cumulatively five or more acres, an individual land owner who seeks to construct his/her own single-family residence or associated residential structures on the site is exempted from the Contributing Zone Plan application requirements under this section (that requires a plan to be submitted and a fee paid), provided that he/she does not exceed 20 percent impervious cover on the site. Temporary erosion and sedimentation controls are required to be used; however, no additional permanent BMPs are required. In response to these and similar comments, the commission has also provided in the rules that other permanent BMPs are not required when a site used for low density single-family residential development has 20 percent or less impervious cover. A Contributing Zone Plan and Notice of Intent are required to be submitted and approved and temporary erosion and sedimentation controls are required to be used. This exemption is required to be recorded in the county deed records, with a notice that if the percent of impervious cover increases above 20 percent or land use changes, the exemption of the whole site may no longer apply and the property owner must notify the appropriate regional office of these changes. In addition, the executive director may waive the requirement for other permanent BMPs for multi-family residential development, schools, or small business sites where 20 percent or less impervious cover is used at the site. The same deed recording requirements as for single-family residential development are required. A Contributing Zone Plan and Notice of Intent are required to be submitted and approved and temporary erosion and sedimentation controls are required to be used.

An individual commented that he wanted some credible evidence that implementation of these regulations will prevent, or even reduce, the possible problem that all affected property owners will now be required to submit a very detailed application, pay a $500 application fee, hire a qualified geological expert, compose an in-depth technical report, and then have the high possibility of having the application rejected.

The commission responds that the proposed rule has been revised to add a section indicating that the fee for any contributing zone plan or exception is $250. In addition, the commission responds that the proposed rule does not require a geologic assessment to be performed for sites located in the contributing zone. The proposed rule has also been revised to allow the submittal of the EPA Stormwater Pollution Prevention Plan (SWPP) which is required under the NPDES General Permit for Storm Water Discharges from Construction Activities and the notice of intent to construct as part of a Contributing Zone Plan submitted for regulated activities disturbing at least five acres, or regulated activities disturbing less than five acres which are part of a larger common plan of development or sale with the potential to disturb cumulatively five or more acres in the contributing zone. These changes have greatly reduced the scope of affected property owners to those already required to participate under the EPA NPDES General Permit for Storm Water Discharges from Construction Activities. The proposed rules have been revised to allow the executive director 15 calendar days to review the Contributing Zone Plan application. If the executive director fails within 16 calendar days to issue a letter approving or denying the application, the application shall be deemed to be granted.

WWSC commented that the regulation and prohibitive fees proposed for Western Hays County will not solve potential pollution to the Edwards Recharge Zone. They continued that the hundreds of wells being drilled into the Aquifer over the Edwards are a greater threat to the groundwater contamination, and that the lack of a well head protection program in Hays County as well as its' many abandoned water wells are a most serious threat to groundwater contamination especially in the Edwards Zone.

The commission disagrees with the comment noting that the Barton Springs-Edwards Aquifer Conservation District has been established in northern Hays County and the Edwards Aquifer Authority has been established in southern Hays County. Each of these districts has the authority and have active programs for regulating water wells and closing abandoned water wells. The commission further responds that extending the Edwards Aquifer Protection rules into western Hays County will protect areas outside the jurisdiction of these two districts.

USFWS stated that the following sections included in Subchapter A are not included in Subchapter B: responsibility for maintenance of permanent BMPs and measures after construction is complete, organized sewage collection systems, static hydrocarbon substance storage in underground storage tank systems, static hydrocarbon and hazardous substance storage in an aboveground storage tank facility, notification and inspection, wastewater treatment and disposal systems, and prohibited activities. USFWS recommends that these required sections be included in the contributing zone as well, or that an explanation be provided regarding their omission.

The commission responds that the requirement for the responsibility for maintenance of permanent BMPs and measures has been clarified under §213.23(k). The commission has not included the other provision requested by the commentor, because Subchapter B is intended to regulate activities in the contributing zone to the Edwards Aquifer having the potential for polluting surface streams which recharge the aquifer. These other section apply to releases that occur within the recharge zone and can directly enter the aquifer. The existing statewide

commission rules on these other topics are sufficient to prevent the release of pollutants to surface streams.

TxDOT did not disagree with the findings that indicate that a significant amount of recharge occurs from streams flowing onto the recharge zone.

The commission agrees with the comment. Studies conducted by the U.S. Geological Survey and others demonstrate that recharge to the aquifer occurs from stream loss. Water balance studies in the Barton Springs segment of the aquifer indicate that the amount of this measured stream loss is equivalent to 80-85 percent of the springflow from Barton Springs, the main outlet for the aquifer segment. While detailed water balances have not been conducted in other segments of the aquifer, significant stream loss has been demonstrated throughout the Edwards Aquifer recharge zone.

TxDOT commented that there are existing regulations in the form of the National Pollution Discharge Elimination System (NPDES) Construction General Permit which regulates similar activities and requires similar BMPs as the proposed rules. TxDOT proposed that the NPDES program already addresses some of the issues on the contributing zone and that increasing the scope of the rules by adding the contributing zone would do little to increase water quality protection.

The commission has adopted the requirements of the NPDES general permit for construction activities into the rule. However the rules also address post-construction activities and the potential contamination from stormwater entering the recharge zone from the contributing zone.

Travis County commented that they understand that the proposed rules as written do not require other governmental authorities to enforce or administer the rules or deed recordation, nor maintain the permanent BMP systems after completion.

The understanding of Travis County is correct. As the rules are written, other governmental authorities are not required to enforce or administer the rules or deed recordation, nor maintain the permanent BMP systems after completion. However, other government authorities may assume the state program pursuant to §213.21(g) or may enter into a cooperative agreement with the agency to review, approve and enforce plans and may accept responsibility for the maintenance of permanent BMPs (see 213.23(k)).

BW commented that there is no consideration being given to the fact that the western part of Comal County is in the Trinity Aquifer. BW continued that water availability and water quality are real concerns, but to attempt to extend control over a broad area of poorly defined geography and hydrologic features is a land-grab on the part of people who really do not appreciate the real nature of what's going on out in those areas. He continued that the Trinity Aquifer has been rated as a water-critical area and the people that live in the Trinity Aquifer area have to contend with the fact that our water comes from rainfall over our area. BW stated that they do not have a flow of water that comes through, as does the Edwards where a storm at one place recharge the aquifer and that comes up at another place, that we rely upon the water that's there. BW continued that water which does not seep into the ground runs off. BW stated that they are the primary beneficiary of the rainfall that comes into our area and that it is only the excess water that runs off and eventually makes its way into the Edwards Recharge Zones.

The commission agrees with the commenter that the Trinity Aquifer is not considered in this rule. No changes in the rule, however, are proposed in response. It is not the intent of the rule to regulate or protect the Trinity Aquifer, but to protect water quality in streams which are near the Edwards Recharge Zone and which may impact the Edwards Aquifer.

Representative Krusee questioned why are certain areas within the contributing zone exempt from the proposed rules?

The commission responds that certain areas were exempted because the particular stream or watershed did not drain across the mapped Edwards Aquifer recharge zone and supply recharge, such as drainage to the Colorado River, or were far enough upstream from the Recharge Zone that in stream process would mitigate contaminants in runoff. A more detailed discussion of the contributing zone boundary is contained later in the preamble.

§213.21. Applicability and Person or Entity Required to Apply

BMC asked how is the commission proposing to deal with land development projects with existing approvals and construction underway? Similarly, RECA and SCW commented that the regulated activities not currently subject to regulation in the contributing zone with construction projects in progress will have an uncertain status once the rules become effective. Previously, they commented under House Bill 4 and Senate Bill 1704, new regulations could not generally be imposed on a project after a permit was filed; however, with the inadvertent repeal of this provision, there is less statutory guidance on how activities in progress are to be treated by new regulations, and therefore it is important that the rules are clear on this issue. RECA and SCW further commented that under the proposal, it appears that in some cases projects would be required to immediately cease construction while the owner develops the plan, technical report and completes an application, and construction may not be able to begin again until the executive director completes its review of the application and issues their approval of the contributing zone plan (as provided in Section 213.21(b)).

Additionally, RECA and SCW stated that the rules will inequitably impact projects with budgets based on estimates made long before the rules were proposed, under contracts which may prevent the party from recovering the additional costs. Such a dramatic impact on planned and in-progress construction activity, they commented, is unwise and unduly burdensome. RECA and SCW suggested that the rules should provide for a transition for those projects planned or in progress on the date of adoption of the regulations. One mechanism would be to provide a date certain as to when a project will be governed by the new rules, for example, subdivisions which have had their plats approved by a city or county should be allowed to proceed with construction under the standards which applied prior to adoption of these rules. In addition, TCWA commented that they hope the agency works with any development that is in the planning process now or prior to the time of these rules being finally adopted, i.e. find some way to work with those people on a voluntary basis instead of the rather traditional grandfathering process that takes place.

RECSA commented that the rules fail to expressly grant critically important "grandfather" status to projects in progress and that this will unfairly and improperly subject projects currently in the process to delays, interruptions and uncertainty. RECSA continued that predictability in process is of the utmost concern to their members and those employed by the real estate

industry. Peal commented that if a grandfather rule cannot be added, there is no way that current property owners will be able to afford a new permit every time they make improvements to their property. GDSCPP commented that all platted residential lots should be exempt.

PDE commented that 213.21(b) needs clarification of any grandfathering rights that a regulated activity may have. They continued that an explanation needs to be provided as to how this section affects or doesn't affect existing residential development. If a homeowner wants to construct a new garage, swimming pool, or a new private driveway, is it regulated? If a developer wants to construct a new phase of a subdivision which has been planned prior to these proposed rules being adopted, is it regulated? PDE commented that a project which has started construction or which has developed planning documents prior to implementation of these proposed regulations should have some grandfather rights and that the commission needs to provide clear guidance on what is regulated and what has grandfather rights. They concluded that these new regulations should not be used to eliminate existing uses within the regulated area that are not a documented threat to quality of stormwater runoff. PP commented that the rules do not address the impact they may have on project already in progress and the submission of technical reports and plans for the protection of the aquifer's contributing zones could result in costly delays, even complete stoppage of construction projects currently in progress.

The commission responds that phased developments that received executive director approval and which have been constructed within the approval period will not need to make additional submittals if the approved contributing zone plan included the different phases of construction that are yet to be constructed. Language has been added to the rule that provides for regulated activity occurring in the in the contributing zone to be considered to have commenced prior to the effective date of the rules and, therefore, not subject to the rules if the applicant has received all necessary federal, state and/or local approvals; and if either on-site construction directly related to the development has begun or construction commences within 6 months of the effective date of the rules. This would be consistent with HB 4 and SB 1704 because the rules would not seek to impose new requirements on any phase of a project having previous executive director authorization or projects within the new jurisdictional boundaries on which construction has begun. With this clarification, existing construction should not be delayed and necessary water quality protection measures can be determined prior to the commencement of new construction.

An individual commented that he is in favor of making the rules strong, and that is why he is concerned that these regulations will have no teeth because of the grandfathering. He believes that when there is a real threat to the aquifer, then the commission should step in and do something about it, regardless of when and how this source of contamination was put in place.

The commission responds that the purpose of this chapter is to regulate activities having the potential for polluting the Edwards Aquifer. Consistent with §26.401 of the Texas Water Code, the goal of this chapter is the existing quality of groundwater not be degraded, consistent with the protection of public health and welfare, the propagation and protection of terrestrial and aquatic life, the protection of the environment, the operation of existing industries, and the maintenance and enhancement of the long-term economic health of the state. Nothing in this chapter is intended to restrict the powers of the commission to prevent, correct, or curtail activities that result or may result in pollution of the Edwards Aquifer. Under §26.121 of the Water Code, the commission has the legislated authority to direct remediation and restoration as a result of harm to the environment anywhere in Texas, including the Edwards Aquifer recharge and contributing zones.

§213.22 Definitions

AGCT commented that the definition of "contributing zone" appears to be intended to regulate the geographic area directly upstream of the recharge zone and that this is a significant expansion of authority. AGCT questioned the constitutionality of regulation of this vast area.

The commission responds that water quality protection measures are necessary in the contributing zone to protect water quality in the aquifer and that surface streams arising in the Contributing Zone flow across the Recharge Zone. These surface streams provide approximately 80-85 percent of the aquifer's recharge. If those streams are contaminated, then this presents a significant potential impact to the water quality of the aquifer. Population and economic projections indicate an increase in significant development in the Contributing Zone. USGS and NURP studies indicate that such development has a significant potential to result in contaminated stormwater runoff to surface stream. Therefore, to protect the aquifer, it is necessary to protect the quality of recharging surface streams from this water quality impact. The commission has sought to impose only those requirements that are reasonable and necessary by seeking consistency with federal requirements, where applicable, exempting smaller development activities with little or no potential for water quality rights, and providing program delegation to local governments to avoid duplicative regulatory programs. Additionally, these regulations do not rise to the level of being a constitutional taking. These rules are promulgated to further a legitimate state purpose, the preservation of the Edwards Aquifer. In addition, in no way do these rules deny a landowner of all or substantially all of the economically viable use of his or her land. The commission has reviewed state and federal takings case law and has found no basis for the claim that these rules are unconstitutional.

Commissioner Knight commented that after reviewing the four (4) options proposed to define the "Contributing Zone," option three (3) appears to be the most reasonable, practical, definable and enforceable and would provide the protection necessary to protect the water quality recharging the Edwards Aquifer without invoking unjustifiable regulation on adjoining counties. He stated that extending regulations into additional counties to include all contributory watershed to the recharge zone cannot be justified by existing water quality data and that there is insufficient data to indicate that a real or potential threat to the aquifer exists from activities in the adjoining counties. He continues that point sources such as accidental spills of hazardous materials, will be immediately addressed and mitigated by local response teams and local city and county officials within the adjoining counties. He concluded that Kendall County is keenly aware of potential threats to the contamination of its groundwater and has aggressively addressed the issue of water wells and sewage treatment systems in its subdivision regulations. EAA stated that it believes the regulation of the portion of the contributing zone

within the counties currently regulated under the existing rules is a good first step.

EAA agreed with the commission that the other options involve difficult field determinations that require more staff and resources than would be available to make such determinations. EAA stated that the option to include all areas contained within the contributory watershed crossing the recharge zone not only demands more staff and resources, but would regulate a large number of local governments and landowners unfamiliar with the program and not dependent upon the aquifer.

LCRA stated that extending protection to the northern and western boundaries of Hays and Travis counties as proposed encompasses the areas that are seeing perceptible development pressure. The decision on how far into the contributing zone to extend protection should be guided by identifying where development is most likely to occur in coming years. Such a decision can be revisited every few years to adjust for future development trends. LCRA found the proposed boundary for contributing zone protection appropriate within their watershed.

The commission acknowledges the comments supporting the proposed extent of the contributing zone.

GVA commented that in regards to the concerns defining the geographic regulatory scope of Subchapter B, they support whichever boundaries are hydrologically effective in protecting the aquifer, and the contributing and transition zone boundaries should be based on the same principles. USFWS asked if county lines are used as regulatory boundaries, is there sufficient distance in all cases to assure that recharge zones close to a county boundary will have adequate protective measures upstream?

GSACC commented that the proposed rules expand the jurisdiction to regulate activities pursuant to the Edwards Rules to the contributing zones of only those counties in which the recharge zone is present (Medina, Bexar, Comal, Kinney, Uvalde, Hays, Travis and Williamson). This expansion, while a step in the right direction, does not sufficiently protect the quality of water entering the Edwards Aquifer, and in fact, may inadvertently contribute to its degradation. GSACC continued that if the objective of the new rules is to maintain a quality water supply, then the area to which these rules apply should be expanded to include all Contributing Zone areas, regardless of the counties in which those areas fall. Failing to do so will only encourage development in the contributing zone areas in non-listed counties. Typically, these counties have less stringent development regulations and regulatory structures that are not yet prepared to deal with growth rates likely to be observed. The end result will be that of putting the Edwards water quality at risk of contamination, and the primary objective of these rules will not be attained. In other words, for the proposed rules to be effective and credible, they should be based on the hydrogeological characteristics of the region, not artificial political subdivision boundaries.

PDE commented that the definition for "Contributing Zone" (213.22(1))has been arbitrarily done; thus, allowing politics to affect a technical based issue. The contributing zone boundary proposed in the exhibits referenced in this section propose to set the northern limits of the regulated area at the county line of the counties already regulated. The northeastern portion of Medina County has little or no contributing zone, yet there are some very significant recharge features in the recharge zone downstream of this area. The boundaries of the contributing zone must be established on a technical basis and not on a political basis. An individual commented that he is a rancher in northern Medina County, and is in support of the commission's efforts to protect the water supply; however, he does not support the driving force in setting up the rules being the county lines rather than any available maps or geology. For example, Hondo Creek runs right through the middle of Medina County up into Bandera County; thus, anything that is polluted in Bandera or Kerr or Real County will quickly get down into the recharge zone, and contribute to the pollution that they have been regulated to stop in Medina County. He believes that the whole idea of protecting the watershed should be based on sound science and not county lines. In individual commented that in the area around Ben Road, Balcones Creek will be part of the contributing zone. He is ten miles or less from the recharge zone and 95 - 99 percent of that water from this area goes and is absorbed by Fair Oaks and none of it ever gets to the Edwards.

UDSC commented that the proposal to incorporate all areas upstream of the current Recharge Zone within the counties subject to the current Edwards Aquifer rules into a proposed "contributing zone" is a broad-brush approach which appears to provide no significant benefit to the Edwards Aquifer while imposing an unwarranted regulatory burden on the public. Runoff from a large portion of the area included within the proposed contributing zone is captured by the Glen Rose Formation and poses little if any threat to the Edwards Aquifer. UDSC proposes that the boundaries of a contributing zone be determined based on risk-based assessment which takes into account the geology and hydrogeology of the area, mitigation of contaminants by natural stream processes and other factors. USFWS stated that the rules should include the entire contributing zone in all counties.

SOS, ASC, LWVSA, LWV, and TCWA commented that protections should be extended to all creek watersheds in the entire contributing zone, in accordance with scientific principles, rather than according to political boundaries such as county lines.

SAWS recommended that the commission base the northern Contributing Zone boundaries on watersheds draining onto the Recharge Zone. SAWS stated that basing the proposed Contributing Zone boundary on county boundaries should be evaluated. SAWS commented that the boundary should be based on watersheds alone. EAA urged the commission to consider expanding the area regulated under this subchapter to the entire contributory watershed.

COA commented that the boundary of the Contributing Zone should include the entire watershed of each creek that contributes runoff to the Recharge Zone and that establishing the boundary to coincide with the county boundary is not based on hydrologic principles and does not provide the best resource protection to the Edwards Aquifer. COA recommended that the commission incorporate the entire area of affected watersheds, consistent with the agency's watershed-based planning approach in other programs such as the TMDL program.

TCPS commented that while the rules represent progress towards ensuring water quality protection, they do not go far enough. They continued that the decision to apply only the rules to the eight counties presently covered by the Edwards Aquifer Rules is arbitrary and political. Instead, TCPS stated that protection and rules should apply to all creek watersheds

in the contributory watershed, rather than according to county boundaries.

CECT commented that the definition of "contributing zone" be expanded to cover all counties affected from that of only regulating the contributing zone in those counties currently subject to Subchapter A, which they believe is the result of political compromises and not water quality protection.

TxDOT commented that if portions of the contributing zone are to be added, there are diminishing risks of impacts to the Edwards Aquifer as distance increases from the recharge zone. TxDOT continued that since both agencies are concerned with limited resources, they encouraged the commission to target its water quality protection efforts on the basis of opportunities for the greatest risk reduction. TxDOT recommended that if the contributing zone is added, the regulated area be defined as the area within a 0.5 mile riparian buffer zone on either side of a stream for a specified distance. They continue that this distance should not be arbitrary, but based on the ability of a pollutant to reach the recharge zone. GE commented that although the commission proposes to extend some water quality protection into the Edwards Aquifer Contributing Zone, the extent of protection is limited. The commission should not confuse the relevant issue by using the term "Contributing Zone" to refer to geographical boundaries that are different from the hydrological contributing zone; thus, they recommend that protection under the Edwards Rules be extended to include the entire contributing zone, or protection of all areas within 20 miles of the recharge zone, or the proposed counties, whichever is more inclusive.

GEOS commented that the proposed upgradient contributing zone regulations §213.22 are critical. They present an option which they did not find among the four considered by the commission, but which they believe warrants consideration: 1) the commission establishes surface water quality standards for water entering onto the Edwards Aquifer Recharge Zone. These standards would take effect at the point of entry onto the recharge zone, and they would be practical, enforceable, and flexible (to allow for natural quality variations such as result from fluctuations in flow, seasonality, etc.); 2) the authority to enforce these standards would be delegated to the appropriate political entity(s) (municipal, county, water district, etc.) located in the contributing zone watershed. This authority would be delegated once the entity(s) have developed a commission approved quality enforcement plan and demonstrated the ability and resources to enforce the standards; and 3) The locally-formulated, commission-approved plans would be tailored to the specific hydrogeologic regime, resources, political sensitivities, and other local considerations that aquifer-wide regulations could not or would not address. This approach conforms to the overall intent of the recently enacted SB-1, which has a stated goal of delegating, as much as possible, to local political entities the responsibility for and control over their water resources.

The commission responds that the definition for contributing zone in the rules will not be modified based on the comments received. Executive director scientific and technical analysis indicates that water quality in the Edwards Aquifer is vulnerable to potential sources of pollution located in areas upstream of the recharge zone. Activities in the contributing zone may discharge pollutants to surface streams which traverse the recharge zone. These streams provide recharge to the Edwards Aquifer through sensitive features in the stream bed. Research by the U.S. Geological Survey and others indicates approximately 80 to 85 percent of the recharge to the Edwards Aquifer occurs through sensitive features located in the stream channels traversing the recharge zone. It is therefore appropriate to consider water pollution control requirements for activities occurring in the contributing zone.

The proposed definition for contributing zone provides for regulation in the area directly upstream of the recharge zone where stream drainage conveys runoff onto the recharge zone. The area identified for regulation provides protection to both surface water flowing to the recharge zone and groundwater in the Edwards Aquifer while minimizing the regulatory burden of these rules to those areas having the greatest potential for impacting the Edwards Aquifer. The definition limits the scope of regulation to the area geographically proximate to the recharge zone within the counties currently regulated under the existing rules and limits the zone to those watersheds which cross the recharge zone of the Edwards Aquifer (as defined under Subchapter A of this Chapter).

In determining the areal extent of the contributing zone to be regulated under new Subchapter B, the commission considered several alternatives and weighed the relative reasonableness, necessity, and cost required to directly address potential water quality threats. Four different options to protect water quality were evaluated based on relative effectiveness, regulatory burden, administrative feasibility, and available agency resources. In decreasing geographic size, the options considered were: 1) total area within all contributory watersheds that provide flow to the recharge zone; 2) all area within a ten mile zone upstream from the recharge zone boundary; 3) all area upstream of the recharge zone within counties currently affected by the Edwards Rules under Subchapter A; and 4) all area within a 0.5 mile riparian buffer zone on either side of a stream for a distance of ten stream miles upstream from the recharge zone.

The commission considered the first option listed above and suggested by many commentors, the inclusion of all areas that are contained with the contributory watersheds that cross the Edwards Aquifer recharge zone. The commission acknowledges that the size of the geographic area of regulation would represent a totally inclusive approach to water quality protection. All areas that potentially contribute stream flow to the recharge zone would be regulated. However, this option would more than triple the geographic area currently regulated by the rules and double the number of counties affected by the regulations. This large an area would spread the available staff and resources too thinly to adequately implement an effective regulatory program. This option can not be supported by existing water quality data, which is insufficient to indicate that a real or potential threat to the aquifer exists from activities in the upper reaches of these basins. Data is also insufficient to model or predict the potential impact of regulated activities on water quality. In addition, a large number of local governments and landowners that are unfamiliar with the program and not dependent upon the aquifer would be regulated (all or parts of Edwards, Real, Kerr, Bandera, Kendall, Gillespie, Blanco, and Burnet Counties).

The commission considered a second option of a contributing zone area (also suggested by commentors) that would encompass regulated activities within a ten mile zone upstream from the recharge zone boundary which would include portions of two new counties within the program (Bandera and Kendall Counties). This option would include all geographical areas immediately upstream of the recharge zone. While this zone option can be portrayed on maps, the on-the-ground determination at

the upstream boundary of the zone would be more difficult than the first option because there would be no clear topographic features to use for reference to precisely indicate watershed boundaries. In addition, the on-the-ground projection of the ten mile zone from the recharge zone would be more difficult than the on-the-ground determination of the presence of the Edwards Aquifer recharge zone, because no distinct geologic boundary would exist at the upstream boundary of the contributing zone.

The commission considered and included within adopted rules, a third option to regulate all the area upstream of the recharge zone within counties currently affected by the Edwards Aquifer rules under Subchapter A. This option was supported by several commentors and provides regulation in the area immediately upstream of the recharge zone with the greatest potential to impact water quality. Regulation in this area would address cumulative effects from the upper reaches and impacts to the aquifer by minimizing nonpoint source pollution loadings within the regulated contributing zone, thus allowing for natural stream processes to reduce or mitigate contaminants. Boundaries established at county lines are easily mapped and understood by affected landowners. The regulated community will be able to easily determine if they are within a regulated county and detailed mapping and site position determination will not be necessary. Landowners that are unfamiliar with the Edwards Aquifer protection program and not dependent upon the aquifer will be regulated; however, these individuals should benefit from water quality protection of surface streams in the contributing zone.

The commission also considered, but rejected, a fourth option, a contributing zone to encompass regulated activities within a 0.5 mile riparian buffer zone on either side of tributary streams for a distance of ten stream miles upstream from the recharge zone. The boundaries of this option would be the most difficult to convey to the general public and the regulated community. The on-the-ground determination of this boundary would be difficult because, in most instances, the buffer zone would overlap into an adjacent buffer zones for another stream, resulting in only small outliers of area not being included within the contributing zone. While the ten mile upstream boundary is used in the wastewater discharge permitting program as contained in §213.6, this relatively small regulated community is knowledgeable as to methods to determine actual stream miles and this determination is confirmed by agency staff as part of the agency wastewater permitting process. Staff and resources would not be available to confirm the location of every regulated activity under Subchapter B for this option.

An individual commented that the commission seems to ignore other potential areas of regulation. For example, the bridges over the Colorado River are infested with bats that dump tons of guano and fecal contamination into the river. In addition, tons of debris and manure come down the Blanco River during floods. Also, tons of chemicals and fertilizers are spread over dozens of golf courses and farms that wash off into the Edwards during irrigation and rain; thus, the commission needs to worry about other areas and not just about attacking western Hays County.

The commission disagrees with the commentor. The bridge mentioned over the Colorado River is not in the contributing or recharge zone to the aquifer and is not a potential threat to the aquifer. The proposed rules will address the washing off of debris related to construction and with urbanization. The use of chemical fertilizers and pesticides on farms is beyond the regulatory authority of the commission. The rules apply to Williamson, Travis, Uvalde, Kinney, Comal, and Bexar counties as well as Hays County.

BE commented that based on the definitions applicable to the Contributing Zone a rancher or farmer couldn't put in a ranch or farm road without a permit and a delay, and as far as they are aware, most of these owners are not aware that these rules are being proposed or do not understand their significance. Thus, BE believes the proposed regulations of performance standards in the Contributing Zone are extreme and not very well balanced against the degree of the perceived problem.

The commission responds that the proposed definition states that, "Regulated activity" does not include, "agricultural activities, except feedlots/concentrated animal feeding operations which are regulated under Chapter 321 of this title (relating to Control of Certain Activities by Rule.)" Rather, the State Soil and Water Conservation Board provides water quality protection for agricultural activities under its programs. On this basis, construction of ranch and farm roads on the contributing zone will not be regulated.

USFWS stated that regulated activities should specifically include all construction activities that disturb soils, such as regrading road rights-of-way and construction of single/multi-family residences, on lots larger than one acre.

The commission responds that the normal maintenance and repairs to existing sites/structures is by definition not included as a regulated activity. The commission clarifies that the construction of single-family and multi-family residences are included in the definition of regulated activity; therefore, the appropriate Contributing Zone Plan must be submitted and approved by the executive director prior to commencing any construction. However, the construction of single-family residences on lots that are larger than five acres, where no more than one single-family residence is located on each lot, is not regulated under Subchapter B. The proposed rule applies only to regulated activities disturbing at least five acres, or regulated activities disturbing less than five acres which are part of a larger common plan of development or sale with the potential to disturb cumulatively five or more acres.

BW commented that there is no effort made to identify the percentage of that rainfall that we receive which is retained within the Trinity, and should be up to Trinity people to manage, verses the percentage of the rainfall which runs off and becomes a part of the recharge. They continued that the rules attempt to establish measures of control over all construction in the recharge or in the contributing zone with a couple exceptions: the controls do not apply to agriculture (he expressed that this was not a problem) and single-family residential properties which are larger than five acres do not have to submit a plan. BW concludes that this means that the rules are going to affect 99 percent of those residential properties that are going to try to do anything at all.

The commission responds that it is impractical to use rules or rulemaking to assess rainfall and runoff amounts for purposes of runoff water quality protection. The rules contemplate the incorporation of runoff estimates as a part of the design process for BMP's. The commission believes such estimates should be made by appropriate technical specialists in accordance with good engineering practice and the Commissions BMP Guidance Manual, to be released with he final rule.

An individual commented that if scientific evidence cannot be found, then he requests that residential development in the contributing zone be omitted from these regulations.

The commission's position is to be proactive in protecting the water quality of the Edwards Aquifer. The commission has, however, provided for certain exemptions in the proposed rule for developments that are not anticipated to have potential, long-term water quality impacts to the Edwards Aquifer. For instance in the contributing zone, construction of single-family residences on lots that are larger than five acres, where no more than one single-family residence is located on each lot, is not regulated under Subchapter B. The proposed rule applies only to regulated activities disturbing at least five acres, or regulated activities disturbing less than five acres which are part of a larger common plan of development or sale with the potential to disturb cumulatively five or more acres. If a single-family residence is part of a common plan of development or sale with the potential to disturb cumulatively five or more acres, an individual land owner who seeks to construct his/her own single-family residence or associated residential structures on the site is exempted from the Contributing Zone Plan application requirements under this section (that requires a plan to be submitted and a fee paid), provided that he/she does not exceed 20 percent impervious cover on the site. Temporary erosion and sedimentation controls are required to be used; however, no additional permanent BMPs are required. In response to these and similar comments, the commission has also provided in the rules that other permanent BMPs are not required when a site used for low density single-family residential development has 20 percent or less impervious cover. A Contributing Zone Plan and Notice of Intent are required to be submitted and approved and temporary erosion and sedimentation controls are required to be used. This exemption is required to be recorded in the county deed records, with a notice that if the percent of impervious cover increases above 20 percent or land use changes, the exemption of the whole site may no longer apply and the property owner must notify the appropriate regional office of these changes. In addition, the executive director may waive the requirement for other permanent BMPs for multi-family residential development, schools, or small business sites where 20 percent or less impervious cover is used at the site. The same deed recording requirements as for single-family residential development are required. A Contributing Zone Plan and Notice of Intent are required to be submitted and approved and temporary erosion and sedimentation controls are required to be used.

At this time, much of the Edwards Aquifer Recharge, Transition Zone and Contributing Zone is undeveloped. The proposed regulations are a proactive step intended to regulate activities that can affect the quality of the groundwater in the Edwards Aquifer, thus protecting the existing and potential uses of these water resources before they are substantially impacted. Preventing pollution of the waters of the Edwards Aquifer is more economically feasible than trying to clean the waters after the water quality has been degradated to unsafe levels.

An individual commented that there was no mention of regulating activities such as the laying of pipelines, buying of electrical/communication cables, and other similar utility activities. He continued that utility organizations seem to be immune from any policing or enforcing of any action to protect our water. He continued that particularly the trenching activities of utilities have and are doing considerable damage to our water aquifers because the trenches often cut into cave, or similar cavernous structures, which feed our aquifers. He concludes that these trenches act as French drains which carry stormwater run-off straight into the aquifer; thus, some action needs to be taken to stop this form of activity.

The commission responds that the installation of underground utilities is a regulated activity as defined in 30 TAC §213.24(11). The commission states, however, that if the underground utility is not designed to carry pollutants, a Contributing Zone Plan application is not required. All temporary erosion and sedimentation controls must be installed prior to construction and must be maintained until the alignment has been restabilized.

USFWS commented that confined animal feeding operations and aquaculture facilities should be addressed in the contributing zone. USFWS questioned if the regulations for CAFOs (confined animal feedlot operations) as regulated under Chapter 321 have been reviewed in reference to Edwards Aquifer standards/ rules? They continued that current regulations in Chapter 321 provide only for 25 yr. events during a 24 hour period. Storm events exceeding this level may overwhelm CAFO lagoons.

The commission disagrees with the commenter. The current commission rules for CAFO's to be adequate to protect water quality in the streams of the designated Contributing Zone. The commission further responds that while a greater than 25-year storm event may cause a CAFO problem, the frequency of such events does not warrant the costs and burden of additional regulation.

USFWS suggested adding pipelines to the list of regulated activities.

The commission responds that the scope of regulation suggest by the commentor is under the jurisdiction of the Railroad Commission of Texas.

Representative Krusee commented that in relation to some other activities, such as normal agricultural practices, the amount of stormwater discharge affected by residential construction is minute. Representative Krusee, RECA and TxCABA commented that residential construction seems to be specifically targeted in the rules.

The commission disagrees that the amount of stormwater discharge affected by residential construction is relatively small, but not inconsequential. The National Urban Runoff Program (NURP) Study compared water quality measurements among selected watersheds with different levels of urban and suburban development. The study concluded that increasing levels of development cause greater amounts of run off with increased loading of pollutants in receiving streams. One of the areas studied was Austin, Texas. The report states that heavy metals, organic priority pollutants, coliform bacteria, nutrients, oxygen demanding substances, and total suspended solids are present in urban storm water and urban storm water discharges cause frequent exceedances of heavy metals ambient water quality criteria, certain metals in storm water appear to pose a significant threat to aquatic life uses in some areas of the country, and coliform bacteria in urban runoff can cause exceedances of water quality criteria in most rivers and streams during and after storm events. The US Geological Survey water quality monitoring in the Austin area, found increased densities and concentrations of TSS (total suspended solids), BOD (biological oxygen demand), TOC (total organic carbon), TN (total nitrogen), TP (total phosphorous), and bacteria in

streams draining areas with a higher percentage of impervious cover, detection of trace elements increased with increasing density of development, and synthetic organic compounds were detected more frequently and in larger concentrations at sites with higher density of urban development.

The commission also responds that residential construction is not specifically targeted in the rules. Regulated activities are any construction or post-construction activity occurring on the recharge or contributing zones of the Edwards Aquifer that have the potential for contributing pollution to surface streams that enter the Edwards Aquifer recharge zone. These activities include construction or installation of: buildings (residential and commercial), utility stations, utility lines, underground and aboveground storage tank systems, roads, highways, or railroads. Also included is clearing, excavation or other activities which alter or disturb the topographic or existing stormwater runoff characteristics of a site and any other activities that pose a potential for contaminating stormwater runoff are regulated activities.

An individual wanted the commission to define "buildings," "storage tanks," if pertaining to water storage, "roads" as may pertain to driveways, pasture roads, etc., and the very broad terms "or any other activities...," "or that may pose a potential...."

The commission responds that the proposed definition of regulated activity adequately defines the scope of regulated development. In addition, more detailed definitions in subchapter A also apply to subchapter B.

USFWS commented that the change in the wording of the definition of a regulated activity from "clear land" to "clear land without disturbing soil," is a positive step.

The commission appreciates positive responses to the proposed rule.

FSMC commented that the definition for "regulated activity" is sufficient to impact business activities that are conducted in the Contributing Zones since the definition indicates that "any clearing of vegetation without soil disturbance" is a regulated activity.

The commission responds that the proposed rule exempts clearing of vegetation provided no soil disturbance takes place, as is possible when clearing is accomplished by hand or with a chainsaw, however, this type of clearing typically does not occur on a massive scale. The use of equipment such as a bulldozer, or chains, to remove trees and vegetation is defined as a regulated activity and subject to the rules since this would result in soil disturbances. Clearing is allowed when it is a part of regulated activities that are exempt from the requirement of submitting an application for executive director approval prior to commencing construction. These exempted activities include the construction of utility lines which are not designed to carry and will not carry pollutants and the construction of single-family residences on lots that are larger than five acres, where no more than one single-family residence is located on each lot. The proposed rule applies only to regulated activities disturbing at least five acres, or regulated activities disturbing less than five acres which are part of a larger common plan of development or sale with the potential to disturb cumulatively five or more acres. If a single-family residence is part of a common plan of development or sale with the potential to disturb cumulatively five or more acres, an individual land owner who seeks to construct his/her own single-family residence or associated residential structures on the site is exempted from the Contributing Zone Plan application requirements under this section (that requires a plan to be submitted and a fee paid), provided that he/she does not exceed 20 percent impervious cover on the site.

GDSCPP commented that commission should look at impervious cover versus acreage as a means of addressing what segments of construction will be affected. Similarly, an individual commented that he strongly encouraged the commission to use impervious cover as the criteria for establishing preventive action. A developer can build a dense house pattern on 10 percent of the acreage and leave the remainder for run-off BMPs and other non-constructed site use. Or, the developer can have large lot sizes, which will allow for the BMPs and rules the commission has proposed to protect the Edwards Aquifer can be applied. If a developer or individual wants to construct a building on 100 acres, then the following should apply. 1) The building and associated surfaces should not create an impervious cover greater than 10 percent of the total property. In this example it would be 10 acres, and 2.) BMPs et al should be applied to the 10 acres that lie downstream from the construction site.

The commission has adopted an impervious cover threshold of 20 percent below which applicants are not required to implement storm water controls.

An individual commented that as a rancher, activities such as removal of cedar trees is essential to his economic survival, and these regulations appear to regulate that activity; thus, making it economically unfeasible for ranchers to stay in business.

The commission responds that the proposed definition of regulated activity states that, "Regulated activity" does not include, "agricultural activities, except feedlots/concentrated animal feeding operations which are regulated under Chapter 321 of this title (relating to Control of Certain Activities by Rule.)" On this basis, the clearing of trees (cedar) and brush, on sites used for agricultural activities is not included in the definition of a regulated activity and therefore not regulated under the chapter. The impact of such agricultural activities may be addressed by the water quality protection plan program administered by the State Soil and Water Conservation Board.

One commenter wanted to know the commission's definition of a "concentrated animal feeding operation" or "poultry facility" relating to the number of animals involved? How many eggs per day constitute "egg production?"

These terms are defined in Subchapter B, Chapter 321, and are cross-referenced in these rules.

Additionally, an individual commented that the rules do not clarify that pre-1830's land restoration is exempt. The rules do exempt land clearing for agricultural use. It could be argued that land restoration includes floriculture and reforestation with native species, and thus is agricultural by nature. The purpose of pre-1800's land restoration is to enhance the aquifer recharge characteristic of the land and enhance native land productivity with respect to native flora and fauna; thus, these rules need to reflect that these activities are legitimate, necessary, and exempt from these fees and permits.

The commission responds that the clearing of land for agricultural uses is not included in the definition of regulated activity; therefore, the submittal of a Contributing Zone plan for executive director approval is not required.

Hays County suggested that the definition of regulated activity be amended to clarify that the maintenance of, and minor changes to, existing roads is not a regulated activity rather than only allowing for the resurfacing of existing roads.

The commission responds that in the definition of regulated activity, routine maintenance of existing structures that does not involve additional site disturbance is not included. In addition, subchapter B only applies to regulated activities disturbing at least five acres, or regulated activities disturbing less than five acres which are part of a larger common plan of development or sale.

Hays County requested that the definition of "regulated activity" be changed so that existing single family residential lots are exempt from permitting requirements. All other construction (commercial, multi-family, roads, and utilities) should require permitting. It makes little sense to require permitting in an existing subdivision, which may be 80-90 percent developed. The benefit to cost ratio is insignificant. In addition, an individual commented that the preventive measures and requirements for BMPs are adequate; however, they should be applied to all construction activity, not just on five-acre or smaller lots. Developers will just move their lot sizes to 5.1 acres for those areas where run-off control would be expensive and difficult. He commented that if the purpose of the existing and amended rules is to prevent/minimize stormwater run-off from polluting and degrading the quality of water in the Edwards, then the commission has failed. The rules, as proposed, only address the activity of a portion of the potential offenders because acreage is not the appropriate criterion to use to achieve the objective. He commented that the rules do not address any of the other potential offenders. Similarly, another individual commented that he was in support of the efforts to protect the aquifer; however, he does believe that current landowners of less than five acres could be exempted while they own the property since the regulations were not in effect when they purchased the property. Also, GA commented on the exemption of single family subdivisions, specifically the lack of information in the rules which supports the need for a five acre minimum exemption; thus, they recommend that an amendment be made to Section 213.3(25)(B)(v) to allow exemption from the definition of regulatory activity for single family residential construction on lots that are one acre or larger. In addition, LSUC questioned if Leon Springs is serving a residential area in which streets and utilities are in place, but home construction has not yet begun, do the builders of individual homes need to file WPAPs and receive approval before they begin construction of this matter?

The commission responds that subchapter B has been rewritten and only applies to regulated activities disturbing at least five acres, or regulated activities disturbing less than five acres which are part of a larger common plan of development or sale. This change reflects consistency with the requirements of EPA's NPDES General Permit for Storm Water Discharges from Construction Activities. Construction of single-family residences on lots that are larger than five acres, where no more than one single-family residence is located on each lot, are not regulated under the subchapter. In addition, if a single family residence is part of a common plan of development or sale with the potential to disturb cumulatively five or more acres, an individual land owner who seeks to construct his/her own single-family residence or associated residential structures on the site is exempted from the contributing zone plan application requirements (which requires a plan to be submitted and a fee paid), provided that he/she does not exceed 20 percent impervious cover on the site. Temporary erosion and sedimentation controls are required to be used (however no additional permanent BMPs are required.)

Because there is a cross reference to the permanent BMP requirements in Subchapter A, a site used for low density single-family residential development that has 20 percent or less impervious cover, is not required to have any other permanent BMPs. A contributing zone plan is required to be submitted and approved and temporary erosion and sedimentation controls are required to be used. This exemption is required to be recorded in the county deed records, with a notice that if the percent impervious cover increases above 20 percent or land use changes, the exemption of the whole site may not longer apply and the property owner must notify the appropriate regional office of these changes.

Again, because there is a cross reference to the permanent BMP requirements under Subchapter A, the executive director may waive the requirement for other permanent BMPs for multi-family residential development, schools, or small business sites where 20 percent or less impervious cover is used at the site. Same deed recording requirements are required. A contributing zone plan and is required to be submitted and approved and temporary erosion and sedimentation controls are required to be used.

LSUC commented that they read the proposed rules to say that the special requirements regarding organized sewage collection systems over the recharge zone do not apply to organized sewage collection systems constructed over the contributing zone. The lack of special requirements in the contributing zone makes sense, as the collection systems are not directly over the area recharging the aquifer. However, Leon Springs has noticed that the rules require geologic assessments for all construction in the contributing zone even though recharge features do not exist in the contributing zone. Leon Springs wanted to know if they were reading the rules correctly.

The commission responds that requirements of Organized Sewage Collection Systems (SCS) and the associated geologic assessment is required only over the recharge zone (subchapter A) and addresses the design, construction and testing of sewers, manholes, lift stations, and other parts of the system. Also, approvals require notification and mitigation of features exposed during construction of the trenches for the sewers. Since direct recharge to the Edwards Aquifer does not occur in the contributing zone, the proposed rule for the contributing zone does not require a geologic assessment. An Organized Sewage Collection System plan is not required in the contributing zone; however, the entity proposing a system must meet all requirements for the design and construction of a collection system specified in Title 30, Chapter 317 relating to Design Criteria for Sewerage Systems.

COA recommended that the following definitions for discharge features be included in Subchapter B. "Spring": A point or zone of natural groundwater discharge having measurable flow or a pool, or both, however small, characterized by the presence of a mesic plant community adapted to the moist conditions of the site. "Seep": A zone of natural groundwater discharge having a pool and characterized by the presence of a mesic plant community adapted to the moist conditions of the site. "Wetland": An area of land transitional between terrestrial and aquatic systems where the water table is usually at or near the

surface or the land is covered by shallow water. Classification of areas as wetlands should conform to the current technical definition established or used by the U.S. Army Corps of Engineers.

The commission responds that discharge features such as springs that feed surface streams in the contributing zone do ultimately provide recharge to the Edwards Aquifer. However, the location of these features and their protection is beyond the scope of the rule. The purpose of the rule is to protect the quality of storm water entering hydrologically connected streams that recharge the Edwards Aquifer.

§213.23. Plan, Processing and Approval

SAOSAB commented that the executive director's technical review of Contributing Zone plans should be as rigorous as the review required for Recharge Zone plans.

COA stated that Contributing Zone plans are not to be formally reviewed by the executive director under the proposed rule and that the proposed procedure will be similar to the expedited Edwards Aquifer Protection Plan review process in which the applicant will have to submit the plan, executive director staff will do a brief review, and the approval will be issued. The COA suggested that the executive director should conduct more thorough plan reviews in order to ensure compliance with the requirements of Chapter 213 rather than less thorough or cursory reviews as proposed. Few local governments have manpower and expertise to conduct a meaningful review of engineering designs and geologic assessments.

The commission responds that the proposed rule has been revised to allow the submittal of the EPA Stormwater Pollution Prevention Plan (SWPP) which is required under the NPDES General Storm Water Discharges from Construction Activities and the notification of intent to construct as part of their Contributing Zone plan. The executive director will have 15 calendar days to review the application. If the executive director fails within 16 calendar days to issue a letter approving or denying the application, the application shall be deemed to be granted. The plans will also be reviewed for requirements for post-construction stormwater controls. All phases of development and post-construction controls in the contributing zone are subject to inspection under Subchapter B. The inclusion of regulations for the contributing zone under Subchapter B is a first step in protecting the aquifer from stormwater runoff originating from the drainage areas upgradient of the recharge zone. The commission is not adequately staffed to conduct a thorough review of proposed plans; therefore, the current rule will provide for a streamlined review process which assumes that the certification of structural designs by an engineer is sufficient to meet the requirement of the plan.

OPIC commented that as the rule currently reads, there is no opportunity for members of the public to participate in the decision making process on actions within the contributing zone. OPIC requested that this provision be amended by requiring the publication of notice in the largest newspaper of general circulation in the affected county, along with providing copies to affected incorporated cities, groundwater conservation districts, and counties as required in §213.4(a)(1). OPIC stated that a 30 day period for submittal of comments on the plan should be established under this section. OPIC continued that the new provisions of Subchapter B recognize the importance of the contributing zone in protecting the water quality of the Edwards Aquifer and §213.23(a) should reflect this by providing adequate notice and a chance for meaningful public participation in the decision making process. OPIC suggested that once these comments are received, the executive director should review these comments and respond to them to insure that the executive director makes an informed decision by obtaining relevant and material information he may not have available to him. OPIC concluded that the availability of more information will not only aid the executive director's review but also allow affected persons to have meaningful input in the commission's decision making process.

The commission believes the public participation process is adequate. The rule as it is written provides the opportunity for the an affected person to file a motion for reconsideration of the executive director's final action on a contributing zone plan or modification to a plan.

RECSA and SCW commented that under the proposed §213.20, a "person affected" may seek reconsideration of the executive director's decision to approve a plan. Because the term "person affected" is undefined, it is unclear who might qualify. They continued that it could conceivably be any person who uses the Aquifer for drinking water and if this is the case, such a person (or group) could routinely and arbitrarily hold up the issuance of plan approvals. They continued that most prudent applicants would delay the commencement of regulated activity until after a motion for reconsideration was finally decided by the commission, or overruled by operation of law and that under the current rules (30 TAC §50.39), this may delay the finality of an executive director's action by up to 90 days from the date of the action. They concluded that the rules should eliminate this unnecessary procedural step and opportunity for delay, and fix the executive director's decision on a plan as final. They suggested that one method to eliminate such a delay, as well as other unnecessary procedural steps, would be for the commission to utilize its general permit authority under §26.040 of the Water Code and promulgate a general permit to authorize the regulated activities. Construction under the general permit could then begin on the 31st day after a Notice of Intent was filed with the commission (Texas Water Code §26.040(e)).

MLK commented on the use of the term "person affected" in Section 213.20. This indicates that persons not associated with the application or who pay for the application would be able to petition the Executive Director for "reconsideration" if the application is granted. This creates additional uncertainty and potential cost for an applicant. It is inequitable to allow other persons the ability to hold or to delay these programs when they are not sharing in the cost. Both current rules and proposed rules have safeguards already in place to ensure water quality protection. This includes certification by a registered licensed engineer and review and approval by the executive director. It is unwarranted to authorize executive director reconsideration to authorize a competitor or protestant to delay final approval of a plan after it has been designed, certified and reviewed and approved by the executive director. Texas law does not authorize any "person affected" an opportunity for a public hearing on these applications.

The commission responds that an "affected person" is defined in 30 TAC §55.29. A motion for reconsideration filed by an individual who is not an affected person will be granted. Filing of the motion will not affect the executive directors action unless expressly ordered by the commission. The commission does not believe that protection of the Edwards Aquifer is best carried

out under a general permit scheme pursuant to Texas Water Code 26.040. The variation in regulated activity covered by this rule is too great to be effectively covered under a general permit.

BADC commented that the design of the PAPs and the associated plans and approval bottlenecks will add months on even the simplest project.

The commission has modified the rule to allow for a streamlined review process which allows the executive director to review Contributing Zone plans within 15 calender days. If the executive director fails within 16 calender days to issue a letter approving or denying the application, the application shall be deemed to be granted.

BS/EACD commented that copies of the contributing zone plans should be provided to the local downgradient underground water district for review and comment.

Each underground water district may contact the regional offices of the commission to receive copies of the application or plan.

COA requested that the commission add a provision for submittal of Contributing Zone plans to local governments for review and should be required as it is in § 213.4 (a)(2) under Application Processing and Approval in Subchapter A.

The commission has provided a shorter review and approval time for contributing zone applications to expedite the process. However, an affected person may file a motion for reconsideration of the executive director's action.

SAWS recommended that the review process for Contributing Zone plans must include comment by "affected incorporated cities, groundwater conservation districts, and counties in which the proposed regulated activity will be located" as allowed for Recharge Zone plans in 213.4(a)(2). SAWS commented that the technical review of Contributing Zone plans should be just as rigorous as that required for Recharge Zone plans and that SAWS staff frequently works closely with the local commission staff to investigate and resolve technical concerns found during both agencies' technical review of Recharge Zone and Transition Zone plans. Additionally, TU commented that they urge the commission to revise the proposed new contributing zone plan requirements under Subchapter B to make them consistent with the recharge zone requirements under Subchapter A. Currently, the installation of natural gas pipelines and electric lines are exempt from the Edwards Aquifer protection plan application requirements (Section 213.5(h)(1)), although they must comply with best management practices. Under Section 213.22(2)(A)(I) and Section 213.22(2)(B)(iv) of the proposed contributing zone requirements, regulated and non-regulated activities are identical to those under the recharge zone. However, the installation of utility lines (natural gas, electric, telephone, and water, etc.) are not exempt from the requirements of the contributing zone plan.

The commission agrees that the same exemption for the contributing zone should be applied. The rule has been revised to include an exemption paragraph in the contributing zone.

LSUC commented that they understand that a WPAP must be filed and approved before construction commences. If Leon Springs has construction of any utility facility under way at the time that the proposed rules become effective, will WPAPs need to be filed for that construction, or will that construction be grandfathered?

The commission has revised the rules to address projects under construction on the effective date of the rules. For regulated activity occurring in the proposed redefined recharge zone under Subchapter A or in the contributing zone under Subchapter B, activities will be considered to have commenced prior to the effective date of the rules (and therefore not subject to the new rules) if the applicant has obtained all federal, state, and/or local approvals or permits required to begin physical construction, and if either: on-site construction directly related to the development has begun; or construction commences within six months of the effective date of the rule.

SAWS commented that the 30-day technical review period does not allow time for comments from cities, counties and water districts. The technical review time frame should be adequate to allow for receipt and review of comments. Since Contributing Zone plans will be essentially identical to Recharge Zone plans, the review time should be the same. SAWS recommended that the review time for Contributing Zone plans be the same as that required for Recharge Zone and Transition Zone plans.

The commission disagrees and responds that no provisions have been made in the proposed rule to require 30-day review/comment period by affected incorporated cities, groundwater conservation districts, and counties in the contributing zone in which the proposed regulated activity will be located. With the lack of sensitive features in the contributing zone, the level of detail and plan submittal requirements are reduced from the Recharge Zone. Recognizing this difference, the proposed rules require the executive director complete the application review within 15 days. This streamlined review procedure is possible because of the engineer certifications required by the rules.

RECA and TxCABA commented that to require one and one-half month for administrative review of plans prepared and sealed by a professional engineer is to too long. The fifteen days the executive director is allowed to determine if an application is administratively complete should be included in the time for total review. Total process time for both activities should routinely be handled in two weeks and never exceed thirty days. Wording should be included in the rule that if the executive director fails to respond within the time required in the rules, the application shall be deemed approved.

BMC asked what is the processing time and fees required by the commission if this rule modification is adopted?

The commission responds that the rule has been modified to allow for a streamlined review process which allows the executive director to review Contributing Zone plans within 15 calender days. If the executive director fails within 16 calender days to issue a letter approving or denying the application, the application shall be deemed to be granted. The existing fees for recharge zone plan applications are included in the §§213.27 and 213.28. As proposed, a person submitting an application for approval or modification of any contributing zone plan or exception must pay an application fee of $250.

PDE commented 213.23(e)(1)&(2) should be revised to allow an applicant to proceed with a plan when the executive director has not responded within the 30 days. They continued that the commission has similar provisions in their regulation of sanitary sewer systems in the Chapter 317 regulations; however, this does not relieve the applicant from complying with the regulations. PDE concluded that if the commission insists

on an approved plan prior to construction, then sufficient staff should be provided to comply with the review times.

The commission agrees with this comment and has revised the rule to allow the executive 21 days to issue a letter approving or denying an application. If the executive director does not respond within 21 days, the application shall be deemed to be granted.

WE and an individual commented that on §213.23(f) that there is no need to have public comment or written rules if this provision allows the executive director to make up any additional provisions he might desire on a particular site or day.

The commission responds that this provision is necessary to accommodate special sites which may require additional protection. Not all sites will require additional protections, so the rule needs to have some level of flexibility built in. No change was made in response to this comment.

SAWS recommended that the Contributing Zone plans should be deed recorded. They commented that deed recordation is required on the Recharge Zone to insure that future property owners are aware that a particular parcel is subject to the Chapter 213 Edwards Aquifer Rules and that this information will be just as important for future property owners on the Contributing Zone.

The commission does not agree with this comment and has made no change to the rule in response to this comment. The only case where contributing zone plans are required to be deed recorded is in cases where the executive director has waived the requirement for other permanent BMPs and less than 20 percent impervious cover is used at the site.

Hays County suggested that the following be added to the rule: "to provide adequate protection for new single family residential subdivision developments, planning materials shall include a stormwater management plan for both roads and building construction as part of the platting process. This stormwater master plan or contributing zone plan shall be filed in the deed records and thereby eliminates the need for permitting individual residential site developments."

The commission does not agree with this comment and has made no change to the rule. The commission believes that the rules allow for adequate flexibility and environmental protection.

AGCT stated that the requirement that any change to BMPs or operational modifications must have executive director approval is onerous, and this requirement relegates day-to-day authority over construction practices to the agency for subjective approval. The commentor continued that this provision is clearly an intrusion and it allows for disruption in the sequence in construction which will delay and unnecessarily harm projects.

The commission responds that executive director approval is required if a previously approved plan is significantly altered. The commission does not believe it is productive to review and approve submitted plans if the applicant is allowed to change the plans without any notice and approval.

COA commented that there is no requirement for a Geologic Assessment. COA suggested that this should be included due to the potential for the occurrence of localized zones of high transmissivity within formations in the Contributing Zone. COA continued that recharge to alluvial or shallow, perched aquifers may occur via infiltration to gravelly soils, fractured rock, vuggy rock, solution enlarged passages within evaporate beds, and sandy horizons and that springs discharging from these alluvial or shallow, perched aquifers to drainages in the Contributing Zone may convey water contaminated by site runoff. COA suggested that sensitive features that could be a component of a shallow recharge/discharge system should be identified in the Geologic Assessment and that BMPs to protect sensitive features that allow recharge/discharge should be included in the Technical Report.

The commission disagrees with the commenter that there is a need for a Geologic Assessment in the Contributing Zone. The commenter notes the occurrence of porous and transmissive zones in the Trinity Aquifer. While the commission agrees with this assessment of the Trinity Aquifer, the commission responds that the purpose of the rule is to protect the Edwards Aquifer not the Trinity Aquifer. Too little data and information are available to justify protection of subsurface pathways in the Trinity Aquifer which are unlikely to be in direct connection with the Edwards Aquifer and which experience some mitigative processes before discharging to contributing zone streams. The commission does not believe that the additional burden of a Geologic Assessment in the Contributing Zone is justified by the commenter or by existing data.

SAWS commented that the maximum contour interval of 10 feet would allow potentially important information to be obscured on the Site Plan and stated that a large amount of "gutting and filling" could be done without being shown on the plan and that if 10 foot contour intervals are used on a relatively flat site, it will be possible that no information regarding flow direction, flow to Best Management Practices (BMP), etc. will be shown. They continue that the proposed rule states that "appropriate" contour intervals should be used; however, it may be impossible for the reviewer to determine if the contour interval is "appropriate" if insufficient information is provided on the Site Plan to make the determination. SAWS recommended that the maximum contour interval be 5 feet.

The commission agrees that applicants should use their best professional judgement in specifying contour intervals to be used in the planning materials to adequately delineate drainage patterns, as long as the interval is not greater than 10 feet.

PDE commented that the requirement to provide volume figures under §213.24(3) should be dropped because it provides no valuable information for staff purposes.

The commission responds that the determination of mass loading requires quantity and quality of storm water, and these are inherent to assessing the hydrology of a watershed and basin.

LCRA concurred with the need to establish a performance standard for runoff from new development on the recharge and contributing zones. They stated that the approach, relating to the efficiency of BMP design and operation, appears to have the drawback of allowing a higher intensity development to discharge a significantly higher loading than a lower intensity project. In fact, a low density project could be required to discharge higher quality water than background conditions if a removal efficiency approach is used. Consequently the approach in the rule as drafted, being a standard limiting the increase in annual loading to a specific percentage above background levels, is preferable. However, given the large increases in pollutant loadings for urban intensities of development, either approach would yield a significant level of protection.

COA commented that the preservation of baseflow quantity and quality within creeks in the recharge zone and the contributing zone would be enhanced with the inclusion of specific BMPs to require protective buffers that border drainage ways. This approach is crucial to attaining non-degradation standards and is an efficient method for preserving the riparian vegetation and the shallow alluvial perched water tables frequently occurring near the natural stream channel. The COA recommended the commission develop stream buffer requirements for drainage ways. The COA suggested that an appropriate buffer system for the Edwards Aquifer watersheds would include a setback of 400 feet from major stream channels, 200 feet from major tributaries, and 100 feet from minor tributaries.

COA recommended that in addition to preservation of baseflow and recharge quality, another BMP for the contributing zone should be the preservation of buffers around discharge features (springs and seeps and wetlands). Discharge features are not defined in the proposed Edwards Rules, however their preservation through the use of protective buffers should be added as a temporary and permanent BMP. Buffers around the discharge features will protect the unique habitat they form and the ancillary water quality function of wetlands located nearby. One of the purposes of the proposed Edwards Rules in §213.20 is "...to protect existing and potential beneficial uses of groundwater..."; the functions of springs, seeps and wetlands should be considered existing uses of groundwater.

The commission disagrees with the need to provide buffers around discharge features in the contributing zone. The protection of these features is beyond the scope of the subchapter. The purpose of the subchapter is to protec the quality of storm water entering the hydrologically connected recharge streams.

COA commented that preservation of baseflow quantity and quality within creeks in the Contributing Zone would be enhanced by the requirement of setbacks for creeks, tributaries and for discharge features and that the EPA's "State Source Water Assessment and Protection Programs Guidance, Draft Guidance" (April 1997), describes this approach as a means of filtering sheetflow and encouraging increased groundwater infiltration. COA stated that another benefit is stabilizing the soils within the riparian corridor by maintaining an undisturbed vegetated area adjacent to the waterway. COA continued that in the Barton Creek watershed, there is an alluvial aquifer system within the floodplain of the main stem of the creek and its tributaries which sustains flow in Barton Creek and is a critical resource to be protected as a means of preserving baseflow. The COA recommended that the commission adopt setbacks from drainageways that would include a setback of 400 feet from major stream channels, 200 feet from major tributaries, and 100 feet from minor tributaries.

GE recommended setbacks between development and stream channels and recharge features. Setbacks from springs in the Contributing Zone are recommended to protect the quantity and quality of recharging stream flow. Some minimum setback distance should be established based on the 100-year floodplain, surface and subsurface drainage patterns, the extent of any caves, and slope. The developer should be required to maintain or enhance native landscape using existing native soils within the setback, and application of chemicals should be prohibited.

BE asked who would determine if the performance standards are not being met and who is responsible for monitoring/testing to determine this? If the agency is so uncertain about the methodology that it thinks a retrofit may be necessary, then BE stated that it seems premature to impose a performance standard at this time.

The commission responds that the agency and any other authorized entity could monitor/test to determine performance of BMPs, however, it is the intention of the commission to require BMPs that are assumed to remove 80 percent of the post-development loadings of total suspended solids. Use of a agency approved BMP would negate the need for monitoring of the BMP provided the BMP is constructed as designed. System retrofits become necessary for various reasons. The executive director requires documentation (photographs, as built drawings, etc.) as special conditions to applications to develop this information. Uncertainty does not lie in the methodology of the BMPs but instead with the construction quality control.

COA commented that setbacks should also be used as a BMP to preserve an undisturbed, vegetated area adjacent to discharge features. Discharge features should include springs, seeps and wetlands. Flow from them helps maintain high quality baseflow to creeks in the Contributing Zone and provides habitat supporting beneficial uses for aquatic life. A 150-foot setback is recommended for discharge features.

MLK supported extending the current Edwards rules to the contributing zone, but believes that current scientific studies do not support requiring the proposed performance standards and the temporary BMP.

The commission agrees that these could be appropriate BMPs, but rather than prescribe such BMPs, the commission has adopted the performance requirements of the NPDES general permit for construction activities in the final rules. This will not only provide consistency with the federal program, but also flexibility as how to achieve the performance standard.

State Representative Shields asked who will be responsible for constructing these pollution control measures?

The commission responds that owner(s), the owner(s) authorized agent(s), or a person having the right to possess and control the property which is the subject of the contributing zone plan is responsible for insuring that the pollution control measures as described in their application (and approved by the executive director) are constructed as proposed or to get a modification of a previously approved plan if changes are needed. An engineer must certify in writing that a permanent control measure was constructed as designed.

USFWS commented that in Subchapter B of the proposed rules, it is not clear if the involvement of a Texas Licensed Professional Engineer is required for the temporary BMPs in the contributing zone as it is for temporary BMPs over the recharge zone and for permanent BMPs in both zones. USFWS recommend that this be clarified to ensure that a licensed engineer is involved for all BMPs in both the recharge and contributing zones.

The commission responds that the proposed rule has been revised to require the submittal of the EPA Stormwater Pollution Prevention Plan (SWPPP) as part of application for construction in the contributing zone, however, the proposed rule requires temporary and permanent BMPs to be certified by a Texas Registered Professional Engineer.

MH commented that several years ago structural controls were required for single family development. However, this requirement had changed at some point in the past, and it is

our understanding that the structural controls for single family are no longer required because, in many cases, these controls were not being maintained at an acceptable level. If not properly maintained, structural controls may only serve to degrade water quality rather than enhance it. MH continued that they have estimated the cost of regular maintenance for four single family subdivisions. Based upon this analysis, it costs more per lot for smaller developments to maintain sedimentation filtration ponds than larger developments. If a homeowners association is responsible for maintenance, then this cost will be reflected directly in HOA dues. Has the commission resolved who will maintain structural controls for single family development? Within the City of Austin and its ETJ, this is not a logistical issue because the City has staff and resources to maintain water quality ponds within their jurisdiction. Even so, it is our perception and experience that the City is not maintaining these ponds to a level that they should be. Outside the City of Austin's jurisdiction, someone else must shoulder this burden. Who will this be? Additionally, MH stated that regarding maintenance of water quality controls: a) will some of the rural counties and cities have the resources to maintain these facilities? Do they know that they may be asked to own and maintain structural water quality controls? Do some of the medium and large cities have the resources to maintain required controls? It is likely that the answer to all of these questions is "no;" b) the Homeowners' Association of a development with 500 units may be able to shoulder the maintenance required of structural controls (assuming it is a mandatory HOA). However, it is not a requirement of state law that HOA's be mandatory. However, a smaller development with fewer than 100 lots would have to pay significantly more per year in HOA dues just to maintain the water quality controls. MH continued that it is their experience that most homeowners are not willing to pay additional money for maintenance of ponds over and above regular HOA dues. In addition, most HOA's will not have the educated staff to adequately evaluate the need for maintenance and properly keep the ponds operating efficiently; c) While water and wastewater providers do not have the authority to maintain and own drainage and water quality facilities, some barely have the resources to maintain their existing utility systems and facilities. Can they justify raising rates for all customers to maintain water quality facilities for new developments within their jurisdiction? Would they do an adequate job maintaining the facilities? Will the commission get into the practice of enforcing maintenance requirements of structural controls? In addition, the cost associated with water quality ponds is enough to eat all after-tax profit on even the most lucrative single family developer or homebuilder. And finally, Representative Shields asked who will be responsible for maintaining these pollution control measures once construction on the house is completed? BMC and an individual asked who will be required to maintain ponds located in residential developments and in commercial developments?

The commission agrees that improper maintenance of structural controls has the potential for degrading water quality. To respond to this problem, the commission has clarified the responsibility for maintenance of permanent best management practices during and after construction in the contributing zone under §213.23(k). The applicant is responsible for maintaining the permanent BMPs after construction until such time as the maintenance obligation is either assumed in writing by another entity having ownership or control of the property (such as without limitation, an owner's association, a new property owner or lessee, a district, or municipality) or the ownership of the property is transferred to the entity. Such entity shall be responsible for maintenance until another entity assumes such obligation in writing or ownership is transferred. A copy of the transfer of responsibility must be filed with the executive director at the appropriate regional office within 30 days of the assumption of obligation or transfer of ownership. This requirements applies to multiple single-family residential developments, multi-family residential developments and non-residential developments such as commercial, industrial, institutional, schools and other sites where regulated activities occur.

USFWS commented that maintenance plans for sediment detention ponds should identify where removed sediments will be stockpiled. Stockpiles should be prohibited from areas near creeks and other recharge features.

The commission generally agrees that sediment removed from ponds must not be stockpiled near creeks and other recharge features. The sediment removed from ponds or basins is considered a waste and must be treated as such. This would include characterization, classification and proper disposal of the waste.

An individual asked what happens when the ponds become contaminated and will the EPA provide funds to clean up the contamination or will the original developer? Additionally, PP commented that plans for future enforcement and maintenance are not established, and if left to individuals or entities, such as property owner associations, will again only result in financial burdens to the end users in the way of increased cost.

As stated earlier, the commission has clarified the responsibility for maintenance of permanent best management practices during and after construction in the contributing zone under §213.23(k). The applicant is responsible for maintaining the permanent BMPs after construction until such time as the maintenance obligation is either assumed in writing by another entity having ownership or control of the property (such as without limitation, an owner's association, a new property owner or lessee, a district, or municipality) or the ownership of the property is transferred to the entity. Such entity shall be responsible for maintenance until another entity assumes such obligation in writing or ownership is transferred. A copy of the transfer of responsibility must be filed with the executive director at the appropriate regional office within 30 days of the assumption of obligation or transfer of ownership. This requirements applies to multiple single-family residential developments, multi-family residential developments and non-residential developments such as commercial, industrial, institutional, schools and other sites where regulated activities occur. The commission is unaware of any U.S. EPA funding for the clean-up of contamination in ponds.

An individual commented that commission needed to establish a registration procedure for all permanent stormwater controls and constructed "BMPs" so that their locations may be accurately documented and data may be accessed by all concerned regulatory agencies, developers, consultants, or any other interested party. The accumulation of monitoring data could more easily be evaluated and impacts to watersheds documented. A unique identification number would be issued for each structure that would accompany documents and real estate transactions (similar to UST registration).

The commission responds that the proposed rule has been revised to require that a copy of the transfer of responsibility

for permanent BMPs be filed with the executive director at the appropriate regional office within 30 days of the assumption of obligation or transfer of ownership. In addition, contributing zone pre-plan applications include, at a minimum, the following information: (1) the name of the development, subdivision, or facility for which the application is submitted and the name, address, and telephone number of the owner or any other persons signing the application; (2) a narrative description of the location of the project or facility for which boundaries can be located during a field inspection; (3) a technical report as described by §213.24; and (4) any additional information needed by the executive director for plan approval.

USFWS questioned what is meant by "equivalent water quality protection?" Is this targeted for the same pollutants as required under Subchapter B provisions or can other pollutants be considered?

The commission responds that "equivalent water quality protection" refers to a BMPs ability to achieve the same water quality standard of 80 percent removal of total suspended solids during and post-construction as BMPs formally recognized by the executive director as meeting this standard. Waste minimization and pollution prevention which achieves the same performance or result as stormwater treatment may qualify as equivalent water quality protection for maintaining a safe drinking water supply in the Edwards Aquifer.

LCRA stated that it is highly appropriate that the Edwards Aquifer rules incorporate provisions requiring that runoff velocities, stream flashing and increased erosion be controlled; however, the proposed language is rather vague beyond requiring that the technical report describe how these issues will be addressed. They suggested that a clear standard, such as no increase in the two year peak runoff rate, would be a very helpful clarification in the proposed rules. They continued that as written, it is implied that these impacts must be mitigated, but there is considerable ambiguity in the proposed language. LCRA stated that they have found that such a standard imposes a very minimal impact on most developments and that practically any BMP sized to control TSS at the level proposed will simultaneously provide much of the storage volume needed to reduce peak runoff rates to an acceptable level. LCRA continued that a requirement of this nature conveys an important concept in the rules while imposing a minimal burden on development and that the concept and associated standard should be laid out more explicitly. Normal drainage practice is to move the water off the street, parking lot, etc., and into a storm sewer as quickly as possible. The result is that the receiving stream sees a dramatically higher peak runoff after development for normal rainfall events compared to predevelopment runoff patterns, and peak runoff rates can increase by a factor of five or more for the one year storm event. They stated that the result of this radical change in runoff patterns is to set up a potentially severe and prolonged process of erosion, thus dramatically increasing TSS loading, while the stream cuts a new channel to adapt to the altered flow patterns. They continued that erosion and attendant TSS lasts for many years following the development of an area. They concluded that there are a lot of other pollutants generally attached to sediment, so setting up a long term erosion pattern has water quality impacts extending beyond increased TSS loadings.

The commission agrees that in-stream process are a potentially significant factor in water quality management practices. General requirements to minimize changes in the way in which water enters a stream as a result of regulated activities are specified in §213.24(7). These requirements address the in-stream processes referenced in the comment. The means by which applicants can meet the requirements of §213.24(7) will be specified in technical guidance being prepared by the executive director.

In a related comment, an individual wanted the commission to define "degradation".

The commission responds that degradation occurs when the physical, thermal, chemical, or biological condition of water is altered.

§213.25 Enforcement

GEOS commented that the rules should incorporate strict provisions for their enforcement, including substantial civil penalties to ensure a high level of compliance. SOS, ASC, LWVSA, and LWV commented that the rules must provide strict provisions for enforcement to achieve a high level of compliance.

TCWA commented that the rules must provide strict provision for enforcement to achieve a higher level of compliance so that these rules as implemented will protect our drinking water.

COA commented that if the commission is to rely solely upon the design engineer's interpretation of the rules to design controls that are in compliance, and the geologists' interpretation of the rules in assessing and identifying site and substrata features of importance in aquifer protection, then the enforcement provisions should be strengthened. COA suggested a penalty clause in Subchapter B that states actions to be taken against applicants that submit applications that do not meet standards and are discovered at any point in design or construction (for example, during a COA review of site development plans or commission review of Water Quality Protection Zone plans). COA continued that while procedures are available under the Engineering Practice Act to request enforcement actions, additional stipulated penalties are appropriate when operating under a rule that has been inadequately enforced and abused frequently by applicants in the past.

The commission believes that the rules as they are written provide for sufficient enforcement. Penalties are addressed in the rule and are subject to guidelines in the Texas Water Code, including amount. By utilizing the measures provided for in the rule and TWC Chapter 7, the commission believes that a high level of compliance will be achieved.

SAWS commented that the Contributing Zone fee of $500 is too low because the plan review will be essentially the same for Contributing Zone plans as for Recharge Zone plans. They continued that the fees charged for plan review should be the same. They stated that the only difference in review is the lack of a geologic assessment and the related review and field visit for Contributing Zone plans and while this difference may produce a slight reduction in the cost of review, the majority of the review time is taken up with review of the BMPS. SAWS recommended the fees charged for Contributing Zone plans be the same or slightly reduced from the current Recharge Zone and Transition Zone fees.

The commission responds that staff will be reviewing only for surface water quality runoff issues and not potential for subsurface infiltration as on the recharge zone, therefore the level of review will not be as intense. The commission also notes that temporary and permanent BMPs, both in the recharge and

in the contributing zones, must be prepared by or under the direct supervision of a Texas Registered Professional Engineer. All plans and design information must be signed, sealed, and dated by the Texas Registered Professional Engineer. The agency anticipates reduced plan review time as a result of these proposed rule.

§213.27 Contributing Zone Plan Application and Exception Fees

RECA and TxCABA commented that a $500 fee on small lot rural subdivisions can be excessive. TxCABA recommended the fees be reduced to $50 per application. PP commented that the $500 fee for small lot rural subdivisions provides no exemption for small scale projects greater than 10 acres. All such increased costs and fees will no doubt be passed on to the end user.

An individual commented that he is not going to pay a $500 application fee and also pay $2000 for a geological fee or engineering fee.

Another individual commented that the application fee, as proposed, seems excessive for those individuals who would want to construct an addition to their home at some future date. However, the cost for a developer seems insufficient. A fee of $500 per house and/or building over 1000 sq. ft. would be appropriate for new home/building construction.

A third individual commented that the fees imposed on the homeowner should not be designed to discourage development nor pay for the regulatory process when the regulation is intended to benefit the population of a multi-county area.

WWSC commented that the regulations and fees proposed will only nurture an unneeded bureaucracy with funds and have a serious negative impact on over 60 percent of the country population with $2.25 billion dollars tax base value.

The commission has revised the rule to reduce the fee from $500 to $250. As stated earlier, Subchapter B has been modified to apply only to regulated activities disturbing at least five acres, or regulated activities disturbing less than five acres which are part of a larger common plan of development or sale with the potential to disturb cumulatively five or more acres. If a single family residence is part of a common plan of development or sale with the potential to disturb cumulatively five or more acres, an individual land owner who seeks to construct his/her own single-family residence or associated residential structures on the site is exempted from the contributing zone plan application requirements under this section (that requires a plan to be submitted and a fee paid), provided that he/she does not exceed 20 percent impervious cover on the site. The commission also responds the there is no requirement to conduct a geologic assessment in the contributing zone.

Subchapter A. Edwards Aquifer in Medina, Bexar, Comal, Kinney, Uvalde, Hays, Travis and Williamson Counties

30 TAC §§213.3-213.10

STATUTORY AUTHORITY

These amended sections are adopted under Texas Water Code (TWC), §5.103 which provides the commission with the authority to promulgate rules necessary for the exercise of its jurisdiction and powers provided by the TWC and other laws of Texas, §5.105 which directs the commission to establish and approve all general policy of the commission by rule, and §26.046, which requires the commission to receive public comment on actions the commission should take to protect the Edwards Aquifer from pollution. Section 26.011 of the TWC provides that the commission will administer the provisions of Chapter 26 of the TWC and establish the level of quality to be maintained in and control the quality of the water in the state. Waste discharges or impending discharges are subject to rules adopted by the commission in the public interest. This section also grants the commission with the powers necessary or convenient to carry out its responsibilities. Section 26.341 of the TWC recognizes that it is the policy of the state to maintain and protect the quality of groundwater and surface water resource from certain substances in underground and aboveground storage tanks that may pollute groundwater and surface water resource, and §26.345 allows the commission to develop a regulatory program regarding underground and aboveground storage tanks. Additionally, Texas Water Code §26.046 requires the commission to hold annual public hearing to receive evidence from the public on actions the commission should take to protect the Edwards Aquifer from pollution, §26.0461 allows the commission to impose fees for inspecting the construction and maintenance of projects covered by plans and for processing plans or amendments that are subject to review or approval under the commission's Edwards Aquifer rules, §26.121 prohibits unauthorized discharges, §26.401 give the goal for groundwater protection in the state, and §28.011 authorizes the commission to make and enforce rules for the protection and preservation of groundwater quality. Texas Health and Safety Code, §361.024 provides the commission with the authority to promulgate rules consistent with the Solid Waste Disposal Act and standards of operation for the management and control of solid waste. Texas Health and Safety Code, §366.012 provides the commission with the authority to adopt rules governing the installation of on-site sewage disposal systems. The review of the commission's rules is proposed under Article IX, §167, General Appropriations Act, 75th Legislature.

There are no other codes or statutes that will be affected by this adoption.

§213.3. Definitions.

The definitions in Texas Water Code, §§26.001, 26.263, and 26.342 are applicable to this chapter. When used in this chapter, those definitions have the same meaning as the following definitions, unless the context in which they are used clearly indicates otherwise, or those definitions are inconsistent with the definitions listed in this section.

(1) Abandoned well - A well that has not been used for six consecutive months. A well is considered to be in use in the following cases:

(A) a non-deteriorated well which contains the casing, pump and pump column in good condition; or

(B) a non-deteriorated well which has been properly capped.

(2) Aboveground storage tank facility - The site, tract, or other area where one or more aboveground storage tank systems are located, including all adjoining contiguous land and associated improvements.

(3) Aboveground storage tank system - A non-vehicular device (including any associated piping) that is made of nonearthen

materials; located on or above the ground surface, or on or above the surface of the floor of a structure below ground, such as a mineworking, basement, or vault; and designed to contain an accumulation of static hydrocarbons or hazardous substances.

(4) Appropriate regional office - For regulated activities covered by this chapter and located in Hays, Travis, and Williamson counties, the appropriate regional office is Region 11, located in Austin, Texas. For regulated activities covered by this chapter and located in Kinney, Uvalde, Medina, Bexar, and Comal counties, the appropriate regional office is Region 13, located in San Antonio, Texas.

(5) Best management practices (BMPs) - schedule of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of water in the State. BMPs also include treatment requirements, operating procedures, and practices to control site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage. BMPs are those measures that are reasonable and necessary to protect groundwater and surface water quality, as provided in technical guidance prepared by the executive director or other BMPs which are technically justified based upon studies and other information that are generally relied upon by professionals in the environmental protection field and are supported by existing or proposed performance monitoring studies, including, but not limited to, U.S. Environmental Protection Agency, American Society of Civil Engineers, and Water Environment Research Foundation guidance.

(6) Capped well - A well that is closed or capped with a covering capable of preventing surface pollutants from entering the well. The cap must be able to sustain a weight of at least 400 pounds. The cap must not be easily removed by hand.

(7) Commencement of construction - The initial disturbance of soils associated with clearing, grading, or excavating activities or other construction or regulated activities.

(8) 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, Devil's 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.

(9) Edwards Aquifer protection plan - A general term which includes water pollution abatement plan, organized sewage collection system plan, underground storage tank facility plan, aboveground storage tank facility plan, or a modification or exception granted by the executive director.

(10) Edwards Aquifer protection plan holder - Person who is responsible for compliance with an approved water pollution abatement plan, organized sewage collection system plan, underground storage tank facility plan, aboveground storage tank facility plan, or a modification or exception granted by the executive director.

(11) Feedlot/concentrated animal feeding operation - A concentrated, confined livestock or poultry facility operated for meat, milk or egg production, growing, stabling, or housing, in pens or houses wherein livestock or poultry are fed at the place of confinement and crop or forage growing or production of feed is not sustained in the area of confinement.

(12) Geologic or manmade features - Features including but not limited to closed depressions, sinkholes, caves, faults, fractures, bedding plane surfaces, interconnected vugs, reef deposits, wells, borings, and excavations.

(13) Geologic assessment - A report which is prepared by a geologist describing site-specific geology.

(14) Geologist - A person who has received a baccalaureate or post-graduate degree in the natural science of geology from an accredited university and has training and experience in groundwater hydrology and related fields, or has demonstrated such qualifications by registration or licensing by a state, professional certification, or has completed accredited university programs that enable that individual to make sound professional judgements regarding the identification of sensitive features located in the recharge zone or transition zone.

(15) Groundwater conservation district - Any groundwater district created by the Texas Legislature or the commission under the Texas Water Code, Chapter 36, as a groundwater conservation district to conserve, preserve, and protect the waters of an underground water reservoir.

(16) Hazardous substance - Any substance designated as such by the administrator of the Environmental Protection Agency pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act; regulated pursuant to the Federal Water Pollution Control Act, Chapter 311; or any solid waste, or other substance that is designated to be hazardous by the commission, pursuant to the Texas Water Code §26.263 or Texas Health and Safety Code §361.003.

(17) Impervious cover - Impermeable surfaces, such as pavement or rooftops, which prevent the infiltration of water into the soil. Rainwater collection systems for domestic water supplies are not considered impervious cover.

(18) Industrial wastewater discharge - Any category of wastewater except:

(A) those that are primarily domestic in composition; or

(B) those emanating from feedlot/concentrated animal feeding operations.

(19) Land application system - A wastewater disposal system designed not to discharge wastewater into a surface drainage way.

(20) Organized sewage collection system - Any public or private sewerage system for the collection and conveyance of sewage to a treatment and disposal system that is regulated pursuant to rules of the commission and provisions of the Texas Water Code, Chapter 26. A system may include lift stations, force mains, gravity lines, and any other appurtenance necessary for conveying wastewater from a generating facility to a treatment plant.

(21) Permanent BMPs - Best management practices used to prevent and control pollution from regulated activities after construction is complete.

(22) Pollution - The alteration of the physical, thermal, chemical, or biological quality of, or the contamination of any water in the state that renders the water harmful, detrimental, or injurious to humans, animal life, vegetation, or property, or to public health,

safety or welfare, or impairs the usefulness of the public enjoyment of the waters for any lawful or reasonable purpose.

(23) Private sewage facilities - On-site sewage facilities as defined under Chapter 285 of this title (relating to On-site Sewage Facilities).

(24) Private service lateral - A wastewater line extending from the building drain to an existing private or public sewage collection system or other place of disposal that provides service to one single-family residence or building and whose operation and maintenance are the sole responsibility of the tenant or owner of the building. A wastewater line extending from the convergence of private service laterals from more than one single-family residence or building is considered a sewage collection system.

(25) 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 designated as such on official maps located in the appropriate regional office and groundwater conservation districts.

(26) Regulated activity -

(A) Any construction-related or post-construction activity on the recharge zone of the Edwards Aquifer having the potential for polluting the Edwards Aquifer and hydrologically connected surface streams. These activities include, but are not limited to:

(i) construction of buildings, utility stations, utility lines, roads, highways, or railroads;

(ii) clearing, excavation or any other activities that alter or disturb the topographic, geologic, or existing recharge characteristics of a site;

(iii) any installation of aboveground or underground storage tank facilities on the recharge or transition zone of the Edwards Aquifer; or

(iv) any other activities that may pose a potential for contaminating the Edwards Aquifer and hydrologically connected surface streams.

(B) "Regulated activity" does not include:

(i) clearing of vegetation without soil disturbance;

(ii) agricultural activities, except feedlots/concentrated animal feeding operations which are regulated under Chapter 321 of this title (relating to Control of Certain Activities by Rule);

(iii) activities associated with the exploration, development, and production of oil, gas, or geothermal resources under the jurisdiction of the Railroad Commission of Texas;

(iv) routine maintenance of existing structures that does not involve additional site disturbance, such as but not limited to:

(I) the resurfacing of existing paved roads, parking lots, sidewalks, or other development-related impervious surfaces, and

(II) the building of fences, or other similar activities in which:

(-a-) there is little or no potential for contaminating groundwater, or

(-b-) there is little or no change to the topographic, geologic, or existing sensitive features; or

(v) construction of single-family residences on lots that are larger than five acres, where no more than one single-family residence is located on each lot.

(27) Sensitive feature - Permeable geologic or manmade feature located on the recharge zone or transition zone where:

(A) a potential for hydraulic interconnectedness between the surface and the Edwards Aquifer exists, and

(B) rapid infiltration to the subsurface may occur.

(28) Sewage holding tank - A tank or other containment structure used to receive and store sewage until its ultimate disposal in an approved treatment facility.

(29) Site - The entire area included within the legal boundaries of the property described in the application. Regulated activities on a site that is located partially on the recharge zone and transition zone, where the natural drainage in the transition zone flows back to the recharge zone, will be treated as if the entire site is located on the recharge zone.

(30) Static hydrocarbon - A hydrocarbon which is liquid at atmospheric pressure and 20 degrees centigrade.

(31) Stub out - A wye, tee, or other manufactured appurtenance placed in a sewage collection system providing a location for a future extension of the collection system.

(32) Temporary BMPs - Best management practices used to prevent and control pollution from regulated activities during construction .

(33) Tertiary containment - A containment method by which an additional wall or barrier is installed outside of the secondary storage vessel (e.g., tank or piping) or other secondary barrier in a manner designed to prevent a release from migrating beyond the tertiary wall or barrier before the release can be detected. Tertiary containment systems include, but are not limited to, impervious liners and vaults surrounding a secondary tank and/or piping system, or equivalent triple wall tank or piping system as approved by the executive director.

(34) Transition zone - That area where geologic formations crop out in proximity to and south and southeast of the recharge zone and where faults, fractures, and other geologic features present a possible avenue for recharge of surface water to the Edwards Aquifer, including portions of the Del Rio Clay, Buda Limestone, Eagle Ford Group, Austin Chalk, Pecan Gap Chalk, and Anacacho Limestone. The transition zone is identified as that area designated as such on official maps located in the appropriate regional office and groundwater conservation districts.

(35) Underground storage tank facility - The site, tract, or other defined area where one or more underground storage tank systems are located, including all contiguous land and associated improvements.

(36) Underground storage tank system - Any one or combination of underground tanks and any connecting underground pipes used to contain an accumulation of regulated substances, the volume of which, including the volume of the connecting underground pipes, is ten percent or more beneath the surface of the ground.

(37) Well - A bored, drilled or driven shaft, or an artificial opening in the ground made by digging, jetting or some other

method, where the depth of the well is greater than its largest surface dimension. A well is not a surface pit, surface excavation, or natural depression.

§213.4. Application Processing and Approval.

(a) Approval by the executive director.

(1) No person may commence the construction of any regulated activity until an Edwards Aquifer protection plan or modifications to the plan as required by §213.5 of this title (relating to Required Edwards Aquifer Protection Plans, Notification, and Exemptions) or exception under §213.9 of this title (relating to Exceptions) has been filed with the appropriate regional office, and the application has been reviewed and approved by the executive director.

(2) The appropriate regional office shall provide copies of applications to affected incorporated cities, groundwater conservation districts, and counties in which the proposed regulated activity will be located. These copies will be distributed within five days of the application being determined to be administratively complete. Any person may file comments within 30 days of the date the application is mailed to local governmental entities. The executive director shall review all comments that are timely filed.

(3) A complete application for approval, as described in this section, must be submitted with the appropriate fee as specified in §213.12 of this title (relating to Application Fees).

(4) Projects in progress and the effective date of this rule.

(A) For areas designated as recharge zone or transition zone on official maps prior to the effective date of this rule, and for which this designation did not change on the effective date of this rule, all Edwards Aquifer protection plans submitted to the executive director, on or after the effective date of the rule, will be reviewed under all the provisions of the subchapter in effect on the date the plan is submitted.

(B) For areas not designated as recharge zone on official maps prior to the effective date of this rule, regulated activities will be considered to have commenced construction and will not be subject to this subchapter if, on the effective date of the rule, all federal, state, and local approvals or permits required to begin physical construction have been obtained, and if either on-site construction directly related to the development has begun or construction commences within six months of the effective date of the rule.

(C) Regulated activities in areas designated as transition zone on official maps prior to the effective date of this rule and designated as recharge zone on the effective date of this rule will be regulated as transition zone activities if, on the effective date of the rule, all federal, state, and local approvals or permits required to begin physical construction have been obtained, and if either on-site construction directly related to the development has begun or construction commences within six months of the effective date of the rule.

(D) The effective date of the amendments to §§213.3 - 213.10 is June 1, 1999.

(5) Assumption of program by local government.

(A) A local governmental entity may assume the rights, duties, and responsibilities to review and either approve or deny Edwards Aquifer protection plan applications within its boundaries and monitor and enforce compliance with plans if the local government obtains certification from the executive director.

(B) In order to obtain certification, the local government must demonstrate:

(i) it has a water quality protection program equal to or more stringent than the rules contained in this chapter, including but not limited to a program that:

(I) regulates activities covered under this chapter, and

(II) has performance standards equal to or more protective of water quality;

(ii) it has adopted ordinances or has other enforceable means sufficient to enforce the program throughout the local governmental entities jurisdiction; and

(iii) it has adequate resources to implement and enforce the program.

(C) Upon approval of a request for certification under this section, the executive director shall enter into an agreement with the local governmental entity to provide for the terms and conditions of program assumption, including executive director oversight. Nothing in a certification or agreement shall affect the commission's ability to enforce its water quality protection rules or applicable state law.

(D) An agreement under subparagraph (C) of this paragraph shall not provide for the payment of fees required by this chapter to the local entity; rather, fees shall be paid to the commission for continued proper oversight and enforcement. Nor shall such agreement provide for partial assumption of the program unless expressly authorized by the commission.

(E) Certification shall be for a term not to exceed five years, subject to renewal.

(F) Upon written notice, certification may be revoked or suspended by the executive director if the local entity does not meet the terms and conditions of the agreement provided under subparagraph (D) of this paragraph or fails to meet the criteria for certification provided under subparagraph (B) of this paragraph.

(G) A decision by the executive director under this section is not subject to appeal to the commission.

(b) Contents of Application.

(1) Forms provided by the executive director. Applications for approval filed under this chapter must be made on forms provided by or approved by the executive director. Each application for approval must, at a minimum, include the following:

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

(C) name, address, and telephone number of the owner or any other person signing the application; and

(D) information needed to determine the appropriate fee under §213.14 of this title (relating to Fee Schedule) for the following plan types:

(i) (No change.)

(ii) for organized sewage collection system plans and modifications to plans, the total linear footage of all collection system lines; or

(iii) (No change.)

(2) (No change.)

(c) Application submittal.

(1) An original and three copies of the application must be submitted to the appropriate regional office.

(2) Only owners, their authorized agent(s), or those persons having the right to possess and control the property which is the subject of the Edwards Aquifer protection plan may submit the plan for review and approval by the executive director.

(d)-(f) (No change.)

(g) Deed recordation.

(1) The applicant must record in the deed records of the county in which the property is located that the property is subject to an approved Edwards Aquifer protection plan within 30 days of receiving written approval of:

(A) a water pollution abatement plan;

(B) an aboveground storage tank plan;

(C) an underground storage tank plan;

(D) modifications to any of these plans for a proposed regulated activity; or

(E) an exception.

(2) A description of the property boundaries which is covered by the Edwards Aquifer protection plan shall be recorded in the county deed records.

(3) Within 60 days of receiving written approval of an Edwards Aquifer protection plan , the applicant must submit, to the appropriate regional office, proof of recordation of notice in the county deed records, with the volume and page number(s) of the county record.

(4) The construction of a public street or highway is exempt from all deed recordation requirements.

(h) Term of approval. The executive director's approval of an Edwards Aquifer protection plan will expire two years after the date of initial issuance, unless prior to the expiration date, substantial construction related to the approved plan has commenced. For purposes of this subsection, substantial construction means more than ten percent of total construction has commenced. If a written request for an extension is filed under the provisions of this subsection, the approved plan will continue in effect until the executive director makes a determination on the request for an extension.

(1) A written request for an extension must be received not earlier than 60 days prior to the expiration date of an approved Edwards Aquifer protection plan or a previously approved extension. Requests for extensions are subject to fees outlined in §213.13 of this title (relating to Fees Related to Requests For Extensions).

(2) An executive director's approved extension will expire six months after the original expiration date of the approved Edwards Aquifer protection plan or a previously approved extension unless prior to the expiration date, commencement of construction, repair, or replacement related to the approved plan has occurred.

(3) An Edwards Aquifer protection plan approval or extension will expire and no extension will be granted if more than 50 percent of the total construction has not been completed within ten years from the initial approval of a plan. A new Edwards Aquifer protection plan must be submitted to the appropriate regional office with the appropriate fees for review and approval by the executive director prior to commencing any additional regulated activities.

(4) Any requests for extensions received by the executive director after the expiration date of an approved Edwards Aquifer protection plan or a previously approved extension will not be accepted. A new application for the purposes of this chapter must be submitted to the appropriate regional office with the appropriate fees for the review and approval by the executive director.

(5) An extension will not be granted if the proposed regulated activity or approved plan for the regulated activity(ies) under this chapter has changed from the regulated activity(ies) approved by the executive director.

(i) Legal transfer of property. Upon legal transfer of property, sewage collection systems, force mains, lift stations, underground storage tank system, or aboveground storage tank system, the new owner(s) is required to comply with all terms of the approved Edwards Aquifer protection plan. If the new owner intends to commence any new regulated activity on the site, a new Edwards Aquifer protection plan that specifically addresses the new activity must be submitted to the executive director. Approval of the plan for the new regulated activity by the executive director is required prior to commencement of the new regulated activity.

(j) (No change.)

(k) Compliance. The holder of the approved or conditionally approved Edwards Aquifer protection plan is responsible for compliance with this chapter and any special conditions of the approved plan through all phases of plan implementation. Failure to comply with any condition of the executive director's approval is a violation of this rule and is subject to administrative rule or orders and penalties as provided under §213.10 of this title (relating to Enforcement). Such violations may also be subject to civil penalties and injunction.

§213.5. Required Edwards Aquifer Protection Plans, Notification, and Exemptions.

(a) (No change.)

(b) Water pollution abatement plan. A water pollution abatement plan must contain the following information.

(1) Application. The information required under §213.4 of this title (relating to Application Processing and Approval) is part of the plan and must be filed with the executive director at the appropriate regional office.

(2) Site location.

(A) Location data and maps must include a legible road map with directions, including mileage, which would enable the executive director to locate the site for inspection.

(B) A general location map must include:

(i) (No change.)

(ii) a drainage plan, shown on the recharge zone map, indicating all paths of drainage from the site.

(C) A site plan with a minimum scale of 1 inch to 400 feet must show:

(i) (No change.)

(ii) the layout of the development showing existing and finished contours at appropriate, but not greater than ten-foot contour intervals;

(iii) the location of all known wells (including but not limited to water wells, oil wells, and unplugged and abandoned wells);

(iv) the location of any sensitive feature on the site of the proposed regulated activity as identified in the geologic assessment under paragraph (3) of this subsection;

(v) the drainage patterns and approximate slopes anticipated after major grading activities;

(vi) areas of soil disturbance and areas which will not be disturbed;

(vii) locations of major structural and nonstructural controls identified in the technical report;

(viii) locations where stabilization practices are expected to occur;

(ix) surface waters (including wetlands); and

(x) locations where stormwater discharges to a surface water or a sensitive feature.

(3) Geologic assessment. For all regulated activities, the applicant must submit a geologic assessment report prepared by a geologist describing the site-specific geology. The report must identify all potential pathways for contaminant movement to the Edwards Aquifer. Single-family residential subdivisions constructed on less than ten acres are exempt from this requirement.

(A) The geologic assessment must include a geologic map, at site-plan scale, illustrating:

(i) the outcrop of surface geologic units; and

(ii) all geologic and manmade features, specifically identifying:

(I) caves;

(II) sinkholes;

(III) faults;

(IV) permeable fractures;

(V) solution zones;

(VI) surface streams; and

(VII) other sensitive features.

(B) The geologic assessment must contain a stratigraphic column showing, at a minimum, formations, members, and thicknesses.

(C) The geologic assessment must contain a description and evaluation of all geologic and manmade features, on forms provided by or approved by the executive director. The assessment must determine which of these features are sensitive features. The assessment must include:

(i) the identification of each geologic or manmade feature, with a cross reference to the site-plan map coordinates; and

(ii) the type of geologic or manmade feature including, but not limited to:

(I) sinkholes;

(II) caves;

(III) faults;

(IV) wells;

(V) surface streams; or

(VI) potentially permeable fractures and solution zones.

(D) The geologic assessment must contain a narrative assessment of site-specific geology. The assessment must detail the potential for fluid movement to the Edwards Aquifer and include a discussion of the stratigraphy, structure, and karstic characteristics of the site.

(E) The geologic assessment must contain a narrative description of soil units and a soil profile, including thickness and hydrologic characteristics.

(4) Technical report.

(A) The technical report must address the following issues.

(i) The report must describe the nature of the regulated activity (such as residential, commercial, industrial, or utility), including:

(I) the size of the site in acres;

(II) the projected population for the site;

(III) the amount and type of impervious cover expected after construction is complete, such as paved surface or roofing;

(IV) the amount of surface expected to be occupied by parking lots; and

(V) other factors that could affect surface water and groundwater quality.

(ii) The report must describe the volume and character of wastewater expected to be produced. Wastewater generated at a site should be characterized as either domestic or industrial, or if commingled, by approximate percentages of each type.

(iii) The report must describe the volume and character of stormwater runoff expected to occur. Estimates of stormwater runoff quality and quantity should be based on area and type of impervious cover, as described in clause (i) of this subparagraph. An estimate of the runoff coefficient of the site for both the pre-construction and post-construction conditions should be included in the report.

(iv) The report must describe any activities or processes which may be a potential source of contamination.

(v) The report must describe the intended sequence of major activities which disturb soils for major portions of the site (e.g., grubbing, excavation, grading, utilities and infrastructure installation).

(vi) The report must contain estimates of the total area of the site that is expected to be disturbed by excavation, grading, or other activities.

(vii) The name of the receiving water(s) at or near the site which will be disturbed or which will receive discharges from disturbed areas of the project.

(B) The technical report must describe the temporary best management practices (BMPs) and measures that will be used during and after construction. The technical report must clearly describe for each major activity identified in subparagraph (A)(v) of this paragraph appropriate control measures and the general timing (or sequence) during the construction process that the measures will be implemented.

(i) BMPs and measures must prevent pollution of surface water, groundwater or stormwater that originates upgradient from the site and flows across the site as provided under this paragraph.

(ii) BMPs and measures must prevent pollution of surface water or groundwater that originates on-site or flows off site, including pollution caused by contaminated stormwater runoff from the site as provided under this paragraph.

(iii) BMPs and measures must prevent pollutants from entering surface streams, sensitive features, or the aquifer as provided under this paragraph.

(iv) To the maximum extent practicable, BMPs and measures must maintain flow to naturally-occurring sensitive features identified in either the geologic assessment, executive director review, or during excavation, blasting, or construction.

(I) The temporary sealing of a naturally-occurring sensitive feature which accepts recharge to the Edwards Aquifer as a temporary pollution abatement measure during active construction should be avoided .

(II) A request to temporarily seal must include a justification as to why no reasonable and practicable alternative exists. The request will be evaluated by the executive director on a case-by-case basis.

(v) Temporary BMPs and measures must meet the requirements contained in subparagraph (D)(i) of this paragraph.

(vi) The report must include a plan for the inspection of temporary BMPs and measures and for their timely maintenance, repair, and, if necessary, retrofit.

(vii) Temporary sediment pond or basin construction plans and design calculations for a proposed temporary BMP or measure must be prepared by or under the direct supervision of a Texas Licensed Professional Engineer. All construction plans and design information must be signed, sealed, and dated by the Texas Licensed Professional Engineer.

(viii) Pilot-scale field testing (including water quality monitoring) may be required for BMPs that are not contained in technical guidance recognized by or prepared by the executive director.

(ix) The construction-phase BMPs for erosion and sediment controls should be designed to retain sediment on site to the extent practicable.

(x) All control measures must be properly selected, installed, and maintained in accordance with the manufacturers specifications and good engineering practices. If periodic inspections by the applicant or the executive director, or other information indicates a control has been used inappropriately, or incorrectly, the applicant must replace or modify the control for site situations.

(xi) If sediment escapes the construction site, off-site accumulations of sediment must be removed at a frequency sufficient to minimize offsite impacts to water quality (e.g., fugitive sediment in street being washed into surface streams or sensitive features by the next rain).

(xii) Sediment must be removed from sediment traps or sedimentation ponds not later than when design capacity has been reduced by 50 percent.

(xiii) Litter, construction debris, and construction chemicals exposed to stormwater shall be prevented from becoming a pollutant source for stormwater discharges (e.g., screening outfalls, picked up daily).

(C) The technical report must describe the permanent best management practices (BMPs) and measures that will be used during and after construction is completed.

(i) BMPs and measures must prevent pollution of surface water, groundwater, or stormwater that originates upgradient from the site and flows across the site.

(ii) BMPs and measures must prevent pollution of surface water or groundwater that originates on-site or flows off the site, including pollution caused by contaminated stormwater runoff from the site.

(iii) BMPs and measures must prevent pollutants from entering surface streams, sensitive features, or the aquifer.

(iv) To the extent practicable, BMPs and measures must maintain flow to naturally occurring sensitive features identified in either the geologic assessment, executive director review, or during excavation, blasting, or construction.

(I) The permanent sealing of or diversion of flow from a naturally-occurring sensitive feature that accepts recharge to the Edwards Aquifer as a permanent pollution abatement measure should be avoided .

(II) A request to seal a naturally-occurring sensitive feature must include a justification as to why no reasonable and practicable alternative exists. The request will be evaluated by the executive director on a case-by-case basis.

(v) Permanent BMPs and measures must meet the requirements contained in subparagraph (D)(ii) of this paragraph.

(vi) Construction plans and design calculations for the proposed permanent BMPs and measures must be prepared by or under the direct supervision of a Texas Licensed Professional Engineer. All construction plans and design information must be signed, sealed, and dated by the Texas Licensed Professional Engineer.

(vii) The technical report must include a plan for the inspection of the permanent BMPs and measures and for their timely inspection, maintenance, repair, and, if necessary, retrofit. The plan must be prepared and certified by the engineer designing the permanent BMPs and measures. The plan must be signed by the owner or responsible party.

(viii) Pilot-scale field testing (including water quality monitoring) may be required for BMPs that are not contained in technical guidance recognized by or prepared by the executive director.

(I) When pilot-scale field testing of an innovative technology (including water quality monitoring) is required, only one pilot site will be approved.

(II) No additional approvals will be granted until the pilot study is complete and the applicant demonstrates adequate protection of the Edwards Aquifer.

(III) If the innovative technology demonstrates adequate protection of the Edwards Aquifer, additional units may be approved for use as permanent pollution abatement measures on the Edwards Aquifer recharge zone .

(IV) If the innovative technology demonstrates inadequate protection of the Edwards Aquifer, a retrofit of the

pollution abatement measure may be required to achieve compliance with requirements under subparagraph (D) of this paragraph and no additional units will be approved for use on the Edwards Aquifer recharge zone.

(D) Requirements for BMPs and measures.

(i) Temporary BMPs.

(I) The technical report must include a description of interim and permanent stabilization practices for the site, including a schedule of when the practices will be implemented. Stabilization practices may include, but are not limited to: establishment of temporary vegetation, establishment of permanent vegetation, mulching, geotextiles, sod stabilization, vegetative buffer strips, protection of trees, preservation of mature vegetation, and other appropriate measures.

(-a-) The following records shall be maintained and made available to the executive director upon request: the dates when major grading activities occur; the dates when construction activities temporarily or permanently cease on a portion of the site; and the dates when stabilization measures are initiated.

(-b-) Stabilization measures shall be initiated as soon as practicable in portions of the site where construction activities have temporarily or permanently ceased, but in no case more than 14 days after the construction activity in that portion of the site has temporarily or permanently ceased. Where the initiation of stabilization measures by the 14th day after construction activity temporary or permanently cease is precluded by weather conditions, stabilization measures shall be initiated as soon as practicable. Where construction activity on a portion of the site is temporarily ceased, and earth disturbing activities will be resumed within 21 days, temporary stabilization measures do not have to be initiated on that portion of site. In areas experiencing droughts where the initiation of stabilization measures by the 14th day after construction activity has temporarily or permanently ceased is precluded by seasonal arid conditions, stabilization measures shall be initiated as soon as practicable.

(II) The technical report must include a description of structural practices to divert flows from exposed soils, store flows, or otherwise limit runoff and the discharge of pollutants from exposed areas of the site to the degree attainable. Structural practices may include, but are not limited to: silt fences, earth dikes, drainage swales, sediment traps, check dams, subsurface drains, pipe slope drains, level spreaders, storm drain inlet protection, rock outlet protection, reinforced soil retaining systems, gabions, and sediment basins. Placement of structural practices in floodplains should be avoided to the degree attainable.

(-a-) For common drainage locations that serve an area with ten or more acres disturbed at one time, a sediment basin that provides storage for a calculated volume of runoff from a two-year, 24-hour storm from each disturbed acre drained, or equivalent control measures, shall be provided where attainable until final stabilization of the site. Where no such calculation has been performed, a sediment basin providing 3,600 cubic feet of storage per acre drained, or equivalent control measures, shall be provided where attainable until final stabilization of the site. When computing the number of acres draining into a common location it is not necessary to include flows from offsite areas and flows from onsite areas that are either undisturbed or have undergone final stabilization where such flows are diverted around both the disturbed area and the sediment basin.

(-b-) In determining whether installing a sediment basin is attainable, the applicant may consider factors such as site soils, slope, and available area on site. For drainage locations which serve ten or more disturbed acres at one time and where a sediment basin or equivalent controls is not attainable, smaller sediment basins and/or sediment traps should be used. Where neither the sediment basin nor equivalent controls are attainable due to site limitations, silt fences, vegetative buffer strips, or equivalent sediment controls are required for all down slope boundaries of the construction area and for those side slope boundaries deemed appropriate as dictated by individual site conditions. The executive director encourages the use of a combination of sediment and erosion control measures in order to achieve maximum pollutant removal.

(-c-) For drainage locations serving less than ten acres, smaller sediment basins and/or sediment traps should be used. At a minimum, silt fences, vegetative buffer strips, or equivalent sediment controls are required for all down slope boundaries (and for those side slope boundaries deemed appropriate as dictated by individual site conditions) of the construction area unless a sediment basin providing storage for a calculated volume of runoff from a two-year, 24- hour storm or 3,600 cubic feet of storage per acre drained is provided. The executive director encourages the use of a combination of sediment and erosion control measures in order to achieve maximum pollutant removal.

(ii) Permanent BMPs and measures.

(I) BMPs and measures must be implemented to control the discharge of pollution from regulated activities after the completion of construction. These practices and measures must be designed, constructed, operated, and maintained to insure that 80 percent of the incremental increase in the annual mass loading of Total Suspended Solids from the site caused by the regulated activity is removed. These quantities must be calculated in accordance with technical guidance prepared or accepted by the executive director.

(II) Owners of permanent BMPs and measures must insure that the BMPs and measures are constructed and function as designed. A Texas Licensed Professional Engineer must certify in writing that the permanent BMPs or measures were constructed as designed. The certification letter must be submitted to the appropriate regional office within 30 days of site completion.

(III) Where a site is used for low density single-family residential development and has 20 percent or less impervious cover, other permanent BMPs are not required. This exemption from permanent BMPs must be recorded in the county deed records, with a notice that if the percent impervious cover increases above 20 percent or land use changes, the exemption for the whole site as described in the property boundaries required by §213.4(g) of this title (relating to Application Processing and Approval), may no longer apply and the property owner must notify the appropriate regional office of these changes.

(IV) The executive director may waive the requirement for other permanent BMPs for multi-family residential developments, schools, or small business sites where 20 percent or less impervious cover is used at the site. This exemption from permanent BMPs must be recorded in the county deed records, with a notice that if the percent impervious cover increases above 20 percent or land use changes, the exemption for the whole site as described in the property boundaries required by §213.4(g) of this title (relating to Application Processing and Approval), may no longer apply and the property owner must notify the appropriate regional office of these changes.

(E) The technical report must describe measures that will be used to avoid or minimize surface stream contamination and changes in the way in which water enters a stream as a result of

the construction and development. The measures should address the following:

(i) increased stream flashing,

(ii) the creation of stronger flows and in-stream velocities, or

(iii) other in-stream effects caused by the regulated activity which increase erosion that results in water quality degradation.

(F) The technical report must describe the method of wastewater disposal from the site.

(i) If wastewater is to be disposed of by conveyance to a sewage treatment plant for treatment and disposal, the existing or proposed treatment facility must be identified.

(ii) If wastewater is to be disposed of by an on-site sewage facility, the application must include a written statement from the appropriate authorized agent, stating that the site is suitable for the use of private sewage facilities and will meet the special requirements for on-site sewage facilities located on the Edwards Aquifer recharge zone as specified under Chapter 285 of this title (relating to On-site Sewage Facilities), or identifying those areas that are not suitable.

(G) The technical report must describe the measures that will be used to contain any spill of hydrocarbons or hazardous substances such as on a roadway or from a pipeline or from temporary aboveground storage of 250 gallons or more.

(i) Temporary storage facilities are those used on site for less than one year.

(ii) Temporary aboveground storage tank systems of 250 gallons or more cumulative storage capacity must be located a minimum horizontal distance of 150 feet from any domestic, industrial, irrigation, or public water supply well, or other sensitive feature.

(5) Responsibility for maintenance of permanent BMPs and measures after construction is complete.

(A) The applicant shall be responsible for maintaining the permanent BMPs after construction until such time as the maintenance obligation is either assumed in writing by another entity having ownership or control of the property (such as without limitation, an owner's association, a new property owner or lessee, a district, or municipality) or the ownership of the property is transferred to the entity. Such entity shall then be responsible for maintenance until another entity assumes such obligations in writing or ownership is transferred .

(B) A copy of the transfer of responsibility must be filed with the executive director at the appropriate regional office within 30 days of the transfer.

(C) This paragraph applies to:

(i) multiple single-family residential developments, multi-family residential; and

(ii) non-residential developments such as commercial, industrial, institutional, schools, and other sites where regulated activities occur.

(c) Organized sewage collection systems.

(1) No person may commence rehabilitation or construction related to an existing or new organized sewage collection system on the recharge zone, until final design plans, specifications, and an engineering report, as specified in Chapter 317 of this title (relating to Design Criteria for Sewerage Systems) and appropriate special requirements of this section, have been filed with and approved by the executive director.

(2) (No change.)

(3) Special requirements for sewage collection systems. In addition to the requirements in paragraph (2) of this subsection, sewage collection systems on the recharge zone must meet the following special requirements.

(A)-(B) (No Change.)

(C) Lift station design. Lift stations must be designed and constructed to ensure that bypassing of any sewage does not occur. All lift stations must be designed to meet the requirements of §317.2(d) and §317.3 of this title. A lift station application must include final construction plans and a design report prepared by or under the direct supervision of a Texas Licensed Professional Engineer. All design information must be signed, sealed, and dated by a Texas Licensed Professional Engineer.

(D) Certification of new sewage collection system lines by a Texas Licensed Professional Engineer. Owners of sewage collection systems must insure that all new gravity sewer system lines having a diameter greater than or equal to six inches and all new force mains are tested for leakage following construction. Such lines must be certified by a Texas Licensed Professional Engineer to meet the appropriate requirements of §317.2 of this title (relating to Design Criteria for Sewerage Systems). The engineer must retain copies of all test results which must be made available to the executive director upon request. The engineer must certify in writing that all wastewater lines have passed all required testing to the appropriate regional office within 30 days of test completion and prior to use of the new collection system. Following the completion of the new sewer lines and manholes, they must be tested every five years thereafter in accordance with subparagraph (E) of this paragraph.

(E) Testing of existing sewer lines. Owners of sewage collection systems must insure that all existing sewer lines having a diameter greater than or equal to six inches, including private service laterals, manholes, and connections, are tested to determine types and locations of structural damage and defects such as offsets, open joints, or cracked or crushed lines that would allow exfiltration to occur. Existing manholes and lift station wet wells must be tested using methods for new structures which are approved by the executive director.

(i) Testing of all sewage collection systems must be conducted every five years after being put into use. Any sewage collection system in place as of March 21, 1990 must have commenced and completed the first round of five year testing. Every five years, existing sewage collection systems must be tested to determine types and locations of structural damage and defects such as offsets, open joints, or cracked or crushed lines that would allow exfiltration to occur. These test results must be certified by a Texas Licensed Professional Engineer. The test results must be retained by the plan holder for five years and made available to the executive director upon request. The use of one of the following methods will satisfy the requirements for the five year testing of existing sewer lines.

(I) In-place deflection testing must meet the requirements of §317.2(a)(4)(C) of this title. No pipe shall exceed a deflection rate of 5.0 percent.

(II) Internal line inspections, using a color television camera to verify that the lines are free of structural damage such as offsets, open joints, or cracked or crushed lines, that would allow exfiltration to occur, are acceptable. The use of black and white television equipment may be used following demonstration to the executive director that an acceptable inspection can be performed as provided in subclause (IV) of this clause.

(III)-(IV) (No change.)

(ii) Except as otherwise provided in an enforcement order of the commission, as soon as possible, but at least within one year of detecting defects, repairs to the sewage collection system must be completed by the system's owner. However, all leakage must be immediately contained to prevent any discharge to water in the state or pollution of the Edwards Aquifer whether necessary repairs have been completed or not. Leakage is a violation of §26.121 of the Texas Water Code and these rules are not intended to excuse such unlawful discharge of waste into or adjacent to water in the state. All repairs must be certified by a Texas Licensed Professional Engineer. Repairs must be tested within 45 days of completion using the methods described in clause (i) of this subparagraph. Results must be submitted to the appropriate regional office within 30 days of testing.

(F) (No change.)

(G) Sewer line stub outs. New collection system lines must be constructed with stub outs for the connection of anticipated extensions. The location of such stub outs must be marked on the ground such that their location can be easily determined at the time of connection of the proposed extensions. All stub outs must be sealed with a manufactured cap to prevent leakage. Extensions that were not anticipated at the time of original construction or that are to be connected to an existing sewer line not furnished with stub outs must be connected using a manufactured saddle in accordance with accepted plumbing techniques.

(i) Main line stub outs. Manholes must be placed at the end of all sewer lines that will be extended at a future date, as specified in §317.2(c)(5) of this title. If the main line is to be extended within one year, a variance to allow the use of a stub out until the line is extended will be considered on a case-by-case basis. At the time of original construction, new stub outs must be constructed sufficiently to extend beyond the end of the street pavement. Stub outs that were not anticipated at the time of original construction must enter the manhole using a bored or drilled hole. Chiseling or hammering to enter a manhole is prohibited.

(ii) (No change.)

(H) Locating sewer lines within a five-year floodplain. Sewer lines may not be located within the five-year floodplain of a drainageway, unless an exemption is granted by the executive director. If the applicant demonstrates to the executive director that such location is unavoidable, and the area is subject to inundation and stream velocities which could cause erosion and scouring of backfill, the trench must be capped with concrete to prevent scouring of backfill, or the sewer lines must be encased in concrete. All concrete must have a minimum thickness of six inches.

(I) Inspection of private service lateral connections. After installing and prior to covering and connecting a private service lateral to an organized sewage collection system, a Texas Licensed Professional Engineer, Texas Registered Sanitarian, or appropriate city inspector must inspect the private service lateral and the connection to the collection system and certify that construction conforms with the applicable provisions of this subsection and local plumbing codes. Private service laterals may only be connected to approved sewage collection systems.

(J) (No change.)

(K) Sewer lines bridging caverns or other sensitive features. Sewer lines that bridge caverns or sensitive features must be constructed in a manner that will maintain the structural integrity of the line. When such geologic features are encountered during construction, the location and extent of those features must be reported to the appropriate regional office in writing within two working days of discovery. Notification and inspection must comply with the requirements under subsection (f) of this section.

(L) Erosion and sedimentation control. A temporary erosion and sedimentation control plan must be included with all construction plans. All temporary erosion and sedimentation controls must be installed prior to construction, must be maintained during construction, and must be removed when sufficient vegetation is established to control the erosion and sedimentation and the construction area is stabilized.

(M) Alternative sewage collection systems. The executive director may approve an alternative procedure which is technically justified; signed, sealed and dated by a Texas Licensed Professional Engineer indicating equivalent environmental protection; and which complies with the requirements of §317.2(d) of this title (relating to Design Criteria for Sewerage Systems).

(N) (No change.)

(4) Contents of organized sewage collection system plan.

(A) Application. For organized sewage collection systems, the information required under §213.4 of this title (relating to Application Processing and Approval) must be filed with the executive director at the appropriate regional office.

(B) Narrative description of proposed organized sewage collection system. A narrative report must include at a minimum a geographic description and anticipated type of development within the sewage collection system service area.

(C) Geologic assessment. A geologic assessment must be performed along the path of the proposed sewer line(s), plus 50 feet on each side of the proposed sewer line as described in subsection (b)(3) of this section.

(D) Technical report. For an organized sewage collection system, a technical report must be submitted on forms provided by or approved by the executive director. The technical report must contain the information requested in the following subsection of this section: (b)(4)(A)(ii) and (iv), (B), (D)(i), (F)(i), and (G). A technical report for a water pollution abatement plan submitted under subsection (b) of this section satisfies this requirement, provided it properly addresses the proposed sewage collection system.

(E) Plans and specifications. Plans and specifications addressing all the requirements in paragraphs (2) and (3) of this subsection, must include at a minimum:

(i) a map showing the location of the organized sewage collection system lay-out in relation to recharge zone boundaries;

(ii) a map showing the location of the organized sewage collection system lay-out, overlaid by topographic contour lines, using a contour interval of not greater than ten feet, and showing the area within both the five-year floodplain and the 100-year floodplain of any drainage way;

(iii) construction documents prepared by or under the supervision of a Texas Licensed Professional Engineer, which have also been signed, sealed, and dated by that Texas Licensed Professional Engineer, at a minimum, must include:

(I) plan and profile views of the collection system;

(II) construction details of collection system components;

(III) specifications for all collection system components; and

(IV) proposed pollution abatement measures for sensitive features identified along the path of the proposed sewer line.

(d) Static hydrocarbon and hazardous substance storage in underground storage tanks system.

(1) Standards for underground storage tank systems. New or replacement systems for the underground storage of static hydrocarbons or hazardous substances must be of double-walled or an equivalent method approved by the executive director. Methods for detecting leaks in the inside wall of a double-walled system must be included in the facility's design and construction. The leak detection system must provide continuous monitoring of the system and must be capable of immediately alerting the system's owner of possible leakages.

(A) Installation. All underground hydrocarbon and hazardous substance storage tank systems must be installed by a person possessing a valid certificate of registration in accordance with the requirements of Subchapter I of Chapter 334 of this title (relating to Underground and Aboveground Storage Tanks).

(B) Siting. Any new underground hydrocarbon and hazardous substance storage tank system that does not incorporate a method for tertiary containment must be located a minimum horizontal distance of 150 feet from any domestic, industrial, or irrigation well, or other sensitive feature as determined under the geologic assessment at the time of construction or replacement under paragraph (2)C) of this subsection or the tankhold inspection under subsection (f)(2)(B) of this section. This method of tertiary containment also applies to the placement of a tank system within 150 feet of a public water supply well without a sanitary control easement of 150 feet as defined in §290.41(c)(1)(F) of this title (relating to Water Sources).

(2) Contents of an underground storage tank facility plan. An underground storage tank facility plan must, at a minimum, contain the following information.

(A) Application. The information required under §213.4 of this title (relating to Application Processing and Approval) must be filed with the executive director at the appropriate regional office.

(B) A site location map as specified in subsection (b)(2) of this section including a legible road map, a general location map, and a site plan, must be submitted as part of the plan.

(C) Geologic assessment. For all facilities, located on either the recharge zone or transition zone, a geologic assessment, as described in subsection (b)(3) of this section, must be submitted for the site.

(D) Technical report. For all facilities, located on either the recharge zone or transition zone, a technical report must be submitted on forms provided by or approved by the executive director. The technical report must contain the information requested in subsections (b)(4)(B), (C), and (b)(5) of this section. A technical report for a water pollution abatement plan submitted under subsection (b) of this section satisfies this requirement, provided it properly addresses the proposed underground storage tank facility.

(e) Static hydrocarbon and hazardous substance storage in an aboveground storage tank facility.

(1) Design standards. Systems used for the temporary and permanent aboveground storage of static hydrocarbon and hazardous substance must be constructed within controlled drainage areas that are sized to capture one and one-half (1-1/2) times the storage capacity of the system. The controlled drainage area must be constructed of and in a material impervious to the substance(s) being stored, and must direct spills to a convenient point for collections and recovery. Any spills from storage tank facilities must be removed from the controlled drainage area for disposal within 24 hours of the spill.

(2) Contents of an aboveground storage tank facility plan. A permanent aboveground storage tank facility plan must contain, at a minimum, the following information.

(A) Application. For an aboveground storage tank facility, the information required under §213.4 of this title (relating to Application Processing and Approval) must be filed with the executive director at the appropriate regional office.

(B) A site location map as specified in subsection (b)(2) of this section, including a legible road map, a general location map, and a site plan, must be submitted as part of the plan for a permanent facility.

(C) Geologic assessment. For all facilities, located on either the recharge zone or transition zone, a geologic assessment, as described in subsection (b)(3) of this section, must be submitted for the area containing the aboveground storage tank system.

(D) Technical report. For all facilities, located on either the recharge zone or transition zone, a technical report must be submitted on forms provided by or approved by the executive director. The technical report must contain the information requested in subsections (b)(4)(B), (b)(4)(C), and (b)(5) of this section. A technical report for a water pollution abatement plan submitted under subsection (b) of this section satisfies this requirement, provided it properly addresses the proposed aboveground storage tank facility.

(3) A description of measures that will be used to contain any spill of hydrocarbons or hazardous substances from temporary storage of 250 gallons or more must be included with the plan unless described under subsection (b)(4)(G) of this section. Any new temporary aboveground hydrocarbon and hazardous substance storage tank system must be located a minimum horizontal distance of 150 feet from any domestic, industrial, irrigation, or public water supply well, or other sensitive feature.

(4) Exemptions from this section.

(A) Equipment used to transmit electricity that utilizes oil for insulation or cooling purposes, including transformers and oil circuit breakers, are exempt from this subsection. Construction of supporting structures is a regulated activity for which a water pollution abatement plan under subsection (a)(1) of this section is required.

(B) (No change.)

(f) Notification and inspection.

(1) The applicant must provide written notification of intent to commence construction, replacement, or rehabilitation. Notification must be given to the appropriate regional office no later than 48 hours prior to commencement of the regulated activity.

(A) Written notification must include;

(i) the date on which the regulated activity will commence,

(ii) the name of the approved plan for the regulated activity, and

(iii) the name of the prime contractor and the name and telephone number of the contact person.

(B) The executive director will use the notification to determine if the applicant is eligible for an extension of an approved plan. Construction will not be considered to have commenced until written notification is received by the appropriate regional office .

(2) If any sensitive feature is discovered during construction, replacement, or rehabilitation, all regulated activities near the sensitive feature must be suspended immediately.

(A) The holder of an approved Edwards Aquifer protection plan must immediately notify the appropriate regional office of any sensitive features encountered during construction. This notice must be given before continuing construction.

(B) Regulated activities near the sensitive feature may not proceed until the executive director has reviewed and approved the methods proposed to protect the sensitive feature and the Edwards Aquifer from potentially adverse impacts to water quality.

(C) The holder of an approved sewage collection system plan, must meet the following.

(i) Upon completion of any lift station excavation, a geologist must certify that the excavation has been inspected for the presence of sensitive features. Certification that the excavation has been inspected must be submitted to the appropriate regional office.

(I) Further activities may not proceed until the executive director has reviewed and approved the methods proposed to protect any sensitive feature and the Edwards Aquifer from potentially adverse impacts to water quality from the lift station.

(II) Construction may continue if the geologist certifies that no sensitive feature or features were present.

(ii) The applicant must submit a plan for ensuring the structural integrity of the sewer line or for modifying the proposed collection system alignment around the feature. The plan must be certified by a Texas Licensed Professional Engineer. These plans must be submitted to the appropriate regional office for review and approval.

(D) For an approved underground storage tank facility plan, a geologist must certify that a completed tankhold excavation has been inspected for the presence of sensitive features.

(i) Certification that the tankhold excavation has been inspected must be submitted to the appropriate regional office.

(ii) If a sensitive feature is discovered, the applicant must propose methods to protect the feature and the Edwards Aquifer from potentially adverse impacts to water quality from the underground storage tank system. Installation activities may not proceed until the executive director has reviewed and approved the proposed methods. The protection methods must be consistent with subsection (d)(1)(B) of this section.

(iii) Construction may continue if the geologist certifies that no sensitive feature or features were present.

(3) The executive director must review methods or plans proposed to protect sensitive features and the Edwards Aquifer from potentially adverse impacts to water quality. This review will be completed within one week of receiving a method or plan. Regulated activities near the sensitive feature may not continue until the executive director has approved the proposed methods or plans.

(g) On-site sewerage systems. On-site sewerage systems located on the recharge zone are subject to §285.40 of this title (relating to OSSFs on the Recharge Zone of the Edwards Aquifer) and other applicable provisions contained in Chapter 285 of this title. Systems must be designed, installed, maintained, repaired, and replaced in accordance with Chapter 285.

(h) Exemption.

(1) Regulated activities exempt from the Edwards Aquifer protection plan application requirements under this section are:

(A) the installation of natural gas lines;

(B) the installation of telephone lines;

(C) the installation of electric lines;

(D) the installation of water lines;

(E) the installation of other utility lines which are not designed to carry and will not carry the following:

(i) pollutants;

(ii) stormwater runoff;

(iii) sewage effluent; or

(iv) treated effluent from a wastewater treatment facility.

(2) An individual land owner who seeks to construct his/her own single-family residence or associated residential structures on the site is exempt from the Edwards Aquifer protection plan application requirements under this section, provided that he/she does not exceed 20 percent impervious cover on the site.

(3) Temporary erosion and sedimentation controls are required to be installed and maintained for exempted activities on the recharge zone.

(4) All temporary erosion and sedimentation controls

(A) must meet the requirements contained in subsection (b)(4)(D)(i) of this section,

(B) must be installed prior to construction,

(C) must be maintained during construction, and

(D) may be removed only when vegetation is established and the construction area is stabilized.

(5) The executive director may monitor stormwater discharges from these projects to evaluate the adequacy of the temporary erosion and sedimentation control measures. Additional protection will be required if the executive director determines that these controls are inadequate to protect water quality.

§213.7. Plugging of Abandoned Wells and Borings.

(a) All identified abandoned water wells, including injection, dewatering, and monitoring wells must be plugged pursuant to requirements of the Texas Department of Licensing and Regulation under 16 TAC Chapter 76 (Licensing and Regulation of Water

Well Drillers and Water Well Pump Installers) and all other locally applicable rules, as appropriate.

(b) Abandoned injection wells must be closed under the requirements of Chapter 331 of this title (relating to Underground Injection Control).

(c) All borings with depths greater than or equal to 20 feet must be plugged with a non-shrink grout from the bottom of the hole to within three feet of the surface. The remainder of the hole must be backfilled with cuttings from the boring or gravel. All borings less than 20 feet must be backfilled with cuttings from the boring or gravel. All borings must be backfilled or plugged within four days of completion of the drilling operation. Voids may be filled with gravel.

§213.8. Prohibited Activities.

(a) Recharge zone. The following activities are prohibited on the recharge zone:

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

(4) the use of a sewage holding tank as part of an organized sewage collection systems (lift stations approved by the executive director are not prohibited);

(5) new municipal solid waste landfill facilities required to meet and comply with Type I standards which are defined in §330.41(b), (c), and (d) of this title (relating to Types of Municipal Solid Waste Facilities); and

(6) new municipal and industrial wastewater discharges into or adjacent to water in the state that would create additional pollutant loading.

(b) (No change.)

§213.9. Exceptions.

(a) Granting of exceptions. Exceptions to any substantive provision of this chapter related to the protection of water quality may be granted by the executive director if the requestor can demonstrate equivalent water quality protection for the Edwards Aquifer. No exception will be granted for a prohibited activity. Prior approval under this section must be obtained from the executive director for the exception to be authorized.

(b) (No change.)

(c) Fees related to requests for exceptions. A person submitting an application for an exception, as described in this section, must pay $250 for each exception request. The fee is due and payable at the time the exception request is filed, and should be submitted as described in §213.12 of this title (relating to Application Fees). If the exception request fee is not submitted in the correct amount, the executive director is not required to consider the exception request until the correct fee is submitted.

This agency 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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Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
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Subchapter B. Contributing Zone to the Edwards Aquifer in Medina, Bexar, Comal, Kenney, Uvalde, Hays, Travis and Williamson Counties

30 TAC §§213.20-213.28

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code, §§5.103, 5.105, 26.011, 26.046, 26.0461, 26.121, 26.341, and 28.011 and Texas Health and Safety Code, §§361.024 and 366.012 which provide the commission with the authority to promulgate rules necessary for the exercise of its jurisdiction and powers provided by the Codes and other laws.

§213.20. Purpose.

(a) The purpose of this subchapter is to regulate activities in the contributing zone to the Edwards Aquifer having the potential for polluting surface streams which recharge the Edwards Aquifer and to protect existing and potential beneficial uses of groundwater in the Edwards Aquifer.

(b) Nothing in this subchapter is intended to restrict the powers of the commission or any other governmental entity to prevent, correct, or curtail activities in the contributing zone that result or may result in pollution of the Edwards Aquifer or hydrologically connected surface waters. These rules are not exclusive and other rules also apply. In addition to the rules of the commission, EPA NPDES general permits for Storm Water Discharges from Construction Activities and local ordinances and regulations providing for the protection of water quality may also apply to activities in the contributing zone.

(c) The executive director must review and act on contributing zone plans subject to this subchapter. The applicant or a person affected may file with the chief clerk a motion for reconsideration, under §50.39(b)-(f) of this title (relating to Motion for Reconsideration), of the executive director's final action on a contributing zone plan or modification to a plan.

§213.21. Applicability and Person or Entity Required to Apply.

(a) These rules apply only to the contributing zone as defined in §213.22 of this title (relating to Definitions) of the Edwards Aquifer. These rules are not intended to be applied to any other contributing zones for any other aquifers in the state of Texas.

(b) These rules apply only to regulated activities disturbing at least five acres, or regulated activities disturbing less than five acres which are part of a larger common plan of development or sale with the potential to disturb cumulatively five or more acres.

(c) Areas identified as contributing zone within the transition zone described by definition §213.22(2) of this title and delineated on the official recharge and transition zone maps of the agency as provided by §213.3(25) and (34) of this title (relating to Definitions), respectively, are subject to both the requirements of this subchapter governing the contributing zone and to the provisions of §213.5(a)(3)and (4); 213.5(d), (e), and (f) of this title (relating to Prohibited Activities); 213.7 of this title (relating to Required Edwards Aquifer Protection Plans, Notification, and Exemptions); and 213.8(b) of this title (relating to Prohibited Activities) which govern activities in the transition zone.

(d) Unless otherwise provided under this subchapter, executive director approval of a contributing zone plan must be obtained prior to beginning construction of a new or additional regulated activity.

(e) Regulated activities are allowed to be conducted under this subchapter only by applicants who have a letter of contributing zone plan approval issued by the executive director. This letter is issued under §213.23 of this title (relating to Plan Processing and Approval).

(f) Regulated activities will be considered to have commenced construction and not subject to this subchapter if, on the effective date of the rule, all federal, state, and local approvals or permits required to begin physical construction have been obtained, and if either on-site construction directly related to the development has begun or construction commences within six months of the effective date of the rule.

(g) Assumption of program by local government.

(1) A local governmental entity may assume the rights, duties, and responsibilities to review and either approve or deny contributing zone protection plan applications within its boundaries and monitor and enforce compliance with plans if the local government obtains certification from the executive director.

(2) In order to obtain certification, the local government must demonstrate:

(A) it has a water quality protection program equal to or more stringent than the rules contained in this subchapter, including but not limited to a program that:

(i) regulates activities covered under this chapter, and

(ii) has performance standards equal to or more protective of water quality;

(B) it has adopted ordinances or has other enforceable means sufficient to enforce the program throughout the local governmental entities jurisdiction; and

(C) it has adequate resources to implement and enforce the program.

(3) Upon approval of a request for certification under this subsection, the executive director shall enter into an agreement with the local governmental entity to provide for the terms and conditions of program assumption, including executive director oversight. Nothing in a certification or agreement shall affect the commission's ability to enforce its water quality protection rules or applicable state law.

(4) An agreement under paragraph (3) of this subsection shall not provide for the payment of fees required by this chapter to the local entity; rather, fees shall be paid to the commission. Nor shall such agreement provide for partial assumption of the program unless expressly authorized by the commission.

(5) Certification shall be for a term not to exceed five years, subject to renewal.

(6) Upon written notice, certification may be revoked or suspended by the executive director if the local entity does not meet the terms and conditions of the agreement provided under paragraph (4) of this subsection or fails to meet the criteria for certification provided under paragraph (2) of this subsection.

(7) A decision by the executive director under this subsection is not subject to appeal to the commission.

(h) The effective date of this subchapter is June 1, 1999.

§213.22. Definitions.

The definitions in Texas Water Code, §§26.001, 26.263, and 26.342 and in §213.3 of this title (relating to Definitions) apply to this subchapter. Those definitions have the same meaning unless the context in which they are used clearly indicates otherwise, or those definitions are inconsistent with the definitions listed in this section.

(1) Best Management Practices (BMPs) - Schedule of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the discharge of pollutants to the Edwards Aquifer and hydrologically connected surface streams. BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.

(2) Contributing zone - The area or watershed where runoff from precipitation flows downgradient to the recharge zone of the Edwards Aquifer. The contributing zone is illustrated on Contributing Zone (Southern Part) for the Edwards Aquifer and Contributing Zone (Northern Part) for the Edwards Aquifer. The contributing zone is located upstream (upgradient) and generally north and northwest of the recharge zone for the following counties:
Figure 1: 30 TAC §213.22(2)
Figure 2: 30 TAC §213.22(2)

(A) all areas within Kinney County, except the area within the watershed draining to Segment 2304 of the Rio Grande Basin;

(B) all areas within Uvalde, Medina, Bexar, and Comal Counties;

(C) all areas within Hays and Travis Counties, except the area within the watersheds draining to the Colorado River above a point 1.3 miles upstream from Tom Miller Dam, Lake Austin at the confluence of Barrow Brook Cove, Segment 1403 of the Colorado River Basin; and

(D) all areas within Williamson County, except the area within the watersheds draining to the Lampasas River above the dam at Stillhouse Hollow reservoir, Segment 1216 of the Brazos River Basin.

(3) Contributing zone within the transition zone- The area or watershed where runoff from precipitation flows downgradient to the recharge zone of the Edwards Aquifer. The contributing zone within the transition zone is depicted in detail on the official recharge and transition zones maps of the agency as provided for in §213.3(25) and (34) of this title (relating to Definitions), respectively. The contributing zone within the transition zone is located downstream (downgradient) and generally south and southeast of the recharge zone and includes specifically those areas where stratigraphic units not included in the Edwards Aquifer crop out at topographically higher elevations and drain to stream courses where stratigraphic units of the Edwards Aquifer crop out and are mapped as recharge zone.

(4) EPA National Pollutant Discharge Elimination System general permits for storm water discharges from construction activities (EPA NPDES general permits) - United States Environmental Protection Agency national pollutant discharge elimination system general permits for storm water discharges from construction activities in Region 6 as reissued in the July 6, 1998 issue of the *Federal Register* (63 FR 36489-36519).

(5) NOI - Notice of intent required by the EPA NPDES general permits for storm water discharges from construction activities.

(6) Regulated activity -

(A) Any construction or post-construction activity occurring on the contributing zone of the Edwards Aquifer that has the potential for contributing pollution to surface streams that enter the Edwards Aquifer recharge zone.

(i) These activities include construction or installation of:

(I) buildings;

(II) utility stations;

(III) utility lines;

(IV) underground and aboveground storage tank systems;

(V) roads;

(VI) highways; or

(VII) railroads.

(ii) Clearing, excavation, or other activities which alter or disturb the topographic or existing stormwater runoff characteristics of a site are regulated activities.

(iii) Any other activities that pose a potential for contaminating stormwater runoff are regulated activities.

(B) "Regulated activity" does not include:

(i) the clearing of vegetation without soil disturbance;

(ii) agricultural activities, except feedlots/concentrated animal feeding operations which are regulated under Chapter 321 of this title (relating to Control of Certain Activities by Rule);

(iii) activities associated with the exploration, development, and production of oil or gas or geothermal resources under the jurisdiction of the Railroad Commission of Texas;

(iv) routine maintenance of existing structures that does not involve site disturbance such as but not limited to:

(I) the resurfacing of existing paved roads, parking lots, sidewalks, or other development-related impervious surfaces, and

(II) the building of fences, or other similar activities which present little or no potential for contaminating hydrologically-connected surface water;

(v) routine maintenance that involves little or no change to the topographic or geologic features; or

(vi) construction of single-family residences on lots that are larger than five acres, where no more than one single-family residence is located on each lot.

(7) Site - The entire area within the legal boundaries of the property described in the application. Regulated activities on a site located partially on the recharge zone and the contributing zone must be treated as if the entire site is located on the recharge zone, subject to requirements under Subchapter A of this chapter.

§213.23. Plan Processing and Approval.

(a) Approval by the executive director.

(1) No person may begin the construction of any regulated activity until a contributing zone plan or modification to a plan as required by §213.21 of this title (relating to Applicability and Persons or Entity Required to Apply) has been:

(A) filed with the appropriate regional office, and

(B) the application has been reviewed and approval letter issued by the executive director.

(2) A complete application for approval of a contributing zone plan, as described in this section, must be submitted with a copy of the notice of intent and the appropriate fee as specified in §213.27 of this title (relating to Contributing Zone Plan Application and Exception Fees). The application may be submitted to the executive director for approval prior to the submittal of the notice of intent to the EPA.

(b) Contents of application. Applications for contributing zone plan approval filed under this subchapter must be made on forms provided by or approved by the executive director. Each application must, at a minimum, include the following:

(1) the name of the development, subdivision, or facility for which the application is submitted and the name, address, and telephone number of the owner or any other persons signing the application;

(2) a narrative description of the location of the project or facility for which the application is submitted, presenting sufficient detail and clarity so that the project site and its boundaries can be located during a field inspection;

(3) a technical report as described under §213.24 of this title must accompany the application for plan approval; and

(4) any additional information needed by the executive director for plan approval.

(c) Submission of application.

(1) An original and one copy of the application must be submitted to the appropriate regional office.

(2) Only the following may submit an application for review and approval by the executive director:

(A) owner(s);

(B) the owner(s)' authorized agent(s); or

(C) those persons having the right to possess and control the property which is the subject of the contributing zone plan.

(d) Signatories to applications. All applications must be signed as specified under §213.4(d)(1) of this title (relating to Required Signature). The executive director requires written proof of authorization for any person signing an application.

(e) Executive director review.

(1) The executive director must complete the review of an application for contributing zone plan approval within 15 calender days of receipt by the appropriate regional office.

(2) Grounds for denial of an application include, but are not limited to, failure to pay the application fee and failure to include all information listed in this section.

(3) If the executive director fails within 16 calendar days after receipt of the application to issue a letter approving or denying the application, the application shall be deemed to be granted.

(f) Additional provisions. As a condition of contributing zone plan approval, the executive director may impose additional provisions necessary to protect the Edwards Aquifer from pollution. The executive director may conditionally approve a contributing zone

plan or impose special conditions on the approval of a contributing zone plan. Upon inspection, the executive director may require the applicant to take additional measures if the activities do not conform to an approved plan or the plan did not address all potential sources of pollution as required by these rules.

(g) Term of approval. The executive director's approval of a contributing zone plan will expire two years after the date of initial issuance, unless prior to the expiration date, substantial construction related to the approved plan has commenced. For purposes of this subsection, substantial construction is where more than ten percent of total construction has commenced. If a written request for an extension is filed under the provisions of this subsection, the approved plan continues in effect until the executive director acts on the request for an extension.

(1) A written request for an extension must be received not earlier than 60 days prior to the expiration date of an approved contributing zone plan or a previously approved extension. Requests for extensions are subject to fees outlined in §213.28 of this title (relating to Fees Related to Requests For Contributing Zone Plan Approval Extension).

(2) An executive director's approved extension will expire six months after the original expiration date of the approved contributing zone plan or a previously approved extension unless prior to the expiration date, commencement of construction, repair, or replacement related to the approved plan has occurred.

(3) A plan approval will expire and no extension will be granted if less than 50 percent of the total construction has been completed within ten years from the initial approval of a plan. A new plan must be submitted to the appropriate regional office with the appropriate fees for review and approval by the executive director prior to commencing any additional regulated activities.

(4) Any requests for extensions received by the executive director after the expiration date of an approved contributing zone plan or a previously approved extension will not be accepted. A new application for the purposes of this subchapter must be submitted to the appropriate regional office with the appropriate fees for the review and approval by the executive director.

(5) An extension will not be granted if the proposed regulated activity under an approved plan has changed.

(h) Legal transfer of property. Upon legal transfer of property, the new owner(s) is required to comply with all terms of the approved contributing zone plan. If the new owner intends to commence any new regulated activity on the site, a new application for plan approval for the new activity must be filed with and approved by the executive director beforehand.

(i) Modification of a previously approved plan. The holder of any approved contributing zone plan letter must notify the appropriate regional office in writing and obtain approval from the executive director prior to initiating any of the following:

(1) any physical or operational modification of any best management practices or structure(s), including but not limited to temporary or permanent ponds, dams, berms, silt fences, and diversionary structures;

(2) any change in the nature or character of the regulated activity from that which was originally approved;

(3) a change that would significantly impact the ability to prevent pollution of the Edwards Aquifer and hydrologically connected surface water; or

(4) any development of land previously identified in a contributing zone plan as undeveloped.

(j) Compliance. The holder of the approved or conditionally approved contributing zone plan letter is responsible for compliance with this subchapter and the approved plan. The holder is also responsible for any special conditions of an approved plan through all phases of plan implementation. Failure to comply with any rule or condition of the executive director's approval is a violation of this rule and is subject to administrative orders and penalties as provided under §213.25 of this title (relating to Enforcement). Such violations may also be subject to civil penalties and injunction.

(k) Responsibility for maintenance of permanent best management practices (BMPs) and measures after construction is complete.

(1) The applicant shall be responsible for maintaining the permanent BMPs after construction until such time as the maintenance obligation is either assumed in writing by another entity having ownership or control of the property (such as without limitation, an owner's association, a new property owner or lessee, a district, or municipality) or the ownership of the property is transferred to the entity. Such entity shall then be responsible for maintenance until another entity assumes such obligations in writing or ownership is transferred.

(2) A copy of the transfer of responsibility must be filed with the executive director at the appropriate regional office within 30 days of the assumption of the obligation or the transfer of ownership.

(3) This section applies to:

(A) multiple single-family residential developments, multi-family residential, and

(B) non-residential developments such as commercial, industrial, institutional, schools, and other sites where regulated activities occur.

§213.24. Technical Report.

For all regulated activities, a technical report must accompany the application for contributing zone plan approval. The report must address the following issues. The site description, controls, maintenance, and inspection requirements for the storm water pollution prevention plan (SWPPP) developed under the EPA NPDES general permits for stormwater discharges may be submitted to fulfill paragraphs (1)-(5) of this section of the technical report, providing the following requirements are met.

(1) The report must contain a location map and the site plan.

(A) The location map must be a legible road map with directions, including mileage, which would enable the executive director to locate the site for inspection.

(B) The site plan must be drawn at a minimum scale of 1 inch to 400 feet. The site plan must show:

(i) the 100-year floodplain boundaries (if applicable);

(ii) the layout of the development, and existing and finished contours at appropriate, but not greater than ten foot contour intervals; and

(iii) a drainage plan showing all paths of drainage from the site to surface streams;

(iv) the drainage patterns and approximate slopes anticipated after major grading activities;

(v) areas of soil disturbance and areas which will not be disturbed;

(vi) locations of major structural and nonstructural controls identified in the technical report;

(vii) locations where stabilization practices are expected to occur;

(viii) surface waters (including wetlands); and

(ix) locations where stormwater discharges to a surface water.

(2) The report must describe the nature of the regulated activity (such as residential, commercial, industrial, or utility), including:

(A) the size of the site in acres;

(B) the projected population for the site;

(C) the amount and type of impervious cover expected after construction is complete, such as paved surface or roofing;

(D) the amount of surface area expected to be occupied by parking lots; and

(E) other factors that could affect the surface water quality;

(3) The report must describe the volume and character of stormwater runoff expected to occur. Estimates of stormwater runoff quality and quantity should be based on area and type of impervious cover, as described in paragraph (2)(C) of this section. An estimate of the runoff coefficient of the site for both the pre-construction and post-construction conditions should be included in the report.

(4) The report must describe any activities or processes which may be a potential source of contamination and must provide the following information:

(A) the intended sequence of major activities which disturb soils for major portions of the site (e.g., grubbing, excavation, grading, utilities, and infrastructure installation);

(B) estimates of the total area of the site that is expected to be disturbed by excavation, grading, or other activities;

(C) a site map indicating the following: approximate slopes anticipated after major grading activities; areas of soil disturbance; areas which will not be disturbed; locations of major structural and nonstructural controls identified in the technical report; locations where stabilization practices are expected to occur; surface waters (including wetlands); and locations where stormwater discharges to a surface water;

(D) location and description of any discharge associated with industrial activity other than construction; and

(E) the name of the receiving water(s) at or near the site which will be disturbed or which will receive discharges from disturbed areas of the project.

(5) The report must describe the temporary best management practices (BMPs) and measures that will be used during construction. The technical report must clearly describe for each major activity identified in paragraph (4) of this section appropriate control measures and the general timing (or sequence) during the construction process when the measures will be implemented. The storm water pollution prevention plan (SWPPP) developed under the EPA NPDES general permits for stormwater discharges may be submitted to fulfill this part of the technical report providing the following requirements are met.

(A) BMPs and measures must prevent pollution of surface water or stormwater that originates upgradient from the site and flows across the site.

(B) BMPs and measures must prevent pollution of surface water that originates on-site or flows off the site, including pollution caused by contaminated stormwater runoff from the site.

(C) A plan for the inspection of the temporary best management practices and measures and for their timely inspection, maintenance, repair, and, if necessary, retrofit must be included in the report.

(D) BMPs and measures must meet the requirements contained in §213.5(b)(4)(D)(i) of this title .

(E) Temporary sediment pond or basin construction plans and design calculation for a proposed temporary BMP or measure must be prepared by or under the direct supervision of a Texas licensed professional engineer. All construction plans and design information must be signed, sealed, and dated by the Texas licensed professional engineer.

(F) The construction-phase erosion and sediment controls should be designed to retain sediment on site to the extent practicable.

(G) All control measures must be properly selected, installed, and maintained in accordance with the manufacturers specifications and good engineering practices. If periodic inspections by the applicant or the executive director or other information indicates a control has been used inappropriately, or incorrectly, the applicant must replace or modify the control for site situations.

(H) If sediment escapes the construction site, off-site accumulations of sediment must be removed at a frequency sufficient to minimize offsite impacts (e.g., fugitive sediment in street could be washed into surface streams or sensitive features by the next rain).

(I) Sediment must be removed from sediment traps or sedimentation ponds when design capacity has been reduced by 50 percent.

(J) Litter, construction debris, and construction chemicals exposed to stormwater shall be prevented from becoming a pollutant source for stormwater discharges (e.g., screening outfalls, picked up daily).

(6) The report must describe the permanent best management practices (BMPs) and measures that will be used after construction.

(A) BMPs and measures must prevent pollution of surface water or stormwater originating on-site or upgradient from the site and flows across the site.

(B) BMPs and measures must prevent pollution of surface water downgradient of the site, including pollution caused by contaminated stormwater runoff from the site.

(C) BMPs and measures must meet the requirements contained in §213.5(b)(4)(D)(ii) of this title.

(i) Construction plans and design calculations for the proposed permanent BMPs and measures must be prepared by or under the direct supervision of a Texas Licensed Professional

Engineer. All construction plans and design information must be signed, sealed, and dated by the Texas Licensed Professional Engineer.

(ii) The technical report must contain a plan for the inspection of the permanent BMPs and measures and for their timely inspection, maintenance, repair, and, if necessary, retrofit, if requirements contained in §213.5(b)(4)(D) of this title are not being met. This plan must be prepared by the engineer designing the permanent BMPs and measures and signed by the owner or responsible party.

(iii) Pilot-scale field testing (including water quality monitoring) may be required for permanent BMPs and measures that are not contained in technical guidance recognized by or prepared by the executive director.

(I) When pilot-scale field testing of an innovative technology (including water quality monitoring) is required, only one pilot site will be approved.

(II) No additional approvals will be granted until the pilot study is complete and the applicant demonstrates adequate protection of surface water that enters the recharges zone of the Edwards Aquifer.

(III) If the innovative technology demonstrates adequate protection, additional units may be approved for use as permanent BMPs and measures on the contributing zone .

(IV) If the innovative technology demonstrates inadequate protection of surface streams which enter the recharge zone of the Edwards Aquifer, a retrofit of the permanent BMP may be required to achieve compliance with §213.5(b)(4)(D) of this title and no additional units will be approved for use on the contributing zone.

(7) The technical report must describe the measures that will to be taken to avoid or minimize surface stream contamination or changes in the way in which water enters a stream as a result of construction and development. The measures should address the following:

(A) increased stream flashing,

(B) the creation of stronger flows and in-stream velocities, and

(C) other in-stream effects caused by the regulated activity which increase erosion that results in water quality degradation.

(8) The technical report must describe the method of disposal of wastewater from the site.

(A) If wastewater is to be disposed of by conveyance to a sewage treatment plant for treatment and disposal, the existing or proposed treatment facility must be identified.

(B) If wastewater is to be disposed of by an on-site sewage facility, the application must be accompanied by a written statement from the appropriate authorized agent, stating that the site is suitable for the use of private sewage facilities and will meet or exceed the requirements for on-site sewage facilities as specified under Chapter 285 of this title (relating to On-site Sewage Facilities), or identifying those areas that are not suitable.

(C) If wastewater is to be discharged in the contributing zone, requirements under §213.6(c) of this title (relating to Wastewater Treatment and Disposal Systems) must be satisfied.

(9) The technical report must describe the measures that will be used to contain any spill of static hydrocarbons or hazardous substances such as on a roadway or from a pipeline or temporary aboveground storage of 250 gallons or more.

(A) Temporary storage facilities are those used on site for less than one year.

(B) Temporary aboveground storage tank systems of 250 gallons or more cumulative storage capacity must be located a minimum horizontal distance of 150 feet from the five year floodplain of any stream drainage.

(10) The technical report must indicate the placement of permanent aboveground storage tank facilities. Permanent aboveground storage tank facilities for static hydrocarbon and hazardous substances with cumulative storage capacity of 500 gallons or greater must be constructed and spills removed using the standards contained in §213.5(e)(1) of this title.

(11) Exemption.

(A) Regulated activities exempt from the Contributing Zone plan application requirements under this section are:

(i) the installation of underground utilities, including:

(I) storm and sanitary sewage lines;

(II) natural gas lines;

(III) telephone lines;

(IV) electric lines; and

(V) water lines; and

(ii) the installation of underground tanks for the storage of static hydrocarbon and hazardous substances.

(B) An individual land owner who seeks to construct his/her own single-family residence or associated residential structures on the site is exempt from the contributing zone plan application requirements under this subchapter, provided that he/she does not exceed 20 percent impervious cover on the site.

(C) Temporary erosion and sedimentation controls are required to be installed and maintained for exempted activities on the contributing zone. All temporary erosion and sedimentation controls must meet the requirements contained in paragraph (5) of this section, must be installed prior to construction, must be maintained during construction, and may be removed only when vegetation is established and the construction area is stabilized. This subparagraph does not apply to single family residences on a site greater than 5 acres or on a site less than 5 acres and not a part of a common plan of development or sale with the potential to disturb cumulatively five or more acres.

(D) The executive director may monitor stormwater discharges from these projects to evaluate the adequacy of the temporary erosion and sedimentation control measures. Additional protection will be required if the executive director determines that these controls are inadequate to protect water quality.

§213.26. Exceptions.

(a) Granting of exceptions. Exceptions to any substantive provision of this subchapter related to the protection of water quality may be granted by the executive director if the requestor can demonstrate equivalent water quality protection for surface streams which enter the recharge zone of the Edwards Aquifer. Prior approval under this section must be obtained from the executive director for the exception to be authorized.

(b) Procedure for requesting an exception. A person requesting an exception to the provisions of this subchapter relating to the protection of water quality must file an original and one copy of a written request with the executive director at the appropriate regional office stating in detail:

(1) the name, address, and telephone numbers of the requestor;

(2) site and project name and location;

(3) the nature of the exception requested;

(4) the justification for granting the exception as described in subsection (a) of this section; and

(5) any other pertinent information that the executive director requests.

(c) Fees related to requests for exceptions. A complete application for an exception, as described in this section, must be submitted with the appropriate fee as specified in §213.28 of this title (relating to Contributing Zone Plan Application and Exception Fees). If the exception request fee is not submitted in the correct amount, the executive director is not required to consider the exception request until the correct fee is submitted.

§213.27. Contributing Zone Plan Application and Exception Fees.

The person submitting an application for approval or modification of any contributing zone plan or exception under this subchapter must pay an application fee of $250 . The fee is due and payable at the time the application is filed. The fee must be sent to either the appropriate regional office or the cashier in the agency headquarters located in Austin, accompanied by an Edwards Aquifer Contributing Zone Fee Application Form, provided by the executive director. Application fees must be paid by check or money order, payable to the "Texas Natural Resource Conservation Commission". If the application fee is not submitted in the correct amount, the executive director is not required to consider the application until the correct fee is submitted.

§213.28. Fees Related to Requests for Contributing Zone Plan Approval Extension.

The person submitting an application for an extension of an approval of any contributing zone plan under this subchapter must pay $100 for each extension request. The fee is due and payable at the time the extension request is filed, and should be submitted as described in §213.27 of this title (relating to Contributing Zone Plan Application and Exception Fees). If the extension fee is not submitted in the correct amount, the executive director is not required to consider the extension request until the correct fee is submitted. The extension request must be submitted to the appropriate regional office and must include a copy of the contributing zone plan application and approval letter that is the subject of the extension request.

This agency 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 September 25, 1998.

TRD-9815098
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: June 1, 1999
Proposal publication date: March 27, 1998
For further information, please call: (512) 239-4340

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

Part X. Texas Water Development Board

Chapter 363. Financial Assistance Programs

Subchapter B. State Water Pollution Control Revolving Fund

Division 1. Introductory Provisions

31 TAC §363.202, §363.209

The Texas Water Development Board (board) adopts amendments to §363.202 and §363.209, concerning Financial Assistance Programs without changes to the proposed text as published in the June 5, 1998 issue of the *Texas Register* (23 TexReg 5943). The amendments to §363.209 provide a new method for borrowers to finance loan origination fees from revenues. This change is proposed as a result of a recent ruling of the U.S. Environmental Protection Agency that costs for administering the State Revolving Fund (SRF) that are included within loans and disbursed from the SRF are to be calculated as subject to the four percent (4%) administrative cost ceiling.

Amendments to §363.202 add a definition for "repayment schedule" and repeat amendments to definitions which were adopted in the July 3, 1998 issue of the *Texas Register* (23 TexReg 7028) to comply with new numbering requirements of the Texas Register.

Comments were received from the U.S. Environmental Protection Agency (EPA). EPA primarily sought assurances that the method of capitalizing interest would not result in a loaning of loan origination fees from the clean water state revolving fund program funds.

The amendments are adopted 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.

This agency 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 September 23, 1998.

TRD-9815021
Suzanne Schwartz
General Counsel
Texas Water Development Board
Effective date: October 13, 1998
Proposal publication date: June 5, 1998
For further information, please call: (512) 463–7981

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

Part I. Texas Department of Human Services

Chapter 19. Nursing Facility Requirements for Licensure and Medicaid Certification

The Texas Department of Human Services (DHS) adopts amendments to §§19.201, 19.602, 19.1203, 19.1510, 19.1912, 19.1920, 19.1921, 19.2008, 19.2104, 19.2106, 19.2108, and 19.2312, concerning nursing facility requirements for licensure and medicaid certification. The amendments to §§19.1203, 19.1510, 19.1912, 19.1920, 19.1921, 19.2104, 19.2106, 19.2108, and 19.2312, without changes to the proposed text as published in the June 26, 1998, issue of the *Texas Register* (23 TexReg 6705). The amendments to §§19.201, 19.602, and 19.2008 are adopted with changes.

Justification for the amendments is to protect the health and safety of residents of Texas nursing facilities by improving methods of reporting abuse and neglect, increasing the number and types of drugs that may be kept in the emergency drug kit, correcting time frames regarding required frequency of physician visits and the submission of resident assessments, and requiring that facilities make reasonable and prudent efforts to prepare for computer changes resulting from the year 2000.

The amendments will function by incorporating changes regarding reporting abuse and neglect; and correcting errors regarding required frequency of physician visits, time frames for retaining resident assessments in the active clinical record, appeals for suspension, revocation and denial of a license, and copying nurses' licenses; relaxing restrictions on the number and types of prescription medications allowed in emergency drug kits; changing the procedure regarding surety bonds and letters of credit when a facility changes ownership; and adding a requirement about computer changes and the year 2000.

The department received comments regarding adoption of the amendments from the Texas Health Care Association. A summary of the comments and the department's responses follow.

Comment: Regarding §19.201, Year 2000 Requirement, the proposed rule is too vague and agreement was reached with the Department's Aged and Disabled Advisory Committee that the following wording will be adopted in 19.201(d): In respect to all licenses in effect after December 31, 1999: All services provided under licensure by the Texas Department of Human Services are required, as a condition of licensure, not to constitute a threat to the health and safety of residents as a result of computer software, firmware or imbedded logic unable to recognize different centuries or more than one century on or after January 1, 2000.

Response: The department concurs and has made the requested change.

Comment: Regarding §19.602, Incidents of Abuse and Neglect Reportable to the Texas Department of Human Services (DHS) by Facilities, the phrases in (b) are vague and confusing. In order to comply with the statute, more work is needed to clarify what is to be reported. The following terms need to be defined:

Hospitalization - There are several definitions of hospitalization used in health care. For instance, a trip to the emergency room does not necessarily constitute a hospitalization. Emergency room visits are considered outpatient visits and are not an impatient stay.

Under Medicare, a person can be considered outpatient with a leave of absence from the nursing facility and up to 72 hours in the emergency room without ever being admitted to the hospital. Some reasons that a patient is sent to the ER include insertion of NG or G tube, out-patient surgery to place a feeding tube, dialysis, MRI, a plugged Foley or supra-pubic catheter, and X-rays. An attending physician contacted over the weekend many times will have the facility send the resident to the ER and the attending physician is contacted with the findings.

Medicare looks at an acute inpatient stay that is counted by midnights as hospitalization and reimbursable under DRG's. Therefore, the commenter recommends that the definition of hospitalization be admission as an inpatient in the acute care portion of a hospital.

Conduct or Conditions - The statute at 242.1225(b) states that "The board shall adopt rules requiring any person required to report abuse or neglect under section 242.122 to report other conduct or conditions..." The commenter interprets this to mean that the rules should define conduct or condition.

The statute at 242.1225(b) states that "a report made under this section must be made in the manner specified by board rule." Our interpretation of the statute requires the form to be included in the rule. The proposed rule only refers to a form but does not include the actual form.

Response: The department does not concur that a definition of hospitalization is needed. The rule does not require reporting hospitalizations in general, but rather conduct or conditions which result in hospitalization of residents. If facility conduct or conditions result in a resident being sent to the hospital, whether the resident is admitted or treated in the emergency room, the facility must report the conduct or conditions. The department agrees that a definition of conduct or conditions is needed and has amended §19.602 to include the definition. The department has also deleted the proposed requirement for the submission of a form.

Comment: Regarding §19.2008, Investigations of Incidents and Complaints, the rule should clarify what is meant by "any person designated to receive information concerning the resident." Is this a person designated by the resident?

Response: The department agrees that the rule needs clarification and has changed the phrase to read "any person designated by the resident to receive information concerning the resident."

Subchapter C. Nursing Facility Licensure Application Process

40 TAC §19.201

The amendment is adopted under the Health and Safety Code, Chapter 242, which gives the department the authority to license and regulate nursing facilities.

The amendment implements the Health and Safety Code, §242.037.

§19.201. Criteria for Licensing.

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

(d) In respect to all licenses in effect after December 31, 1999, all services provided under licensure by the Texas Department

of Human Services are required, as a condition of licensure, not to constitute a threat to the health and safety of residents as a result of computer software, firmware, or imbedded logic to recognize different centuries or more than one century on or after January 1, 2000.

(e) An applicant for a license must affirmatively show that:

(1) the applicant and all persons required to submit background information have not been convicted of a felony or crime involving moral turpitude in this state or any other state;

(2) the applicant or license holder has the ability to comply with:

(A) minimum standards of medical care, nursing care and financial condition; and

(B) any other applicable state or federal standard;

(3) the facility meets the standards of the Life Safety Code;

(4) the facility meets the construction standards in Subchapter D of this chapter (relating to Facility Construction); and

(5) the facility meets the standards for operation based upon an on-site survey.

(f) DHS considers the background and qualifications of:

(1) the applicant or license holder;

(2) a partner, officer, director, or managing employee of the applicant or license holder;

(3) a person who owns or who controls the owner of the physical plant of a facility in which the nursing facility operates or is to operate; and

(4) a controlling person with respect to the nursing facility for which a license or license renewal is requested.

(g) In making the evaluation required by subsection (f) of this section, DHS requires the applicant or license holder to file a sworn affidavit of a satisfactory compliance history and any other information required by DHS to substantiate a satisfactory compliance history relating to each state or other jurisdiction in which the applicant or license holder and other person described in subsection (f) of this section operated a long term care facility during the five-year period preceding the date on which the application is made. For purposes of the sworn affidavit of a satisfactory compliance history, the applicant will be considered to have complied with the filing requirement (but not necessarily be entitled to a license) if the applicant swears or affirms that all the information disclosed in the application concerning previous state and federal nursing facility sanctions and penalties and related information are true and correct. The affidavit of compliance history is contained in DHS's application form.

(h) A license is issued if, after inspection and investigation, DHS finds that the applicant or license holder, and any other person described in subsection (e) of this section, meets all requirements of this chapter. The license is valid for two years. Each license specifies the maximum allowable number of residents. The number of residents authorized by the license must not be exceeded.

(i) In making a determination whether to grant a nursing facility license, DHS reviews:

(1) the information contained in the application; and

(2) other documents DHS deems relevant, including survey and complaint investigation findings in each facility the applicant or any other person named in subsection (f) of this section has been affiliated with during the last five years.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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

TRD-9815045
Glenn Scott
General Counsel, Legal Services
Texas Department of Human Services
Effective date: October 15, 1998
Proposal publication date: June 26, 1998
For further information, please call: (512) 438–3765

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Subchapter G. Resident Behavior and Facility Pracctice

40 TAC §19.602

The amendment is adopted under the Health and Safety Code, Chapter 242, which gives the department the authority to license and regulate nursing facilities.

The amendment implements the Health and Safety Code, §242.037.

§19.602. Incidents of Abuse and Neglect Reportable to the Texas Department of Human Services (DHS) by Facilities.

(a) Any facility staff member who has cause to believe that the physical or mental health or welfare of a resident has been or may be adversely affected by abuse, neglect, or exploitation caused by another person must report the abuse, neglect, or exploitation, which includes conduct or conditions resulting in serious accidental injury to residents or hospitalization of residents. Conduct or conditions means a facility practice, actions/inaction by staff or circumstances within a facility resulting in:

(1) serious accidental injury to residents; or

(2) hospitalization of residents.

(b) Reports described in subsection (a) of this section are to be made to the DHS state office, Austin, Texas, at 1-800-458-9858.

(1) The person reporting must make the telephone report immediately on learning of the alleged abuse, neglect, exploitation, conduct, or conditions.

(2) The facility must conduct an investigation of the reported act(s). A written report of the investigation must be sent no later than the fifth working day after the oral report.

(c) Each employee of a facility must sign a statement which states:

(1) the employee may be criminally liable for failure to report abuses; and

(2) under the Health and Safety Code, Title 4, §242.133, the employee has a cause of action against a facility, its owner(s) or employee(s) if he is suspended, terminated, disciplined, or discriminated or retaliated against as a result of:

(A) reporting any action described in subsections (a) and (b) of this section to DHS or a law enforcement agency;

(B) reporting the abuse or neglect or other complaint to the person's supervisors; or

(C) for initiating or cooperating in any investigation or proceeding of a governmental entity relating to care, services, or conditions at the nursing facility.

(d) The statements described in subsection (c) of this section must be available for inspection by DHS.

This agency 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 September 24, 1998.

TRD-9815046
Glenn Scott
General Counsel, Legal Services
Texas Department of Human Services
Effective date: October 15, 1998
Proposal publication date: June 26, 1998
For further information, please call: (512) 438–3765

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Subchapter M. Physician Services

40 TAC §19.1203

The amendment is adopted under the Health and Safety Code, Chapter 242, which gives the department the authority to license and regulate nursing facilities; under the Human Resources Code, Title 2, Chapter 32, which authorizes the department to administer medical assistance programs; and under Texas Government Code §531.021, which provides the Health and Human Services Commission with the authority to administer federal medical assistance funds.

The amendment implements the Health and Safety Code, §242.037, and the Human Resources Code, §§32.001-32.042.

This agency 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 September 24, 1998.

TRD-9815047
Glen Scott
General Counsel, Legal Services
Texas Department of Human Services
Effective date: October 15, 1998
Proposal publication date: June 26, 1998
For further information, please call: (512) 438–3765

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Subchapter P. Pharmacy Services

40 TAC §19.1510

The amendment is adopted under the Health and Safety Code, Chapter 242, which gives the department the authority to license and regulate nursing facilities.

The amendment implements the Health and Safety Code, §242.037.

This agency 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 September 24, 1998.

TRD-9815048
Glenn Scott
General Counsel, Legal Scott
Texas Department of Human Services
Effective date: October 15, 1998
Proposal publication date: June 26, 1998
For further information, please call: (512) 438–3765

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Subchapter T. Administration

40 TAC §§19.1912, 19.1920, 19.1921

The amendments are adopted under the Health and Safety Code, Chapter 242, which gives the department the authority to license and regulate nursing facilities; and under the Human Resources Code, Title 2, Chapter 32, which authorizes the department to administer medical assistance programs; and under Texas Government Code §531.021, which provides the Health and Human Services Commission with the authority to administer federal medical assistance funds.

The amendments implement the Health and Safety Code, §242.037, and the Human Resources Code, §§32.001-32.042.

This agency 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 September 24, 1998.

TRD-9815049
Glen Scott
General Counsel, Legal Services
Texas Department of Human Services
Effective date: October 15, 1998
Proposal publication date: June 26, 1998
For further information, please call: (512) 438–3765

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Subchapter U. Inspections, Surveys, and Visits

40 TAC §19.2008

The amendment is adopted under the Health and Safety Code, Chapter 242, which gives the department the authority to license and regulate nursing facilities.

The amendment implements the Health and Safety Code, §242.037.

§19.2008. Investigations of Incidents and Complaints.

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

(j) The individual reporting the alleged abuse or neglect or other complaint, the resident, the resident's family, any person designated by the resident to receive information concerning the resident, and the facility will be notified of the results of DHS's investigation of a reported case of abuse or neglect or other complaint.

This agency 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 September 24, 1998.

TRD-9815050
Glenn Scott
General Counsel, Legal Services
Texas Department of Human Services
Effective date: October 15, 1998
Proposal publication date: June 26, 1998
For further information, please call: (512) 438–3765

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Subchapter V. Enforcement

40 TAC §§19.2104, 19.2106, 19.2108

The amendments are adopted under the Health and Safety Code, Chapter 242, which gives the department the authority to license and regulate nursing facilities.

The amendments implement the Health and Safety Code, §242.037.

This agency 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 September 24, 1998.

TRD-9815051
Glenn Scott
General Counsel, Legal Services
Texas Department of Human Services
Effective date: October 15, 1998
Proposal publication date: June 26, 1998
For further information, please call: (512) 438–3765

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Subchapter X. Requirements for Medicaid-Certified Facilities

40 TAC §19.2312

The amendment is adopted under the Human Resources Code, Title 2, Chapter 32, which authorizes the department to administer medical assistance programs.

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

This agency 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 September 24, 1998.

TRD-9815052
Glenn Scott
General Counsel, Legal Services
Texas Department of Human Services
Effective date: October 15, 1998
Proposal publication date: June 26, 1998
For further information, please call: (512) 438–3765

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Part II. Texas Rehabilitation Commission

Chapter 106. Contract Administration

Subchapter A. Acquisition of Client Goods and Services

40 TAC §106.3

The Texas Rehabilitation Commission adopts an amendment to §106.3, concerning acquisition of client goods and services, without changes to the proposed text as published in the August 28, 1998, issue of the *Texas Register* (23 TexReg 8823).

The section is being amended to rearrange language in subsections (b) and (c). The subsections contain paragraphs that currently have language at the end that applies to the entire subsection. Therefore, the language contained in paragraph (2) of subsection (b) and paragraph (6) of subsection (c) is being moved into the subsection area so that the language will apply to the entire subsection.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Texas Human Resources Code, Title 7, Chapter 111, §111.018 and §111.023, House Bill Number 1, Article IX, §167, which provides the Texas Rehabilitation Commission with the authority to promulgate rules consistent with Title 7, Texas 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 September 28, 1998.

TRD-9815131
Charles Schiesser
Chief of Staff
Texas Rehabilitation Commission
Effective date: October 18, 1998
Proposal publication date: August 28, 1998
For further information, please call: (512) 424–4050

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TITLE 43. TRANSPORTATION

Part I. Texas Department of Transportation

Chapter 4. Employment Practices

Subchapter F. Employee Training and Education

43 TAC §§4.61, 4.63, 4.64

The Texas Department of Transportation adopts amendments to §§4.61, 4.63, and 4.64, concerning the department's employee training and education program. Sections 4.61, 4.63 and 4.64 are adopted without changes to the proposed text as published

in the July 10, 1998, issue of the *Texas Register* (23 TexReg 7203) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

Government Code, §656.048, requires state agencies to adopt rules relating to the eligibility of the department's administrators and employees for training and education supported by the state agencies and the obligations assumed by the administrators and employees on receiving the training and education.

These sections are amended to reflect organizational changes within the department.

Section 4.61 is amended to include definitions for district, district engineer, division, division director, and office director to reflect who will make decisions concerning the education assistance programs. The definition for senior management team has been deleted to reflect the elimination of the use of this term in the department.

Sections 4.63 and 4.64 have been amended to allow the district engineer, division director, office director, or administrator to nominate for, approve participation in, and determine eligibility in the program instead of the management team member. The district engineer, division director, or office director were part of the management team, but the term "management team" is no longer being used. The appropriate district engineer, division director, office director, or administrator may also approve the type of institution and receive course credit verification. The director of the Human Resources Division may approve an extension in the full-time master's program. Amendments also reflect the reorganization of the Training, Quality and Development Division as a section within the Human Resources Division.

COMMENTS

No comments were received on the proposed amendments.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation, and more specifically, Transportation Code, Chapter §656.048 which requires state agencies to adopt rules relating to the eligibility of the department's administrators and employees for training and education and the obligations assumed by the administrators and employees on receiving the training and education.

This agency 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 September 28, 1998.

TRD-9815135
Bob Jackson
Deputy General Counsel
Texas Department of Transportation
Effective date: October 18, 1998
Proposal publication date: July 10, 1998
For further information, please call: (512) 463–8630

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Chapter 5. Finance

Subchapter C. Hardship Financing For Utility Adjustments, Relocations, and Removals

43 TAC §§5.21–5.29

The Texas Department of Transportation adopts new §§5.21-5.29, concerning hardship financing for utility adjustments, relocations, and removals. Sections 5.21-5.29 are adopted without changes to the proposed text as published in the July 10, 1998, issue of the *Texas Register* (23 TexReg 7205) and will not be republished.

EXPLANATION OF ADOPTED NEW SECTIONS

House Bill 1898, 75th Legislature, 1997, amended Transportation Code, §203.092 and §203.093, and added Transportation Code, §203.0921 to enable the department to finance a utility relocation which is not eligible for state reimbursement when a short-term financial condition exists which prevents the utility from being able to fund the relocation. By financing these utility adjustments, the department will be able to complete its highway projects in a more timely manner and allow displaced utilities to maintain continuous service to the public during highway construction.

New §5.21, Purpose and Scope, sets forth the purpose of the new sections, which is to prescribe a process to finance utility relocations that are not eligible for state participation under Transportation Code, Chapter 203, Subchapter E.

New §5.22, Definitions, defines words and terms used in the subchapter.

New §5.23, Ineligible Payments, details expenses which are not eligible for financing under the subchapter.

New §5.24, Pre-application Procedures, outlines the requirements for a memorandum of understanding which must be entered into prior to applying for financing under the subchapter. Such an agreement is required by Transportation Code, §203.0921(a)(4).

New §5.25, Application, sets forth the requirements for an application to the commission for financing. It contains a list of items which must be included on or attached to the application. The application will enable the commission to determine that the financing meets the established criteria under the subchapter.

New §5.26, Commission Approval, provides criteria which must be met before the commission may approve the requested financing. The commission must make a determination that the relocation is essential for the timely completion of the project, continuous service to the utility's customers is essential to the public well-being or to the local economy, a factual basis exists which establishes that the utility has a hardship, and the utility has the ability to reimburse the amount financed plus interest. These criteria are prescribed by statute.

New §5.27, Reimbursement Agreement, describes the form of the reimbursement agreement and contains a list of minimum terms which must be included in the agreement. This section implements the requirements of the statute and further provides safeguards to ensure repayment of state funds.

New §5.28, Release of Funds, explains how and under what circumstances state funds will be released to the utility's contractor or, alternatively, to the department's contractor. It details the final billing and retainage on partial billing.

New §5.29, Repayment and Default, prescribes details of how total costs are determined, the circumstances under which indirect costs will be included, and the results of default.

COMMENTS

No comments were received on the proposed rules.

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, and more specifically Transportation Code, §203.095, which provides the Texas Transportation Commission with the authority to establish rules to implement Transportation Code, Chapter 203, Subchapter E. §5.21. Purpose and Scope. This subchapter prescribes a process to enable the department to complete its highway projects in a timely manner and allow displaced utilities to maintain continuous service to the public during highway construction. In compliance with Transportation Code, Chapter 203, Subchapter E, this subchapter provides policies and procedures to enable the state to finance a utility relocation which is not eligible for state reimbursement when a short-term financial condition exists which prevents the utility from being able to fund the relocation.

This agency 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 September 28, 1998.

TRD-9815136
Bob Jackson
Deputy General Counsel
Texas Department of Transportation
Effective date: October 18, 1998
Proposal publication date: July 10, 1998
For further information, please call: (512) 463–8630

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Chapter 6. State Infrastructure Bank

Subchapter D. Department and Commission Action

43 TAC §6.32

The Texas Department of Transportation adopts amendment to §6.32, concerning commission action. Section 6.32 is adopted without changes to the proposed text as published in the July 10, 1998, issue of the *Texas Register* (23 TexReg 7208) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENT

Section 350 of the Federal National Highway System Designation Act of 1995 (Pub. L. No. 104-59) provides that federal funds are available for the provision of financial assistance to eligible transportation projects through a state infrastructure bank. Transportation Code, Chapter 222, Subchapter D created a state infrastructure bank to provide financial assistance for urgently needed transportation systems.

The state infrastructure bank's operating rules currently require applications for financial assistance from the bank to be subject to a two step commission approval process. This process is cumbersome for applications for small amounts of funds, which generally do not involve large, complex projects, or a complex financing structure, requiring a more extensive examination by the department and the commission before a financial assistance decision is made.

The amendments to §6.32 would allow the commission to approve applications for financial assistance in the amount of $250,000 or less using a one step approval process. Any such approval would still be subject to the project requirements, considerations, and determinations required for other applications. The amendments would also provide the commission with the discretion to require these small loan applications to be subject to the two step approval process if the complexity or size of the project, the type of infrastructure or asset, or the complexity of the project's and the applicant's financial status requires it.

COMMENTS

No comments were received on the proposed rules.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation, and more specifically, Transportation Code, Chapter 222, Subchapter D, which requires the commission to, by rule, implement the subchapter and establish eligibility criteria for an entity applying for financial assistance from the state infrastructure bank.

This agency 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 September 28, 1998.

TRD-9815137
Bob Jackson
Deputy General Counsel
Texas Department of Transportation
Effective date: October 18, 1998
Proposal publication date: July 10, 1998
For further information, please call: (512) 463–8630

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REVIEW OF AGENCY RULES

This Section contains notices of state agency rules review as directed by the 75th Legislature, Regular Session, House Bill 1 (General Appropriations Act) Art. IX, Section 167. Included here are: (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption*, which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the ***Texas Administrative Code*** on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the ***Texas Register*** office.

Proposed Rule Reviews

Texas Ethics Commission

Title 1, Part II

In accordance with the General Appropriations Act, Article IX, Section 167, 75th Legislature, 1997, the Texas Ethics Commission proposes to review Title 1, Texas Administrative Code, chapters 18 (General Rules Concerning Reports), 20 (Reporting Political Contributions and Expenditures), 22 (Restrictions on Contributions and Expenditures), 24 (Restrictions on Contributions and Expenditures Applicable to Corporations and Labor Organizations). The reason for adopting the rules continues to exist.

Comments on the proposed review from any member of the public are solicited. A written comment should be mailed or delivered to Karen Lundquist, Texas Ethics Commission, P.O. Box 12070, Austin, TX 78711-2070, or by facsimile (FAX) to (512)463-5777. A person who wants to offer spoken comments to the commission concerning the proposed review may do so at any commission meeting during the agenda item "Communication to the Commission from the Public." Information concerning the date, time, and location of commission meetings is available by telephoning (512)463-5800 or, toll free in Texas, (800) 325-8506.

TRD-9815206
Tom Harrison
Executive Director
Texas Ethics Commission
Filed: September 28, 1998

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State Finance Commission

Title 7, Part I

The Finance Commission of Texas files this notice of intention to review Texas Administrative Code, Title 7, Chapter 12, Subchapter A (§;12.1-12.11), relating to legal lending limits, pursuant to the Appropriations Act of 1997, HB 1, Article IX, Section 167 (Section 167). The commission will accept comments for 30 days following the publication of this notice in the *Texas Register* as to whether the reasons for adopting the sections in this subchapter continue to exist. Final consideration of this rules review is scheduled for the commission's meeting on December 11, 1998.

The Texas Department of Banking, which administers these rules, believes that the reasons for adopting the rules contained in this subchapter continue to exist. The rules were substantially rewritten and revised effective March 1, 1996, to be in accordance with the recently enacted Texas Banking Act and recently revised federal regulations on this same topic that govern national bank competitors of state banks.

Any questions or written comments pertaining to this notice of intention to review should be directed to Everette D. Jobe, General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Austin, Texas, 78705, or by e-mail to everette.jobe@banking.state.tx.us. Any proposed changes to rules as a result of the review will be published in the Proposed Rules Section of the *Texas Register* and will be open for an additional 30 day public comment period prior to final adoption or repeal by the commission.

TRD-9815298
Everette D. Jobe
Certifying Official
State Finance Commission
Filed: September 30, 1998

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General Services Commission

Title 1, Part V

The General Services Commission (the "Commission") proposes to review Title 1, Texas Administrative Code, Part V, Chapter 126, Sections 126.1 through 126.21 relating to the SURPLUS and SALVAGE PROPERTY PROGRAM pursuant to the General Appropriations, Article IX, Section 167, 75th Legislature.

As part of the review process, the General Services Commission proposed an amendment to Title 1, Texas Administrative Code, Chapter 126, Section 126.3 that was published June 12, 1998, in the *Texas Register* (23 TexReg 6107). Section 126.3 was adopted without comment and published July 31, 1998, in the *Texas Register* to become effective August 6.

The Commission is not proposing any changes to Sections 126.1, 126.2, 126.4, 126.5, 126.20 and 126.21. The assessment made by the Commission at this time indicates that the reason for adopting or readopting these rules continues to exist.

Comments on the review may be submitted in writing within 30 days following the publication of this notice in the *Texas Register* to Judy Ponder, General Counsel, General Services Commission, P.O. Box 13047, Austin, TX 78711-3047.

TRD-9815250
Judy Ponder
General Counsel
General Services Commission
Filed: September 29, 1998

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Texas Department of Health

Title 25, Part I

The Texas Department of Health (department) will review and consider for readoption, revision or repeal Title 25, Texas Administrative Code, Part I, Chapter 289, Radiation Control, Subchapter C, Texas Regulations for Control of Radiation, §289.112.

The review and consideration is being conducted in accordance with the General Appropriations Act, Article IX, Rider 167, passed by the 75th Legislature.

An assessment will be made by the department as to whether the reasons for adopting or readopting these rules continue to exist. This assessment will be continued during the rule review process. Each rule will be reviewed to determine whether it is obsolete, whether the rule reflects current legal and policy considerations, and whether the rule reflects current procedures of the department. The review of all rules must be completed by August 31, 2001.

Comments on the review may be submitted in writing within 30 days following the publication of this notice in the *Texas Register* to Jayne Nussbaum, Environmental and Consumer Health, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756. Any proposed changes to these rules as a result of the review will be published in the Proposed Rule Section of the *Texas Register* and will be open for an additional 30 day public comment period prior to final adoption or repeal by the department.

TRD-9815228
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: September 28, 1998

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The Texas Department of Health (department) will review and consider for readoption, revision or repeal Title 25, Texas Administrative Code, Part I, Chapter 295, Occupational Health: Subchapter H, Hazardous Chemical Right-to-Know §§295.181-295.183. The review and consideration is being conducted in accordance with the General Appropriations Act, Article IX, Rider 167, passed by the 75th Legislature.

An assessment will be made by the department as to whether the reasons for adopting or readopting these rules continue to exist. This assessment will be continued during the rule review process. Each rule will be reviewed to determine whether it is obsolete, whether the rule reflects current legal and policy considerations, and whether the rule reflects current procedures of the department. The review of all rules must be completed by August 31, 2001.

Comments on the review may be submitted in writing within 30 days following the publication of this notice in the *Texas Register* to Jayne Nussbaum, Environmental and Consumer Health, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756. Any proposed changes to these rules as a result of the review will be published in the Proposed Rule Section of the *Texas Register* and will be open for an additional 30 day public comment period prior to final adoption or repeal by the department.

TRD-9815229
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: September 28, 1998

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Texas Board of Nurse Examiners

Title 22, Part XI

The Board of Nurse Examiners proposes to review Chapter 215, Nurse Education in accordance with the Appropriations Act, Section 167. In conjunction with this review, the agency proposes to repeal the existing Sections 215.1-215.20 and proposes new Sections 215.1-215.13 in accordance with the Appropriations Act, Section 167. The proposed repeal and new rules may be found in the Proposed Rules section of the *Texas Register*.

Comments on the proposals may be submitted to Kathy Thomas, MN, RN, Executive Director, Board of Nurse Examiners, 333 Guadalupe, Suite 3-460; Austin, Texas 78701.

TRD-9815138
Kathy Thomas, MN, RN
Executive Director
Board of Nurse Examiners
Filed: September 28, 1998

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Public Utility Commission

Title 16, Part II

The Public Utility Commission of Texas files this notice of intention to review §23.67 relating to Open-access Comparable Transmission Service; and §23.70 relating to Terms and conditions of Open-access Comparable Transmission Service pursuant to the Appropriations Act of 1997, HB 1, Article IX, Section 167 (Section 167). Project Number 18703 has been assigned to the review of these rule sections.

As part of this review process, the commission is proposing the repeal of §23.67 and §23.70 and is proposing new §§25.191 - 25.204 relating to wholesale transmission access and pricing to replace these sections. The proposed repeal and new rules may be found in the Proposed Rules section of the *Texas Register*. As required by Section 167, the commission will accept comments regarding whether the reason for adopting the rules continues to exist in the comments filed on the proposed new sections.

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-9815102

Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: September 25, 1998

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Texas Department of Transportation

Title 43, Part I

The Texas Department of Transportation files this notice of intention to review Title 43, TAC, Part I, Chapter 31 (relating to Public Transportation) 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 31 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-9815132
Bob Jackson
Deputy General Counsel
Texas Department of Transportation
Filed: September 28, 1998

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Texas Water Development Board

Title 31, Part X

The Texas Water Development Board files this notice of intent to review 31 TAC, Part X, Chapter 353, Introductory Provisions, in accordance with the General Appropriations Act, House Bill 1, Article IX, Section 167.

As required by Section 167, the board will accept comments and make an assessment regarding whether the reason for adopting each of the rules in Chapter 353 continues to exist. The comment period will last 30 days beginning with the publication of this notice of intention to review. It is anticipated that some amendments or repeals will be proposed as a result of this review.

Comments or questions regarding this rule review may be submitted to Suzanne Schwartz, General Counsel, Texas Water Development, P.O. Box 13231, Austin, Texas, 78711-3231, by e-mail to sschwart@twdb.state.tx.us or by fax @ 512/463-5580.

TRD-9815308
Suzanne Schwartz
General Counsel
Texas Water Development Board
Filed: September 30, 1998

♦ ♦ ♦

Texas Water Development Board files this notice of intent to review 31 TAC, Part X, Chapter 355, Subchapters A and B, in accordance with the General Appropriations Act, House Bill 1, Article IX, Section 167. Subchapter C, containing §355.90-355.100, is not presented for review because it was adopted in its entirety, after September 1, 1997.

As required by Section 167, the board will accept comments and make an assessment regarding whether the reason for adopting each of the rules in Chapter 355, Subchapters A and B, continues to exist. The comment period will last 30 days beginning with the publication of this notice of intention to review. It is anticipated that some amendments or repeals will be proposed as a result of this review.

Comments or questions regarding this rule review may be submitted to Suzanne Schwartz, General Counsel, Texas Water Development, P.O. Box 13231, Austin, Texas, 78711-3231, by e-mail to sschwart@twdb.state.tx.us or by fax @ 512/463-5580.

TRD-9815309
Suzanne Schwartz
General Counsel
Texas Water Development Board
Filed: September 30, 1998

♦ ♦ ♦

Adopted Rule Reviews

Office of the State Entomologist

Title 4, Part IV

The Office of the State Entomologist readopts, without changes, Chapter 71, in accordance with the Appropriations Act, section 167.

The proposed review appeared in the August 28, 1998 issue of the *Texas Register* (23 TexReg 8849). No comments were received regarding the readoption of this chapter.

TRD-9815243
Paul W. Jackson
State Entomologist
Office of the State Entomologist
Filed: September 29, 1998

♦ ♦ ♦

Texas Natural Resource Conservation Commission

Title 30, Part I

The Texas Natural Resource Conservation Commission (commission) adopts the review of 30 TAC Chapter 213, Subchapter A, concerning the Edwards Aquifer in Medina, Bexar, Comal, Kinney, Uvalde, Hays, Travis and Williamson Counties. This review was conducted in accordance with the General Appropriations Act, Article IX, §167, 75th Legislature, 1997. The proposed review was published in the March 27, 1998 issue of the *Texas Register* (23 TexReg 3192).

REVIEW OF AGENCY RULES

The commission adopts the review of the rules contained in 30 TAC Chapter 213, Subchapter A, concerning the Edwards Aquifer in Medina, Bexar, Comal, Kinney, Uvalde, Hays, Travis and Williamson Counties, as required by the General Appropriations Act, Article IX, §167. Section 167 requires state agencies to review and consider for readoption rules adopted under the Administrative Procedures Act. The reviews must include, at a minimum, an assessment that the reason for the rules continues to exist. The commission has reviewed the rules in Chapter 213, Subchapter A, and determined that the reasons for adopting those rules continue to exist. The rules are still necessary for the protection of the Edwards Aquifer. They apply to the regulation of activities having the potential for polluting the Edwards Aquifer and hydrologically-connected surface streams in order to protect existing and potential beneficial uses of groundwater and maintain Texas Surface Water Quality Standards. The activities addressed are those that pose a threat to water quality in the Edwards Aquifer, the sole or primary source of drinking water for between

1.5 to two million people. Because of its unique hydrogeologic character, this aquifer is extremely vulnerable to contamination, and specific rules regulating activities are necessary. In addition, recent legislative changes during the 75th legislature (1997) to "Fees for Edwards Aquifer Plans," Texas Water Code, §26.0461 indicate that the agency program for protecting the Edwards Aquifer contained under the existing Chapter 213 has been recognized by the legislature as necessary and in need of additional funding.

Sections 213.1, 213.2, and 213.11-213.14 are adopted without change. The commission concurrently adopts amendments to §213.3-213.10 in the Adopted Rules section of this issue of the *Texas Register*. These changes are proposed as a result of the commission's review of the rules, address the commission's regulatory reform goals, and respond to public comment received during hearings held pursuant to Texas Water Code, §26.046. These changes address demonstrated water quality threats. Ambiguous language was clarified and processes and procedures contained within the rules were streamlined to facilitate a new expedited plan review process to allow available resource to be directed to monitoring and inspection of regulated activities covered by this chapter.

The comment period on the proposal and review was originally posted to close on May 11, 1998; however, the comment period was extend for an additional 31 days and ended on June 11, 1998. Three public hearings were held on May 4, 5, and 6, 1998, in Wimberley, Austin, and San Antonio respectively. Written and oral comments were received from 328 commentors, which represented engineers, builders, environmental groups, state representatives and senators, local city and county governments, and many others. These comments are addressed in the adopted rule preamble.

Only one commentor addressed the review of the rules. Hays County Commissioners Court requested that the existing rules be readopted as written and the proposed rules be withdrawn, amended as requested and republished for public comment.

The commission agrees that §§213.1, 213.2, and 213.11- 213.14 should be readopted as written. Response to comments on the proposed revisions to §§213.3-213.10 are addressed in the adoption preamble for the rest of Chapter 213.

TRD-9815107

Margaret Hoffman

Director, Environmental Law Division

Texas Natural Resource Conservation Commission

Filed: September 25, 1998

♦ ♦ ♦

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 1: 30 TAC §213.22(2)

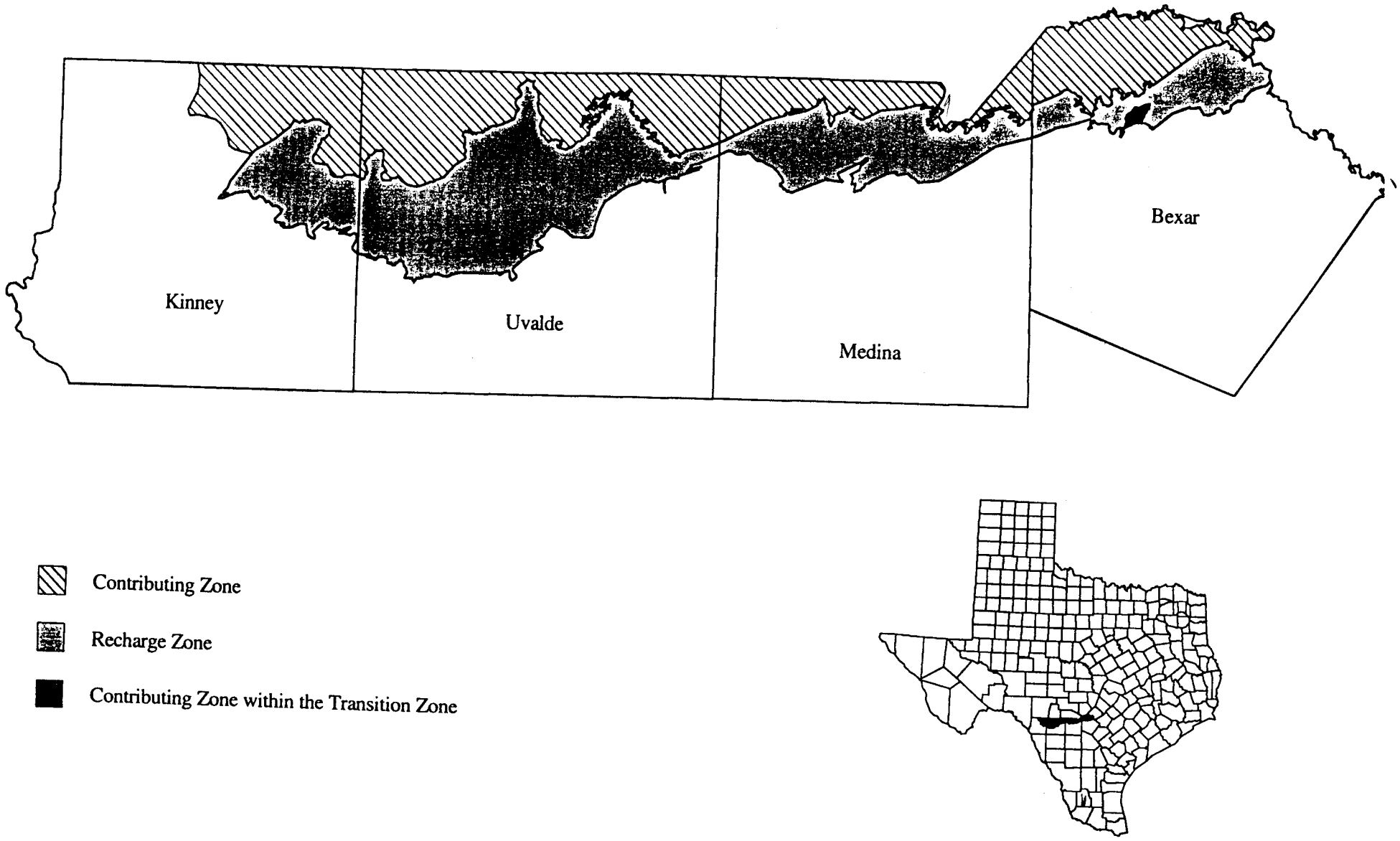


Figure 1a: §213.22. Contributing Zone (Southern Part) for the Edwards Aquifer

Figure 2: 30 TAC §213.22(2)

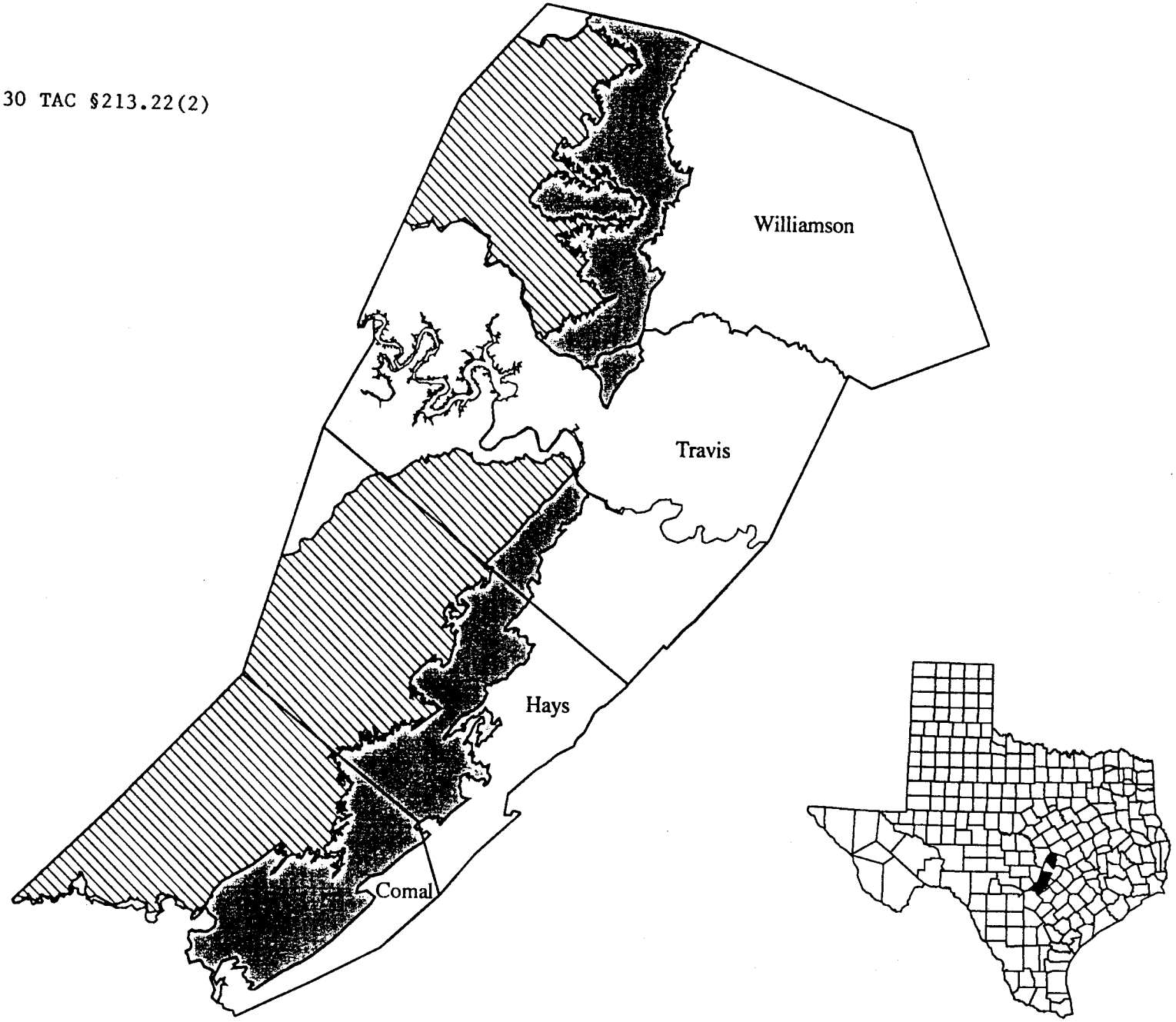


Figure 1b: §213.22. Contributing Zone (Northern Part) for the Edwards Aquifer

Figure: 30 TAC §294.31(d)

EXHIBIT A
294.31(d)

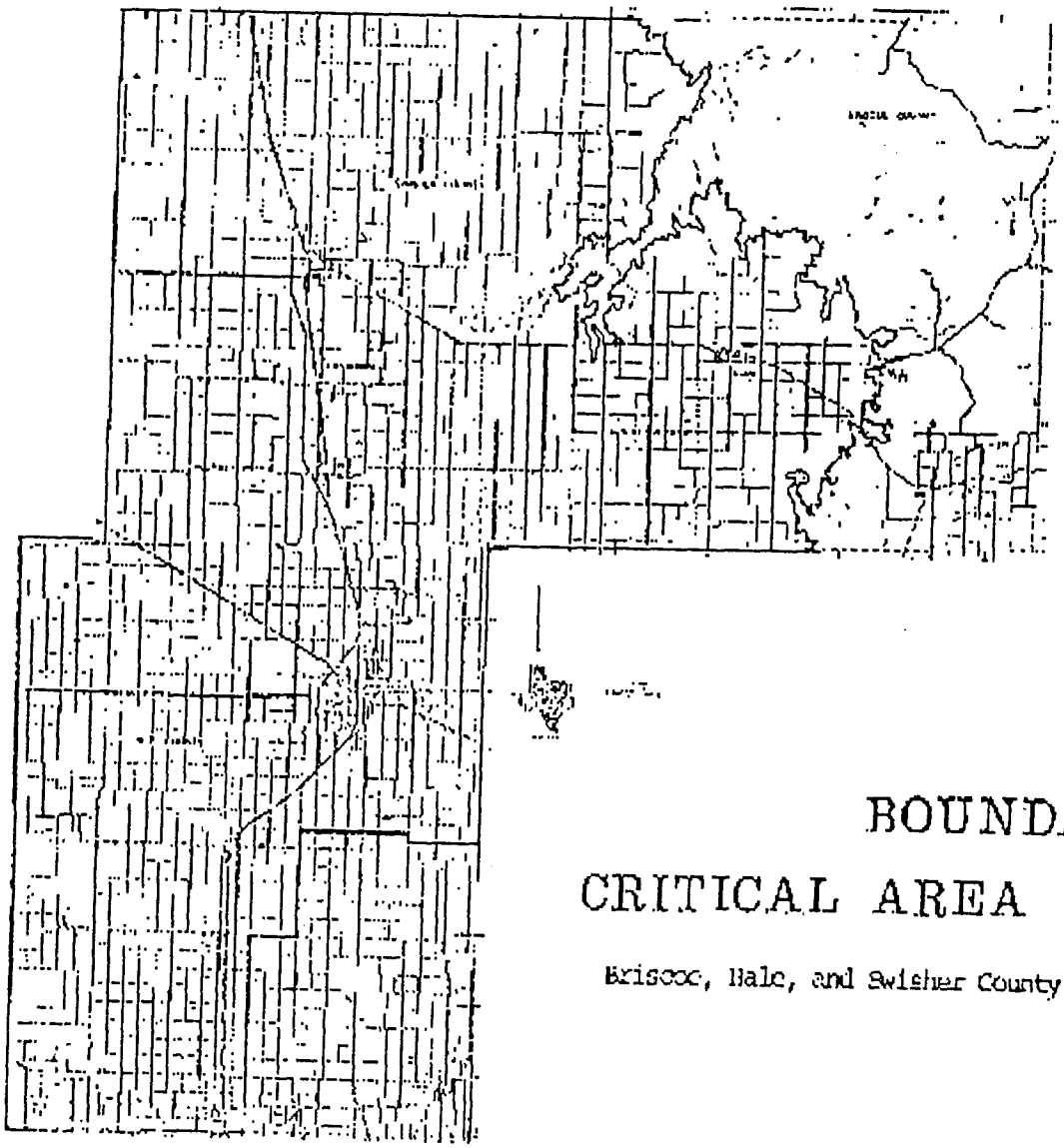
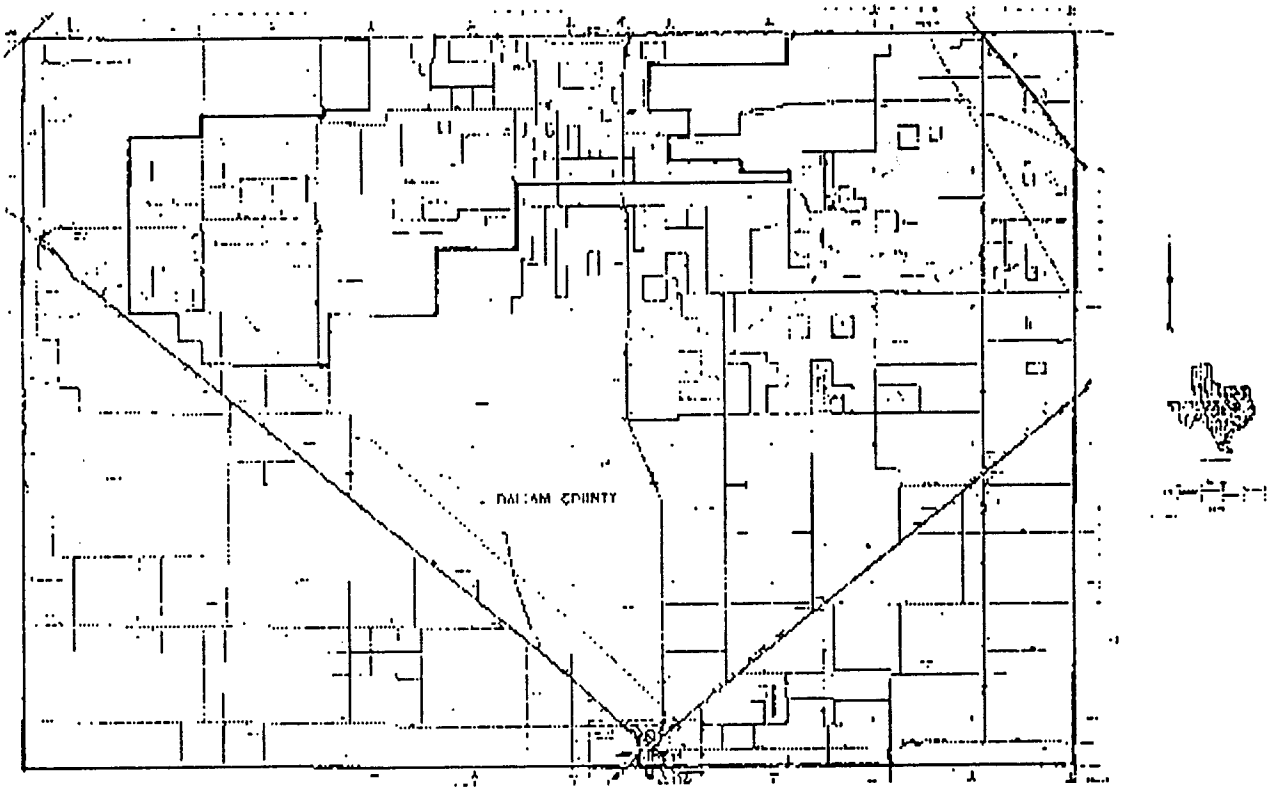


Figure: 30 TAC §294.32(d)

EXHIBIT A
294.32(d)



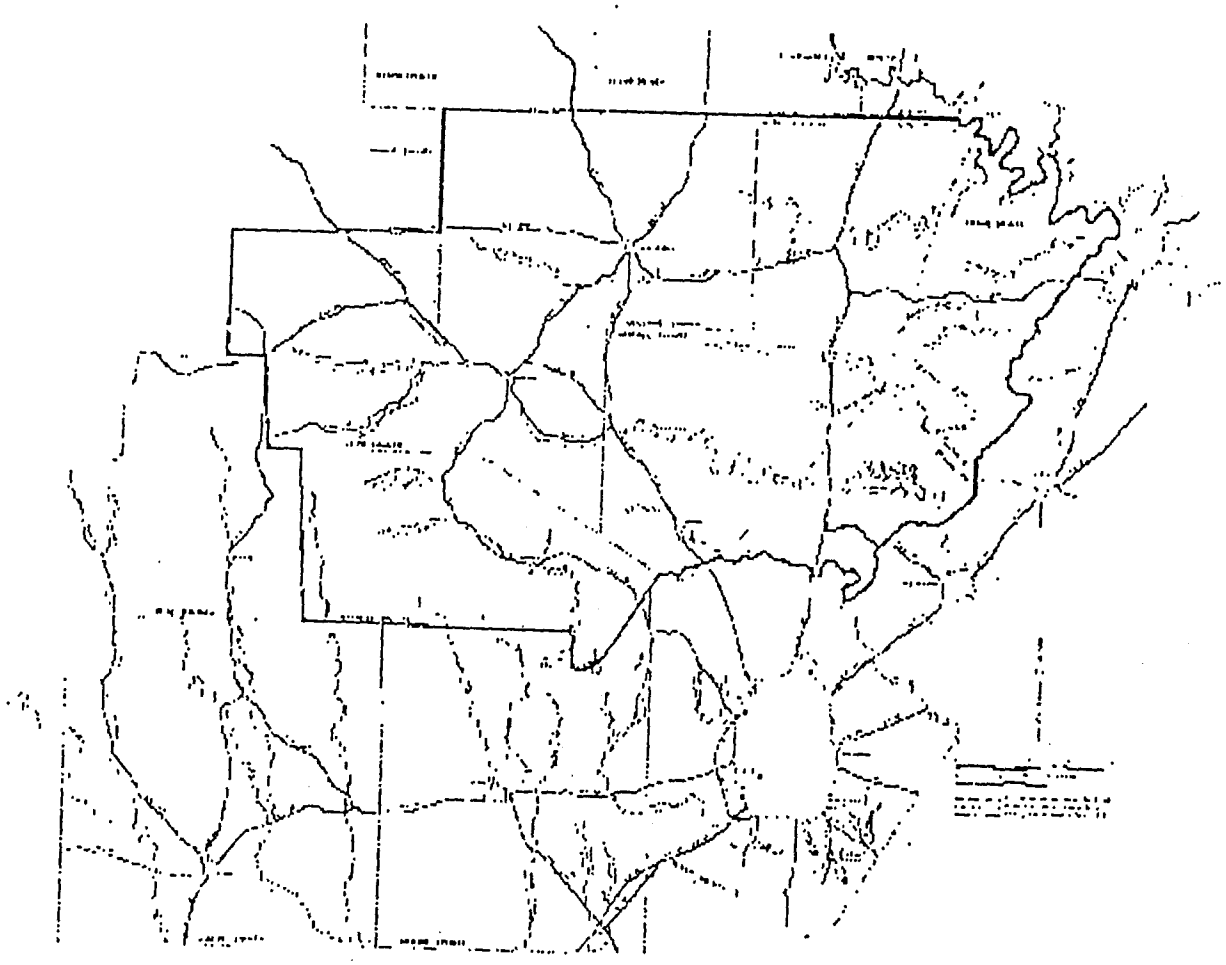
BOUNDARIES

DALLAM COUNTY CRITICAL AREA

Figure: 30 TAC §294.34(c)

EXHIBIT A

294.34(c)



Location Map
Hill Country Critical Area

Figure: 30 TAC §294.35(c)

EXHIBIT A

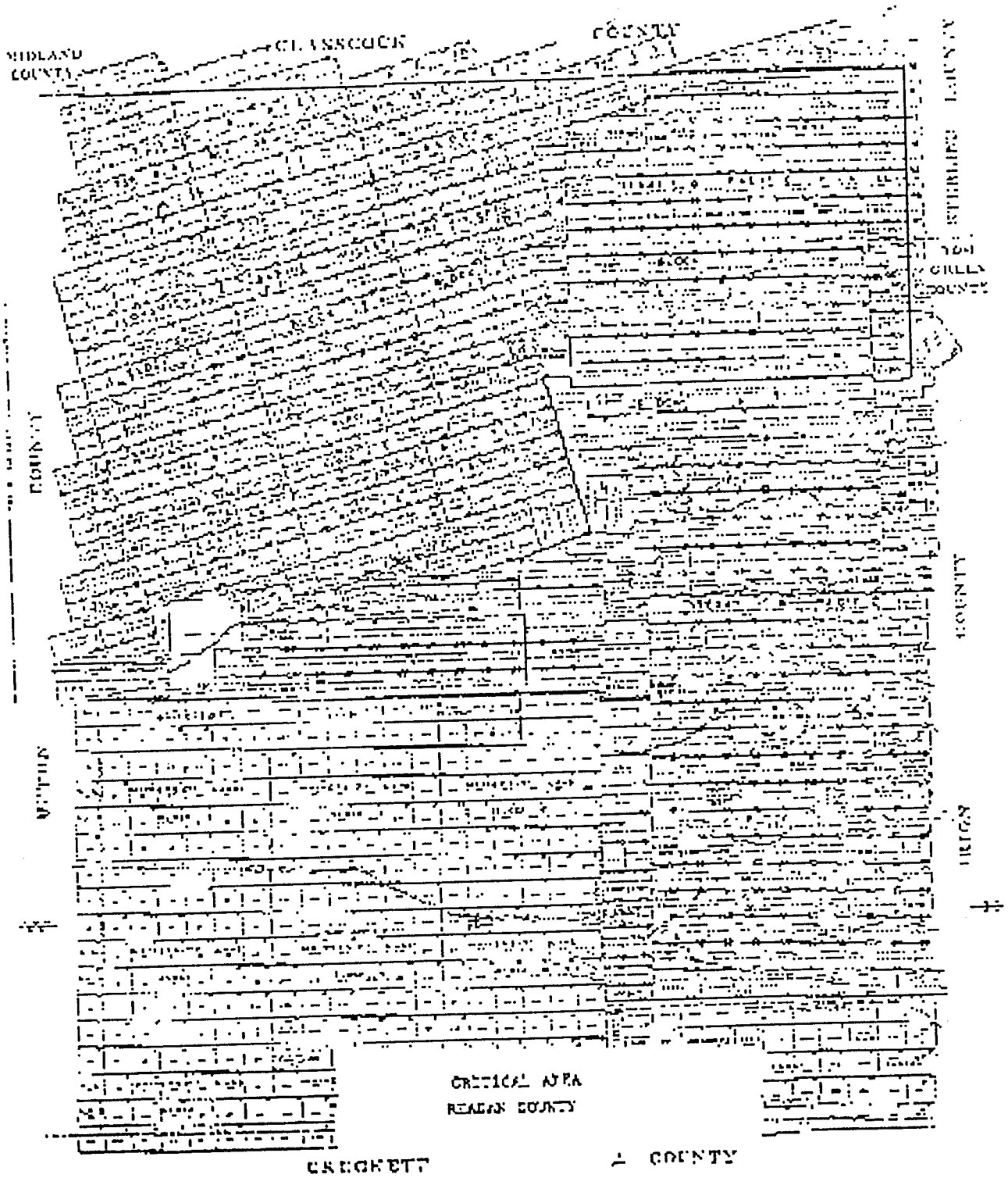


Figure: 30 TAC §294.35(c)

REAGAN, UPTON, AND MIDLAND

CRITICAL AREA

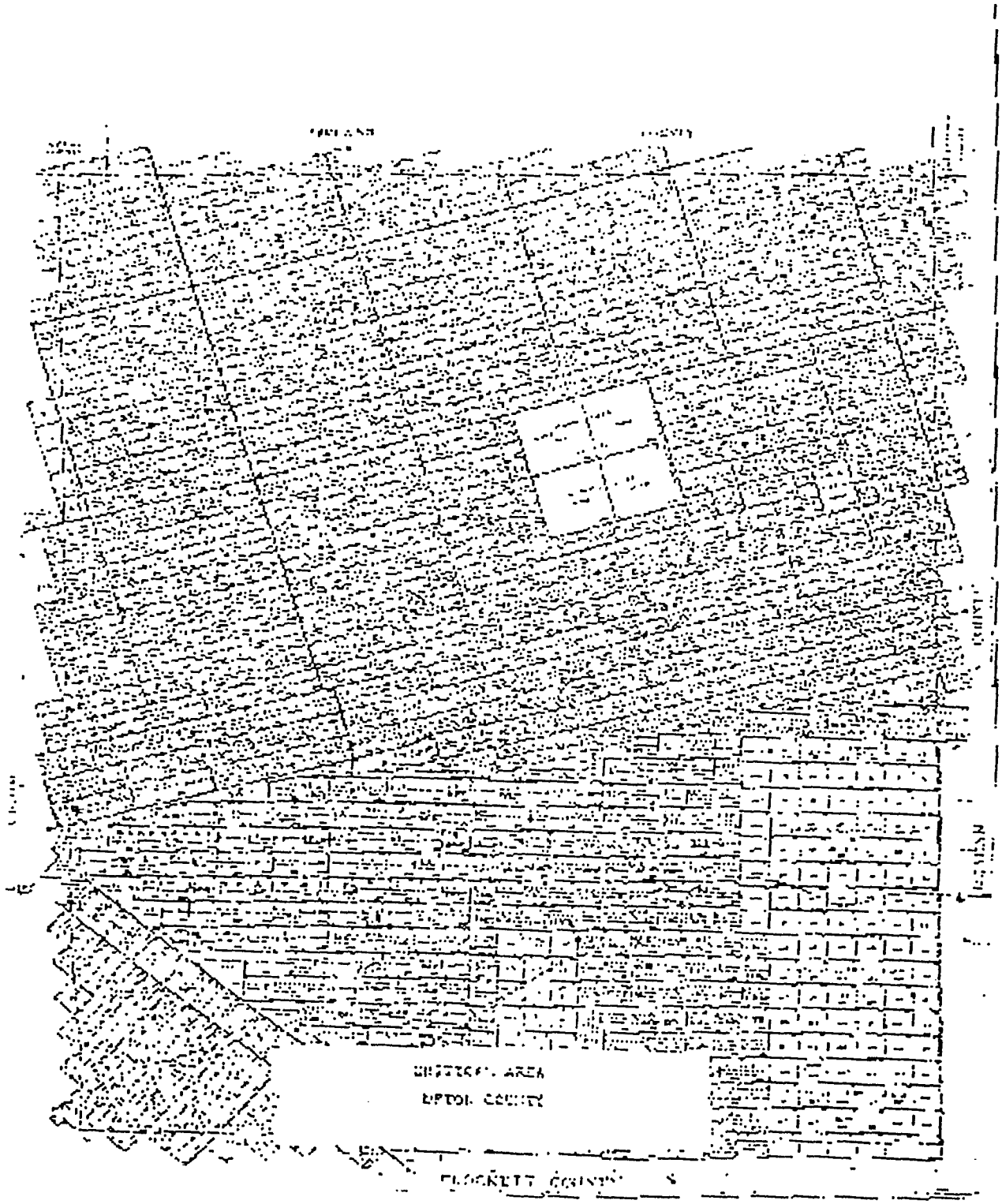


Figure: 30 TAC §294.35(c)

REAGAN, UPTON, AND MIDLAND

CRITICAL AREA

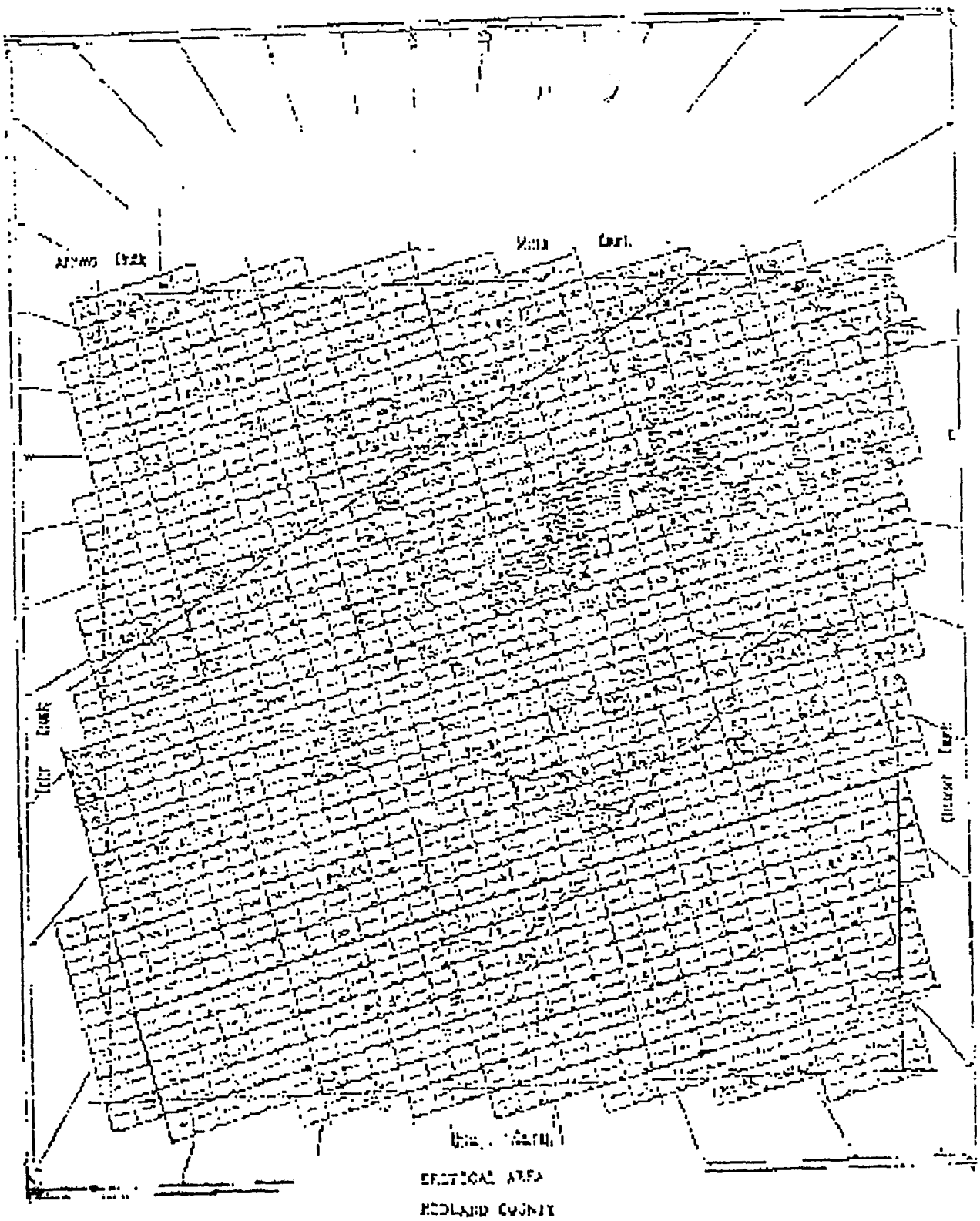


FIGURE 1: 31 TAC 9.51(c)(3)(A)

REDUCED ROYALTY SCHEDULE FOR QUALIFYING RESERVOIRS
BASE ROYALTY RATE = 25.00%

AVG. DAILY PER WELL PRODUCTION (BOE/DAY)	AVERAGE OF THE DAILY PRICE OF OIL DURING THE QUALIFYING PERIOD									
	$15.00 - $15.99/BBL	$16.00 - $16.99/BBL	$17.00 - $17.99/BBL	$18.00 - $18.99/BBL	$19.00 - $19.99/BBL	$20.00 - $20.99/BBL	$21.00 - $21.99/BBL	$22.00 - $22.99/BBL	$23.00 - $23.99/BBL	$24.00 - $25.00/BBL
15	11.00%	16.50%	21.50%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%
14	10.75%	16.25%	21.25%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%
13	10.50%	16.00%	21.00%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%
12	10.00%	15.75%	20.75%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%
11	9.50%	15.25%	20.25%	24.50%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%
10	9.00%	14.75%	19.75%	24.25%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%
9	8.25%	14.00%	19.00%	23.75%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%
8	7.50%	13.25%	18.25%	23.00%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%
7	6.25%	12.25%	17.50%	22.00%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%
6	6.25%	11.00%	16.00%	20.75%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%
5	6.25%	9.00%	14.25%	19.00%	23.25%	25.00%	25.00%	25.00%	25.00%	25.00%
4	6.25%	6.25%	11.75%	16.50%	21.00%	24.75%	25.00%	25.00%	25.00%	25.00%
3	6.25%	6.25%	7.00%	12.25%	17.00%	21.00%	24.75%	25.00%	25.00%	25.00%
2	6.25%	6.25%	6.25%	6.25%	8.75%	13.25%	17.50%	21.25%	24.75%	25.00%
1 or Less	6.25%	6.25%	6.25%	6.25%	6.25%	6.25%	6.25%	6.25%	6.25%	8.50%

FIGURE 2: 31 TAC 9.51(c)(3)(A)

REDUCED ROYALTY SCHEDULE FOR QUALIFYING RESERVOIRS
BASE ROYALTY RATE = 20.00%

AVG. DAILY PER WELL PRODUCTION (BOE/DAY)	AVERAGE OF THE DAILY PRICE OF OIL DURING THE QUALIFYING PERIOD									
	$15.00 - $15.99/BBL	$16.00 - $16.99/BBL	$17.00 - $17.99/BBL	$18.00 - $18.99/BBL	$19.00 - $19.99/BBL	$20.00 - $20.99/BBL	$21.00 - $21.99/BBL	$22.00 - $22.99/BBL	$23.00 - $23.99/BBL	$24.00 - $25.00/BBL
15	11.00%	16.50%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%
14	10.75%	16.25%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%
13	10.50%	16.00%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%
12	10.00%	15.75%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%
11	9.50%	15.25%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%
10	9.00%	14.75%	19.75%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%
9	8.25%	14.00%	19.00%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%
8	7.50%	13.25%	18.25%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%
7	6.25%	12.25%	17.50%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%
6	6.25%	11.00%	16.00%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%
5	6.25%	9.00%	14.25%	19.00%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%
4	6.25%	6.25%	11.75%	16.50%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%
3	6.25%	6.25%	7.00%	12.25%	17.00%	20.00%	20.00%	20.00%	20.00%	20.00%
2	6.25%	6.25%	6.25%	6.25%	8.75%	13.25%	17.50%	20.00%	20.00%	20.00%
1 or Less	6.25%	6.25%	6.25%	6.25%	6.25%	6.25%	6.25%	6.25%	6.25%	8.50%

FIGURE 3: 31 TAC 9.51(c)(3)(A)

REDUCED ROYALTY SCHEDULE FOR QUALIFYING RESERVOIRS
BASE ROYALTY RATE = 18.75%

AVG. DAILY PER WELL PRODUCTION (BOE/DAY)	AVERAGE OF THE DAILY PRICE OF OIL DURING THE QUALIFYING PERIOD									
	$15.00 - $15.99/BBL	$16.00 - $16.99/BBL	$17.00 - $17.99/BBL	$18.00 - $18.99/BBL	$19.00 - $19.99/BBL	$20.00 - $20.99/BBL	$21.00 - $21.99/BBL	$22.00 - $22.99/BBL	$23.00 - $23.99/BBL	$24.00 - $25.00/BBL
15	11.00%	16.50%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%
14	10.75%	16.25%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%
13	10.50%	16.00%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%
12	10.00%	15.75%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%
11	9.50%	15.25%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%
10	9.00%	14.75%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%
9	8.25%	14.00%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%
8	7.50%	13.25%	18.25%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%
7	6.25%	12.25%	17.50%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%
6	6.25%	11.00%	16.00%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%
5	6.25%	9.00%	14.25%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%
4	6.25%	6.25%	11.75%	16.50%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%
3	6.25%	6.25%	7.00%	12.25%	17.00%	18.75%	18.75%	18.75%	18.75%	18.75%
2	6.25%	6.25%	6.25%	6.25%	8.75%	13.25%	17.50%	18.75%	18.75%	18.75%
1 or Less	6.25%	6.25%	6.25%	6.25%	6.25%	6.25%	6.25%	6.25%	6.25%	8.50%

FIGURE 4: 31 TAC 9.51(c)(3)(A)

REDUCED ROYALTY SCHEDULE FOR QUALIFYING RESERVOIRS
BASE ROYALTY RATE = 12.50%

AVG. DAILY PER WELL PRODUCTION (BOE/DAY)	AVERAGE OF THE DAILY PRICE OF OIL DURING THE QUALIFYING PERIOD									
	$15.00 - $15.99/BBL	$16.00 - $16.99/BBL	$17.00 - $17.99/BBL	$18.00 - $18.99/BBL	$19.00 - $19.99/BBL	$20.00 - $20.99/BBL	$21.00 - $21.99/BBL	$22.00 - $22.99/BBL	$23.00 - $23.99/BBL	$24.00 - $25.00/BBL
15	11.00%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%
14	10.75%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%
13	10.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%
12	10.00%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%
11	9.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%
10	9.00%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%
9	8.25%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%
8	7.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%
7	6.25%	12.25%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%
6	6.25%	11.00%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%
5	6.25%	9.00%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%
4	6.25%	6.25%	11.75%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%
3	6.25%	6.25%	7.00%	12.25%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%
2	6.25%	6.25%	6.25%	6.25%	8.75%	12.50%	12.50%	12.50%	12.50%	12.50%
1 or Less	6.25%	6.25%	6.25%	6.25%	6.25%	6.25%	6.25%	6.25%	6.25%	8.50%

FIGURE 5: 31 TAC 9.51(c)(3)(A)

REDUCED ROYALTY SCHEDULE FOR QUALIFYING GULF OF MEXICO RESERVOIRS
BASE ROYALTY RATE = 25.00%

AVG. DAILY PER WELL PRODUCTION (BOE/DAY)	AVERAGE OF THE DAILY PRICE OF OIL DURING THE QUALIFYING PERIOD									
	$15.00 - $15.99/BBL	$16.00 - $16.99/BBL	$17.00 - $17.99/BBL	$18.00 - $18.99/BBL	$19.00 - $19.99/BBL	$20.00 - $20.99/BBL	$21.00 - $21.99/BBL	$22.00 - $22.99/BBL	$23.00 - $23.99/BBL	$24.00 - $25.00/BBL
50.0	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%
47.5	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%
45.0	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%
42.5	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%
40.0	24.25%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%
37.5	19.25%	24.25%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%
35.0	13.50%	18.75%	23.50%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%
32.5	6.25%	12.50%	17.75%	22.25%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%
30.0	6.25%	6.25%	10.75%	15.75%	20.25%	24.25%	25.00%	25.00%	25.00%	25.00%
27.5	6.25%	6.25%	6.25%	8.00%	13.00%	17.25%	21.25%	24.75%	25.00%	25.00%
25.0	6.25%	6.25%	6.25%	6.25%	6.25%	9.00%	13.50%	17.25%	21.00%	24.25%
22.5	6.25%	6.25%	6.25%	6.25%	6.25%	6.25%	6.25%	8.00%	12.00%	15.75%
20.0 or LESS	6.25%	6.25%	6.25%	6.25%	6.25%	6.25%	6.25%	6.25%	6.25%	6.25%

FIGURE 6: 31 TAC 9.51(c)(3)(A)

REDUCED ROYALTY SCHEDULE FOR QUALIFYING GULF OF MEXICO RESERVOIRS
BASE ROYALTY RATE = 20.00%

AVG. DAILY PER WELL PRODUCTION (BOE/DAY)	AVERAGE OF THE DAILY PRICE OF OIL DURING THE QUALIFYING PERIOD									
	$15.00 - $15.99/BBL	$16.00 - $16.99/BBL	$17.00 - $17.99/BBL	$18.00 - $18.99/BBL	$19.00 - $19.99/BBL	$20.00 - $20.99/BBL	$21.00 - $21.99/BBL	$22.00 - $22.99/BBL	$23.00 - $23.99/BBL	$24.00 - $25.00/BBL
50.0	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%
47.5	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%
45.0	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%
42.5	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%
40.0	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%
37.5	19.25%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%
35.0	13.50%	18.75%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%
32.5	6.25%	12.50%	17.75%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%
30.0	6.25%	6.25%	10.75%	15.75%	20.00%	20.00%	20.00%	20.00%	20.00%	20.00%
27.5	6.25%	6.25%	6.25%	8.00%	13.00%	17.25%	20.00%	20.00%	20.00%	20.00%
25.0	6.25%	6.25%	6.25%	6.25%	6.25%	9.00%	13.50%	17.25%	20.00%	20.00%
22.5	6.25%	6.25%	6.25%	6.25%	6.25%	6.25%	6.25%	8.00%	12.00%	15.75%
20.0 or LESS	6.25%	6.25%	6.25%	6.25%	6.25%	6.25%	6.25%	6.25%	6.25%	6.25%

FIGURE 7: 31 TAC 9.51(c)(3)(A)

REDUCED ROYALTY SCHEDULE FOR QUALIFYING GULF OF MEXICO RESERVOIRS
BASE ROYALTY RATE = 18.75%

AVG. DAILY PER WELL PRODUCTION (BOE/DAY)	AVERAGE OF THE DAILY PRICE OF OIL DURING THE QUALIFYING PERIOD									
	$15.00 - $15.99/BBL	$16.00 - $16.99/BBL	$17.00 - $17.99/BBL	$18.00 - $18.99/BBL	$19.00 - $19.99/BBL	$20.00 - $20.99/BBL	$21.00 - $21.99/BBL	$22.00 - $22.99/BBL	$23.00 - $23.99/BBL	$24.00 - $25.00/BBL
50.0	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%
47.5	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%
45.0	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%
42.5	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%
40.0	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%
37.5	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%
35.0	13.50%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%
32.5	6.25%	12.50%	17.75%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%
30.0	6.25%	6.25%	10.75%	15.75%	18.75%	18.75%	18.75%	18.75%	18.75%	18.75%
27.5	6.25%	6.25%	6.25%	8.00%	13.00%	17.25%	18.75%	18.75%	18.75%	18.75%
25.0	6.25%	6.25%	6.25%	6.25%	6.25%	9.00%	13.50%	17.25%	18.75%	18.75%
22.5	6.25%	6.25%	6.25%	6.25%	6.25%	6.25%	6.25%	8.00%	12.00%	15.75%
20.0 or LESS	6.25%	6.25%	6.25%	6.25%	6.25%	6.25%	6.25%	6.25%	6.25%	6.25%

FIGURE 8: 31 TAC 9.51(c)(3)(A)

REDUCED ROYALTY SCHEDULE FOR QUALIFYING GULF OF MEXICO RESERVOIRS
BASE ROYALTY RATE = 12.50%

AVG. DAILY PER WELL PRODUCTION (BOE/DAY)	AVERAGE OF THE DAILY PRICE OF OIL DURING THE QUALIFYING PERIOD									
	$15.00 - $15.99/BBL	$16.00 - $16.99/BBL	$17.00 - $17.99/BBL	$18.00 - $18.99/BBL	$19.00 - $19.99/BBL	$20.00 - $20.99/BBL	$21.00 - $21.99/BBL	$22.00 - $22.99/BBL	$23.00 - $23.99/BBL	$24.00 - $25.00/BBL
50.0	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%
47.5	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%
45.0	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%
42.5	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%
40.0	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%
37.5	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%
35.0	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%
32.5	6.25%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%
30.0	6.25%	6.25%	10.75%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%
27.5	6.25%	6.25%	6.25%	8.00%	12.50%	12.50%	12.50%	12.50%	12.50%	12.50%
25.0	6.25%	6.25%	6.25%	6.25%	6.25%	9.00%	12.50%	12.50%	12.50%	12.50%
22.5	6.25%	6.25%	6.25%	6.25%	6.25%	6.25%	6.25%	8.00%	12.00%	12.50%
20.0 or LESS	6.25%	6.25%	6.25%	6.25%	6.25%	6.25%	6.25%	6.25%	6.25%	6.25%

Figure 1: 43 TAC §28.11(c)(3)(B)

Gross weight in pounds	Highway Maintenance Fee
80,001-120,000	$50
120,001-160,000	$75
160,001-200,000	$100
200,001-above	$125

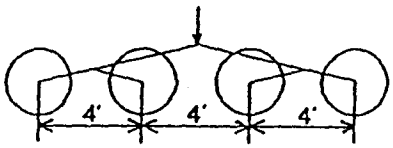
Figure 2: 43 TAC §28.11(c)(3)(C)

Criteria	Vehicle Supervision Fee
200,001 - 254,300 pounds total and at least 95 feet over all axle spacings and not exceeding the maximum permittable weight on any axle or axle group, as described in subsection (d) of this section.	$35
200,001 - 254,300 pounds total and less than 95 feet over all axle spacings, or over the maximum permittable weight on any axle or axle group, or over 254,300 pounds gross weight	$800 if analysis is performed by TxDOT
	$500 if the permittee obtains an analysis performed by a state approved private engineer
	$35 for multiple permits ordered within 30 days of approval
	$100 if no bridges are crossed

APPENDIX A
Figure 1: 43 TAC §28.11(d)(1)(D)

"MAXIMUM PERMIT WEIGHT FOR AXLE GROUPS SPACED LESS THAN 12 FEET"

70,000*



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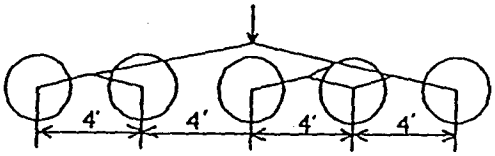
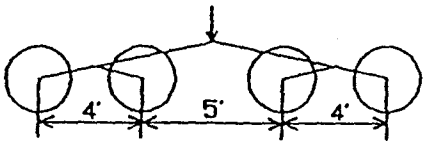


72,500*



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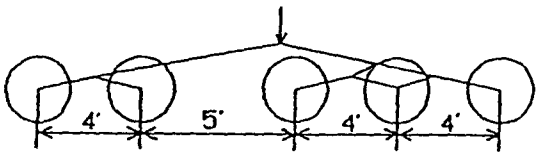
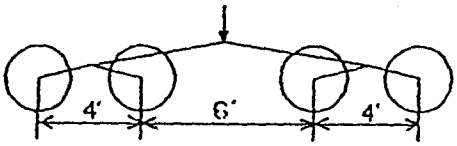


75,000*



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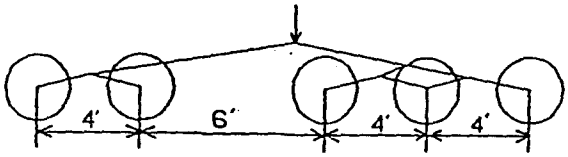
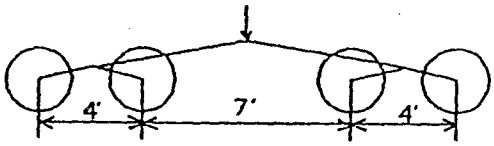


77,500*



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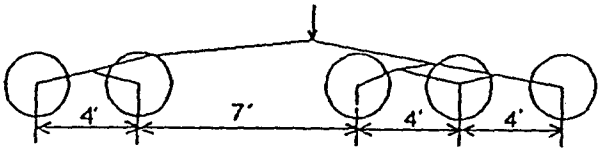
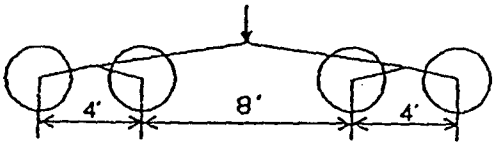


80,000*



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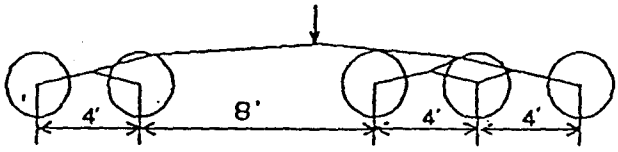

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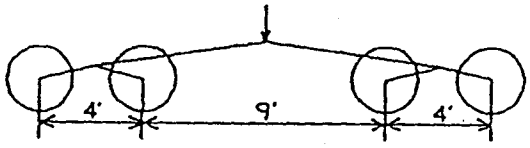

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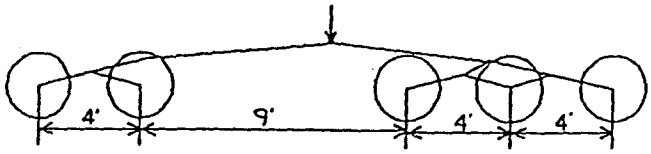
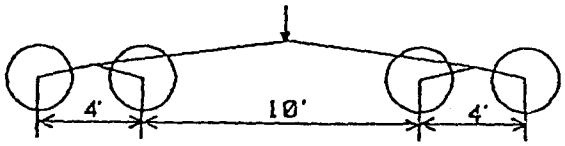


85,000*



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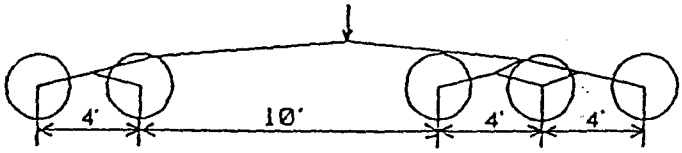

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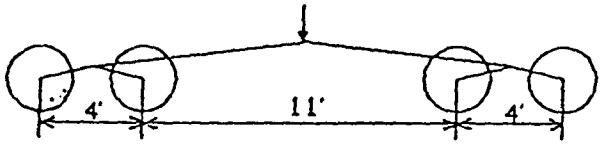


102,050*

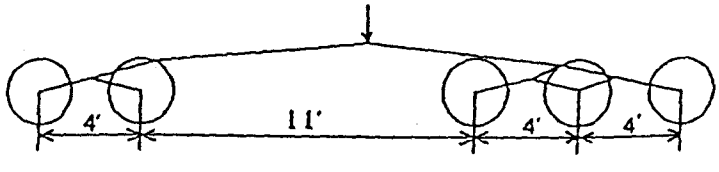
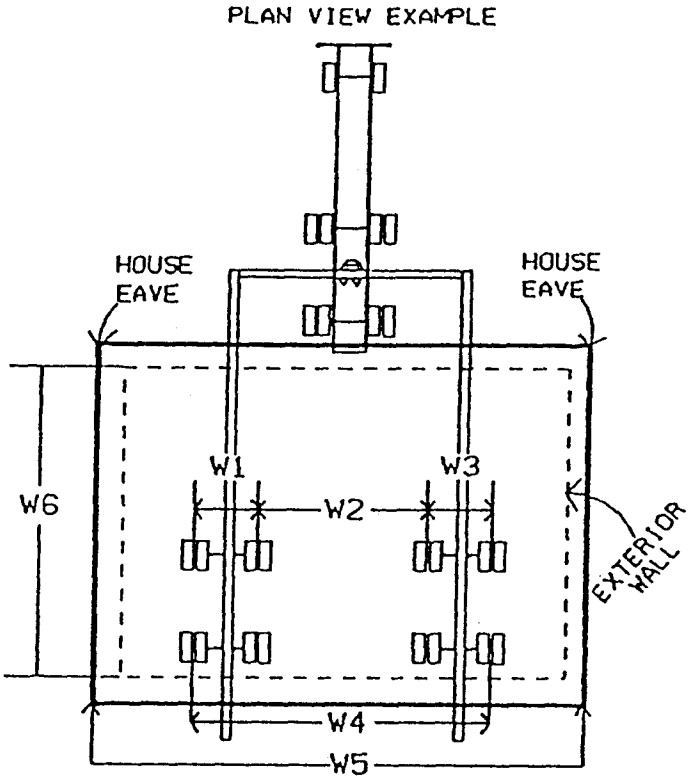
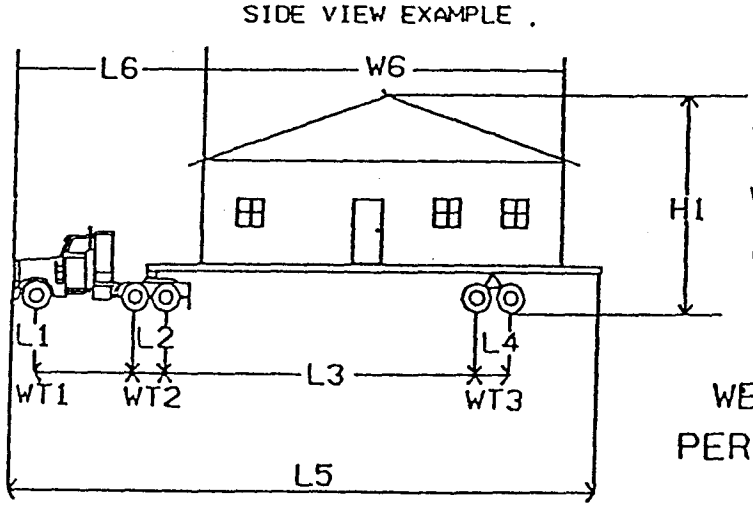


Figure 1: 43 TAC §28.12(e)

DIAGRAM FOR MOVING OVERWEIGHT HOUSES



W1 =
W2 =
W3 =
W4 =
W5 =
W6 =



WT1 =
WT2 =
WT3 =

WEIGHT PER DOLLY =

L1 =
L2 =

L3 =
L4 =
H1 =

L5 =
L6 =

Texas Department of Transportation
Oversize and Overweight Vehicles and Loads

Figure 1: 43 TAC §28.30(e)(4)

Number of counties on permit application	Fee
1-20	$125
21-40	$345
41-60	$565
61-80	$785
81-100	$1,005

Figure 1: 43 TAC §28.42(d)(2)

Actual Mileage to be Traveled	X	Highway Use Factor	X	Total Rate Per Mile	X	Registration Reduction	+	Indirect Cost Share	=	Permit Fee

Figure 2: 43 TAC §28.42(f)

APPENDIX A
MAXIMUM PERMIT WEIGHT TABLE

Length (L) Feet	Weight (W) (lbs/ft)	Length (L) Feet	Weight (W) (lbs/ft)	Length (L) Feet	Weight (W) (lbs/ft)
4	7520	30	3676	55	3111
5	6345	31	3646	56	3094
6	5947	32	3616	57	3077
7	5698	33	3586	58	3061
8	5500	34	3557	59	3045
9	5326	35	3529	60	3030
10	5169	36	3501	61	3015
11	5027	37	3474	62	3000
12	4898	38	3448	63	2985
13	4781	39	3423	64	2971
14	4675	40	3399	65	2957
15	4579	41	3376	66	2943
16	4492	42	3354	67	2929
17	4413	43	3333	68	2915
18	4340	44	3313	69	2901
19	4272	45	3293	70	2887
20	4208	46	3274	71	2874
21	4146	47	3255	72	2861
22	4087	48	3236	73	2848
23	4030	49	3218	74	2835
24	3974	50	3200	75	2822
25	3920	51	3182	76	2809
26	3867	52	3164	77	2796
27	3815	53	3146	78	2783
28	3764	54	3128	79	2771
29	3714	55	3111	80	2759

Figure 2: 43 TAC 28.42(f)

APPENDIX B
MAXIMUM PERMIT WEIGHT FORMULAS

$$W = T / (L + 4)$$

"W" - The value of the equivalent distributed load expressed in pounds per linear foot.

"T" - The sum of the axle loads or equivalent axle loads of any group of two or more axles expressed in pounds. Any combination of axle loads may be considered as a group, up to the total number of axles for the unit.

"L" - The length between axles, expressed in feet and measured to the nearest inch, from the center of the first axle to the center of last axle in the axle group, series of groups, or total axles for the unit.

A unit with axle groups composed of various numbers of tires per axle or with axle groups with a gauge distance greater than 6.0 feet on each axle may have additional reduction factors applied to each axle before summing "T." The revised equivalent axle load is calculated by the following formula.

$$A = (RS)(\text{THE AXLE LOAD})$$

"A" - Equivalent axle load for axles with gauge greater than 6.0 feet and/or more than four tires.

"R" - A reduction factor for a unit with a gauge distance greater than 6.0 feet, calculated by the following formula.

$$R = (6.0 + G) / (2 G)$$

"G" - The gauge distance, expressed in feet and measured to the nearest inch, from the center of the outside dual wheels on one side of the axle to the center of the outside dual wheels on the opposite side of the axle. The gauge distance of an axle equipped with two tires per axle must be measured to the nearest inch from center of tire to center of opposite tire.

"S" - A reduction factor based on the number of tires per axle.

S = 1.0 for axles with four or fewer tires, and

S = 0.96 for axles with eight tires.

Figure 1: 43 TAC §28.43(e)(3)

Hubometer Mileage	X	Highway Use Factor (3%)	X	Total Rate Per Mile	X	Registration Reduction	+	Indirect Cost Share	=	Permit Fee

Figure 1: 43 TAC §28.62(d)(2)

Mileage to be Traveled	X	Highway Use Factor	X	Total Rate Per Mile	X	Registration Reduction	+	Indirect Cost Share	=	Permit Fee

Figure 2: 43 TAC §28.62(f)

APPENDIX A
MAXIMUM PERMIT WEIGHT TABLE

Length (L) Feet	Weight (W) (lbs/ft)	Length (L) Feet	Weight (W) (lbs/ft)	Length (L) Feet	Weight (W) (lbs/ft)
4	7520	30	3676	55	3111
5	6345	31	3646	56	3094
6	5947	32	3616	57	3077
7	5698	33	3586	58	3061
8	5500	34	3557	59	3045
9	5326	35	3529	60	3030
10	5169	36	3501	51	3015
11	5027	37	3474	62	3000
12	4898	38	3448	63	2985
13	4781	39	3423	64	2971
14	4675	40	3399	65	2957
15	4579	41	3376	66	2943
16	4492	42	3354	67	2929
17	4413	43	3333	68	2915
18	4340	44	3313	69	2901
19	4272	45	3293	70	2887
20	4208	46	3274	71	2874
21	4146	47	3255	72	2861
22	4087	48	3236	73	2848
23	4030	49	3218	74	2835
24	3974	50	3200	75	2822
25	3920	51	3182	76	2809
26	3867	52	3164	77	2796
27	3815	53	3146	78	2783
28	3764	54	3128	79	2771
29	3714	55	3111	80	2759

Figure 2: 43 TAC §28.62(f)

APPENDIX B
MAXIMUM PERMIT WEIGHT FORMULAS

$$W = T / (L + 4)$$

"W" - The value of the equivalent distributed load expressed in pounds per linear foot.

"T" - The sum of the axle loads or equivalent axle loads of any group of two or more axles expressed in pounds. Any combination of axle loads may be considered as a group, up to the total number of axles for the crane.

"L" - The length between axles, expressed in feet and measured to the nearest inch, from the center of the first axle to the center of last axle in the axle group, series of groups, or total axles for the crane.

A crane with axle groups composed of various numbers of tires per axle or with axle groups with a gauge distance greater than 6.0 feet on each axle may have additional reduction factors applied to each axle before summing "T." The revised equivalent axle load is calculated by the following formula.

$$A = (RS)(\text{THE AXLE LOAD})$$

"A" - Equivalent axle load for axles with gauge greater than 6.0 feet and/or more than four tires.

"R" - A reduction factor for a crane with a gauge distance greater than 6.0 feet, calculated by the following formula.

$$R = (6.0 + G) / (2G)$$

"G" - The gauge distance, expressed in feet and measured to the nearest inch, from the center of the outside dual wheels on one side of the axle to the center of the outside dual wheels on the opposite side of the axle. The gauge distance of an axle equipped with two tires per axle must be measured to the nearest inch from center of tire to center of opposite tire.

"S" - A reduction factor based on the number of tires per axle.

S = 1.0 for axles with four or fewer tires, and

S = 0.96 for axles with eight tires.

Figure 1: 43 TAC §28.63(e)(3)

Hubometer Mileage	X	Highway Use Factor	X	Total Rate Per Mile	X	Registration Reduction	+	Indirect Cost Share	=	Permit Fee

IN ADDITION

The ***Texas Register*** is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings, changes in interest rate and applications to install remote service units, and consultant proposal requests and awards.

To aid agencies in communicating information quickly and effectively, other information of general interest to the public is published as space allows.

Texas State Board of Public Accountancy

Correction of Error

The Texas State Board of Public Accountancy submitted an Open Meeting Notice, which appeared in the August 28, 1998, issue of the *Texas Register* (23 TexReg 8857).

On page 8857, the notice contained a typographical error. The publication should read as follows:

"Wednesday, September 2, 1998, 9:00 a.m.

AGENDA:

A. Investigations: 2. File Number 96–05–05L"

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Advisory Commission on State Emergency Communications

Proportional Distribution of Wireless Service Fee

Notice is given of the Advisory Commission on State Emergency Communications' (ACSEC) intent to proportionally distribute monthly the wireless service fee revenue using the most recent annual population estimates. The ACSEC Rule 252.6, Wireless Service Fee Proportional Distribution, sets out the process by which the Commission automatically distributes the service fee. Using the population estimates obtained in September 1998 from the Texas State Data Center, the ACSEC has prepared an allocation worksheet for review and comment by Texas 9-1-1 entities under statutory authority of the Councils of Governments and Emergency Communications Districts. The Wireless Service Fee Distribution Allocation Worksheet is updated annually to reflect current population estimates. The document can be obtained by contacting Velia Saenz Williams at the ACSEC at 512-305-6933.

TRD-9815066
James D. Goerke
Executive Director
Advisory Commission on State Emergency Communications
Filed: September 24, 1998

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Texas Department of Agriculture

Notice of Public Hearing

In accordance with the Texas Agriculture Code, §74.113, the Texas Department of Agriculture (the department) will hold a public hearing to take public comment on the proposed assessment referendum to be conducted by the department in the Western Plains Boll Weevil Eradication Zone, and related matters. The hearing will be held on Thursday, October 15, 1998, beginning at 11:00 a.m., at the Brownfield Armory, Coleman Park, 100 Waco Street, Brownfield, Texas.

For more information, please contact Katie Dickie Stavinoha, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711, 512/463-7593.

TRD-9815312
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Filed: September 30, 1998

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Coastal Coordination Council

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439-1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC 501. Requests for federal consistency review were received for the following projects(s) during the period of September 22, 1998, through September 29, 1998:

FEDERAL AGENCY ACTIONS:

Applicant: Pioneer Natural Resources USA, Inc.; Location: The project is located 8 miles seaward of the Corpus Christi Marina in Corpus Christi Bay, State Tracts 14, 45, 46, 51, 56, 57, 58, 60, 61, 66, 69, 70 and 71, Nueces County, Texas; Project No. 98-0457-F1; Description of Proposed Action: The applicant is applying for an

oilfield development permit for the purpose of oil and gas exploration and development; Type of Application: U.S.C.O.E. permit application #21434 under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. 403), and §404 of the Clean Water Act (33 U.S.C.A. §§125-1387).

Applicant: Bill Wade; Location: The project is adjacent to Lot No. 21 of River Bend Road in the Hubert & Watson Subdivision, 1 mile south of the Town of Matagorda, on the east bank of the Colorado River, Matagorda County, Texas; Project No. 98-0458-F1; Description of Proposed Action: The applicant proposes to construct a 56.23-foot-long bulkhead. The purpose of the proposed project is to prevent bank erosion. There are existing bulkheads at both ends of the proposed bulkhead; Type of Application: U.S.C.O.E. permit application #21396 under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. 403), and §404 of the Clean Water Act (33 U.S.C.A. §§125-1387).

Applicant: Aker Gulf Marine; Location: The project is located adjacent to an industrial basin near the intersection of the Corpus Christi Ship Channel and the Gulf Intracoastal Waterway; Project No. 98-0459-F1; Description of Proposed Action: The applicant proposes to construct approximately 700 linear feet of sheetpile bulkhead with associated fill. The bulkhead will be installed first from a barge, and will connect to existing bulkheads located on both sides of the proposed project; Type of Application: U.S.C.O.E. permit application #21175(03) under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. 403), and §404 of the Clean Water Act (33 U.S.C.A. §§125-1387).

Applicant: City of Baytown; Location: The discharge from this municipal wastewater treatment plant is made into Goose Creek, thence to Tabb's Bay, Segment No. 2426 in the San Jacinto-Trinity Estuary, a water of the United States classified for contact recreation and high quality aquatic habitat. The discharge is located on that water at Latitude - 20 degrees 43' 40" North and Longitude - 95 degrees 59' 50" West; Project No. 98-0461-F1; Description of Proposed Action: The applicant requests issuance of a National Pollutant Discharge Elimination System permit to expire August 1, 2003; Type of Application: U.S. Environmental Protection Agency NPDES permit application #TX0020109 under the Clean Water Act (33 U.S.C.A. §§125-1387).

Applicant: Harlingen Shrimp Farm, LTD; Location: The discharges from this existing source are made to a drainage ditch; thence to a cove; thence to the receiving water body named the Laguna Madre Bay in Water Body Segment Code No. 2491 of the Bays and Estuaries Basin. The discharge is located in Cameron County, Texas; Project No. 98-0462-F1; Description of Proposed Action: The applicant requests modifications to a National Pollutant Discharge Elimination System permit to expire June 30, 2000; Type of Application: U.S. Environmental Protection Agency NPDES permit application #TX0087441 under the Clean Water Act (33 U.S.C.A. §§125-1387).

Applicant: Southern Star, Inc.; Location: The discharges from this new discharger are made to the receiving water body named Arroyo Colorado Tidal in Water Body Segment Code No. 2201 of the Nueces-Rio Grande Coastal Basin. The discharger is located at 1.2 miles along FM 1847 and 0.95 miles along FM 2925, Cameron County, Texas; Project No. 98-0463-F1; Description of Proposed Action: The applicant requests modifications to a National Pollutant Discharge Elimination System permit to expire May 31, 2000; Type of Application: U.S. Environmental Protection Agency NPDES permit application #TX0062936 under the Clean Water Act (33 U.S.C.A. §§125-1387).

Applicant: Arroyo Aquaculture Association, Inc.; Location: The discharge from this new discharger are made to the receiving water body named Arroyo Colorado Tidal in water body Segment Code No. 2201 of the Nueces-Rio Grande Coastal Basin. The discharger is located at FM 2925, 1.5 miles east of FM 1847, Cameron County, Texas; Project No. 98-0464-F1; Description of Proposed Action: The applicant requests issuance of a National Pollutant Discharge Elimination System permit to expire May 31, 2000; Type of Application: U.S. Environmental Protection Agency NPDES permit application #TX0103811 under the Clean Water Act (33 U.S.C.A. §§125-1387).

Applicant: City of Baytown; Location: The project site is located on the peninsula between Scott Bay, Crystal Bay, and Burnett Bay, in the old Brownwood Subdivision, in Baytown, Harris County, Texas; Project No. 98-0469-F1; Description of Proposed Action: The applicant proposes to develop new wetland habitat within a master-planned nature park to be know as Baytown Nature park to be known as Baytown Nature park. In addition, the applicant proposes to provide water access for fishing and wildlife/wetland observation by constructing wooden piers and/or riprap groins; Type of Application: U.S.C.O.E. permit application #21419 under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. 403), and §404 of the Clean Water Act (33 U.S.C.A. §§125-1387).

Applicant: City of Baytown; Location: The project is located at 1724 Market Street, on Goose Creek, in Baytown, Harris County, Texas; Project No. 98-0470-F1; Description of Proposed Action: The applicant proposes to construct a single lane boat ramp with two fixed piers and one floating dock. In addition, the applicant requests authorization to dredge a 1,550-foot channel from the Baytown Wetlands Center to the Market Street Bridge downstream; Type of Application: U.S.C.O.E. permit application #21420 under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. 403), and §404 of the Clean Water Act (33 U.S.C.A. §§125-1387).

Applicant: TDI-Halter, L.P.; Location: The project site is located on the Sabine River, at 91 West Front Street, in Orange, Orange County, Texas; Project No. 98-0471-F1; Description of Proposed Action: The applicant requests authorization to perform periodic maintenance dredging for a period of 10 years; Type of Application: U.S.C.O.E. permit application #21426 under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. 403).

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-9815304
Garry Mauro
Chairman
Coastal Coordination Council
Filed: September 30, 1998

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Comptroller of Public Accounts

Notice of Request for Proposals

Pursuant to Chapter 2254, Subchapter B, Texas Government Code, the Comptroller of Public Accounts (Comptroller) announces the issuance of a Request for Proposals (RFP) for the purpose of hiring a consultant to review and evaluate methodologies used in developing the state's

property value study, and develop findings and recommendations for improving such methodologies. The successful proposer will be expected to begin performance of the contract on or about November 23, 1998.

Contact: Parties interested in submitting a proposal should contact the Comptroller of Public Accounts, Legal Counsel's Office, 111 E. 17th St., Room G-24, Austin, Texas, 78774, (512) 305-8673, to obtain a complete copy of the RFP. The RFP will be available for pick-up at the above referenced address on Friday, October 9, 1998, between the hour of noon (12 p.m.) and 5 p.m. Central Zone Time (CZT), and during normal business hours thereafter. All mandatory letters of intent to propose must be received at the above-referenced address no later than 4 p.m. (CZT) on Wednesday, October 21, 1998. All written inquiries must be received at the above-referenced address no later than 4 p.m. (CZT) on Friday, October 23, 1998.

Closing Date: Proposals must be received in the Legal Counsel's Office no later than 4 p.m. (CZT), on Monday, November 9, 1998. Proposals received after this time and date will not be considered.

Award Procedure: Proposals will be subject to evaluation based on the requirements as set forth in the RFP. The Comptroller will make the final decision as to which proposal best satisfies the RFP's criteria. A proposer may be asked to clarify its proposal, which may include an oral presentation prior to final selection.

The Comptroller reserves the right to accept or reject any or all proposals submitted. The Comptroller is under no legal or other obligation to execute a contract on the basis of this notice or the distribution of any RFP. Neither this notice nor the RFP commits the Comptroller to pay for any costs incurred prior to the execution of a contract.

The anticipated schedule of events is as follows: Issuance of RFP - October 9, 1998, Noon (12 p.m.) (CZT); Mandatory Letter of Intent Due - October 21, 1998, 4 p.m. (CZT); Written Questions Due - October 23, 1998, 4 p.m.; Proposals Due - November 9, 1998, 4 p.m. (CZT); and Contract Execution - November 23, 1998, or as soon thereafter as possible.

TRD-9815249
David R. Brown
Legal Counsel
Comptroller of Public Accounts
Filed: September 29, 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 and 1D.009, Title 79, Revised Civil Statutes of Texas, as amended (Articles 5069-1D.003, 1D.005, and 1D.009, Vernon's Texas Civil Statutes).

The weekly ceiling as prescribed by Art. 1D.003 and 1D.009 for the period of 10/05/98 - 10/11/98 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 10/05/98 - 10/11/98 is 18% for Commercial over $250,000.

The monthly ceiling as prescribed by Art. 1D.005 and 1D.009[3] for the period of 10/01/98 - 10/31/98 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 10/01/98 - 10/31/98 is 18% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

[3]For variable rate commercial transactions only.

TRD-9815233
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: September 29, 1998

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State Board for Educator Certification

Correction of Error

The State Board for Educator Certification adopted new 19 TAC §§232.500, 232.510, and 232.520. The rules appeared in the August 21, 1998, issue of the *Texas Register* (23 TexReg 8676).

On page 8676, the following two paragraphs were omitted.

"The SBEC is required by law to specify the classes of certificates to be issued, as well as the period of validity for each certificate. Prior to the passage of Senate Bill 1 by the 75th Texas Legislature (1995), educator certificates were valid for the life of the educator, unless sanctioned by the Commissioner of Education for criminal or unethical activity, and not subject to renewal requirements. The Texas Education Code (TEC) requires the SBEC to specify the period of validity for each certificate it issues and to establish requirements for continuing education and renewal of certificates.

The standard certificate will be issued beginning September 1, 1999, and will be valid for five years unless sanctioned by the SBEC, Certificates issued prior to September 1, 1999, will continue to be valid for life unless sanctioned by the SBEC (§232.500)."

Notice of Contract Renewal

Filing Authority. This Notice of Contract Renewal is filed under Texas Government Code, Chapter 2254, Subchapter B.

Description. The State Board for Educator Certification (SBEC) has renewed the contract of C. T. Maddox, Ph.D., 12212 Brigadoon Lane, Austin, TX, 78727, to continue services previously performed. The contract provides for reviewing requests and making recommendations for testing modifications for examinees on the Examination for the Certification of Educators in Texas (ExCET), required for educator certification, and the Texas Academic Skills Program (TASP) Test, required of students who enter an approved teacher education program or enroll in a public university in Texas. Each time the ExCET or TASP Test is given, examinees who request testing modifications submit educational, psychological, or medical documentation supporting their request. The contractor must review this documentation and make recommendations for appropriate testing modifications. Testing modifications must be consistent with federal and state regulations, EEOC guidelines, court decisions, and other appropriate and equitable policies.

Dates of Contract. The contract period is September 1, 1998 through August 31, 1999. The contract may be extended on an annual basis beyond August 1999 by mutual agreement of the SBEC and contractor.

Contract Amount. The value of the contract renewal is $9,600.00.

Further Information. For additional information, contact Pamela B. Tackett, Interim Executive Director, SBEC, at (512) 469-3000.

TRD-9815070
Pamela B. Tackett
Executive Director
State Board of Educator Certification
Filed: September 25, 1998

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General Land Office

Invitation for Offers of Consulting Services

The General Land Office (GLO) is a participant in the development and implementation of a comprehensive tide monitoring and gauging system known as the Texas Coastal Ocean Observation Network (TCOON). Other participants include the National Ocean Service (NOS), Lamar University (Lamar), the Conrad Blucher Institute (CBI) of Texas A&M University oat Corpus Christi (TAMU-CC), and the U.S. Army Corps of Engineers (COE). The project is funded and administered through a cooperative effort of NOS, GLO, and COE. In previous years, GLO contracted Lamar and TAMU-CC for installation and monitoring of the system and with CBI to obtain professional and technical assistance necessary to review and analyze data received from the operation of the TCOON.

Pursuant to Texas Government Code, 2254.021, et.seq., the GLO is requesting offers of consulting services to assist with the review and analysis of tide and water level data received from the TCOON during the period beginning November 10, 1998 and ending August 31, 1999.

The chosen consultant will be responsible for the coordination of all gauge installation, leveling, and operational reporting with the other participants in this project. These activities will be the subject of regular reports to the GLO. The chosen consultant will also be responsible for continuation of the process of automating the data collection, analysis, leveling, station stability monitoring and datum computation that has been initiated earlier by CBI.

The requested consultant services will require an understanding of ocean tide gauging systems and the ability to continue the assistance previously provided by CBI under the provisions of the GLO-CBI interagency cooperative agreement. It is the GLO's intent to award this contract to a person, or entity familiar with TCOON and the earlier phases of the project in order to obtain maximum benefit of the prior work.

The consultant selected must demonstrate extensive knowledge of the Texas Coastal Ocean Observation Network and have knowledge and experience working with other federal and state agencies. GLO reserves the right to evaluate qualifications and experience of all responders, to reject any and/or all responses and to negotiate specific terms of agreement that are in the best interest of the state.

The closing date for the receipt of offers of these consulting services is 5:00 p.m., November 9, 1998. Further information may be obtained by contacting LaNell Aston, GLO Asset Management Division, 1700 North Congress, Room 720, Austin, Texas 78701-1495, phone (512) 475-1375.

TRD-9815325
Garry Mauro
Commissioner
General Land Office
Filed: September 30, 1998

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Notice of Request for Contract Services Proposal

The General Land Office, on behalf of the Coastal Coordination Council, is contemplating the award of a contract to provide the following services as described.

The Coastal Coordination Council has set forth a mission under the §309 program enhancement portion of the Coastal Zone Management Act:

To characterize the existing water quality conditions in Armand Bayou and develop information and data needed to improve the water quality in the bayou.

To perform the work under the contract a qualified firm or consortium must, as a minimum, have experience and expertise in:

1. collecting quality assured water quality data, consistent with project quality assurance plans,

2. collecting ambient water quality data from natural water bodies,

3. collecting biological data on fish (or nekton) communities, and

4. preparing reports and submitting data to state agency format requirements.

The firm selected must perform a minimum of 80% of the actual contract to qualify for the contract award.

An "indefinite quantity" contract is contemplated, with an initial contract period of 12 months. The providers will be evaluated and selected based on: (1) knowledge, experience, and capabilities in the areas described; (2) ability to perform work within the required time constraints; and (3) demonstrated and projected use of HUB vendors. The contract will be awarded in accordance with the procedures as forth in Texas Government Code, §2254.001, et.seq.

Providers must be capable of entering into a contract within 10 days of selection and initiating work within 10 days of contract award. Request for Qualifications packets may be obtained by contacting Sheila Jimenez, General Land Office, Coastal Division, 1700 North Congress, Room 617, Austin, Texas 78701-1495, or by fax (512) 475-0680.

Interested persons may submit to General Land Office, Coastal Division, 1700 North Congress, Room 617, Austin, Texas 78701-1495. The deadline for submitting these qualifications statements is 5:00 p.m., November 9, 1998.

TRD-9815313
Garry Mauro
Commissioner
General Land Office
Filed: September 30, 1998

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General Services Commission

Notice of Request for Proposal for Contract Rental Car Services

The General Services Commission (the "GSC") announces a Request for Proposals ("RFP") for Contract Rental Car Services (RFP #4-1098RC) to be provided to the State of Texas pursuant to the Texas Government Code, Section 2171.052. Any contract which results from this RFP shall be for the term of January 1, 1999, through December 31, 2001.

Preproposal Conference: A preproposal conference will be held on Tuesday, October 6, 1998, in Austin, Texas. The conference is scheduled from 1:00 p.m. to 3:00 p.m. at the following address: General Services Commission, Central Services Building, Room 200B, 1711 San Jacinto Blvd., Austin, Texas, 78701. The purpose of the conference is to review the content of this RFP and to answer attendees questions.

Submission of Response to the RFP: Responses to the RFP shall be submitted to and received by the GSC Bid Services Department on or before 3:00 p.m., Central Daylight Time, on October 19, 1998, and shall be delivered or sent to: The General Services Commission, Attn: Bid Services, RFP #4-1098RC, 1711 San Jacinto Blvd., Room 180, Austin, Texas 78701, or P.O. Box 12047, Austin, Texas 78711-3047.

Evaluation Criteria: Evaluation of Proposals will be based on the criteria listed in the Request for Proposal. Evaluation will be performed by an evaluation team composed of persons designated by the GSC. The evaluation team will make a recommendation to the Division Director who shall determine and recommend to the Executive Director the proposer(s) chosen for contract award. Proposers to whom contracts are awarded will be notified by mail.

Copies of RFP: If you are interested in receiving a copy of the RFP, contact Ms. Gerry Pavelka, Program Director, at (512) 463-3559 to request a copy.

TRD-9815294
Judy Ponder
General Counsel
General Services Commission
Filed: September 29, 1998

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Office of the Governor

Correction of Error

The Office of the Governor repealed 1 TAC §§3.5, 3.125, 3.225, 3.325, 3.425, 3.525, 3.625, 3.660, 3.725, 3.925, 3.955, 3.1025, 3.4030, 3.4045, 3.4065, 3.4090, 3.4130, 3.7005, amendments to 1 TAC §§3.110, 3.115, 3.150, 3.160, 3.165, 3.180, 3.185, 3.210, 3.215, 3.240, 3.250, 3.260, 3.280, 3.285, 3.310, 3.315, 3.350, 3.380, 3.385, 3.405, 3.410, 3.420, 3.440, 3.450, 3.480, 3.485, 3.500, 3.505, 3.510, 3.515, 3.535, 3.540, 3.545, 3.550, 3.555, 3.560, 3.585, 3.615, 3.635, 3.640 3.645, 3.685, 3.705, 3.710, 3.715, 3.740, 3.760, 3.770, 3.785, 3.910, 3.915, 3.935, 3.940, 3.945, 3.950, 3.960, 3.970, 3.980, 3.985, 3.1015, 3.1030, 3.1050, 3.1060, 3.1080, 3.1085, 3.2000, 3.2005, 3.2010, 3.3045, 3.3050, 3.3055, 3.3060, 3.3065, 3.3070, 3.3075, 3.4000, 3.4015, 3.4025, 3.4055, 3.4070, 3.4075, 3.4080, 3.4095, 3.4100, 3.4105, 3.4115, 3.4120, 3.4125, 3.4135, 3.4140, 3.5000, 3.5005, 3.6000, 3.6010, 3.6015, 3.6020, 3.6025, 3.6030, 3.6040, 3.6045, 3.6050, 3.6055, 3.6060, 3.6065, 3.6070, 3.6075, 3.6080, 3.6090, 3.6095, 3.6100, 3.700, 3.7010, 3.7015, 3.7020, 3.8000, new to 1 TAC §§3.190, 3.295, 3.395, 3.490, 3.495, 3.590, 3.696, 3.790, 3.990, 3.1100, 3.1105, 3.1110, 3.1115, 3.1120, 3.1130, 3.1135, 3.1140, 3.1165, 3.11880, 3.1185, 3.2020, 3.3066, 3.3067, 3.4145, 3.4150, 3.4155, 3.5004, 3.6105, 3.6110, 3.6115,and 3.6120. The rules appeared in the August 7, 1998, issue of the *Texas Register*, (23 TexReg 7947).

Subchapter B, Division 1, §3.165(d) was incorrectly stated, it should read as, "Under no circumstances will CJD approve funds for construction, land acquisition, or supplantation of federal, state, or local funds supporting existing programs or activities."

Subchapter B, Division 5, §3.505(d)(20) was incorrectly stated, it should read as, "Funds cannot be used to pay for nursing home care (except emergency short-term nursing home shelter), home health-care costs, in-patient treatment costs, hospital care, other types of emergency and non-emergency medical and/or dental treatment, or forensic medical examinations for sexual assault victims."

Subchapter C, Division 3, §3.4055(a)(3) was incorrectly stated, it should read as, "Grant(s) expenditures of less than $300,000 in federal funds. Exempt from the Single Audit Act. However, CJD may require a limited scope audit as defined in OMB Circular A-133."

Subchapter C, Division 3, §3.4075(f)(6) was incorrectly stated, it should read as, "For security purposes, there should be a 48–hour limit on the amount of time funds advanced for PE/PI/PS expenditure may be held outstanding. If it becomes apparent at any point during the 48–hour period that the expenditure will not materialize, then the funds should be returned to the advancing cashier as soon as possible. An extension to the 48–hour limit may be granted by the level of management that approved the advance. Factors to consider in granting such an extension are the amount of funds involved, the degree of security under which the funds are being held, how long the extension is required, and the significance of the expenditure. Such extensions should be limited to 48 hours. Beyond this, the funds should be returned and readvanced, if necessary. Regardless of circumstances, within 48 hours of the advance, the fund cashier should be presented with either the unexpended funds, an executed voucher for payment for information or purchase of evidence or written notification by management that an extension has been granted."

Subchapter C, Division 6, §3.7020(d) was incorrectly stated, it should read as, "All CJD grantees, regardless of level of funding, are subject to periodic on-site reviews and audits by CJD. These reviews are designed to complement, not duplicate, any single audit performed."

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Texas Department of Health

Notices of Intent to Revoke Certificates of Registration

Pursuant to Texas Regulations for Control of Radiation, Part 13, (25 Texas Administrative Code §289.112), the Bureau of Radiation Control (bureau), Texas Department of Health (department), filed complaints against the following registrants: Crystal Vet Med Center, Crystal City, R01493; Safari Animal Care Center, League City, R14819; Robert L. Beck, D.M.D., M.D., San Antonio, R14951; Daniel R. Matthews, D.D.S., Harlingen, R13997; Ramon A. Garcia, M.D., Del Rio, R08451; Lake Buchanan Medical Center, Buchanan Dam, R16553; Fidel G. Figueroa, D.C., Pasadena, R18684; Southwest Injury Rehabilitation Center, Houston, R20890.

The department intends to revoke the certificates of registration; order the registrants to cease and desist use of radiation machine(s); order the registrants to divest themselves of such equipment; and order the registrants to present evidence satisfactory to the bureau that they have complied with the orders and the provisions of the Texas Health and Safety Code, Chapter 401. If the fee is paid within 30 days of the date of each complaint, the department will not issue an order.

This notice affords the opportunity to the registrants for a hearing to show cause why the certificates of registration should not be revoked. A written request for a hearing must be received by the bureau within 30 days from the date of service of the complaint to be valid. Such written request must be filed with Richard A. Ratliff, P.E., Chief, Bureau of Radiation Control (Director, Radiation Control Program), Texas Department of Health, 1100 West 49th Street, Austin, Texas

78756-3189. Should no request for a public hearing be timely filed or if the fee is not paid, the certificates of registration will be revoked at the end of the 30-day period of notice. A copy of all relevant material is available for public inspection at the Bureau of Radiation Control, Texas Department of Health, Exchange Building, 8407 Wall Street, Austin, Texas, Monday-Friday, 8:00 a.m. to 5:00 p.m. (except holidays).

TRD-9815116
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: September 25, 1998

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Pursuant to Texas Regulations for Control of Radiation, Part 13, (25 Texas Administrative Code §289.112), the Bureau of Radiation Control (bureau), Texas Department of Health (department), filed complaints against the following registrants: Gulf Coast Physicians, P.A., Houston, R03050; Advance Chiropractic Center, Arlington, R21660; Memorial Villages Chiropractic, Houston, R22629; Rural Health Clinics of South Texas, Harlingen, R23151; Enrique L. Guillen, M.D., San Antonio, R08081; Gonzales Animal Clinic, Gonzales, R00958; DeMark Imaging, Houston, R23176; Laserlite F/X, Incorporated, Markham, Ontario, Canada, Z01145.

The department intends to revoke the certificates of registration; order the registrants to cease and desist use of radiation machine(s); order the registrants to divest themselves of such equipment; and order the registrants to present evidence satisfactory to the bureau that they have complied with the orders and the provisions of the Texas Health and Safety Code, Chapter 401. If the fee is paid within 30 days of the date of each complaint, the department will not issue an order.

This notice affords the opportunity to the registrants for a hearing to show cause why the certificates of registration should not be revoked. A written request for a hearing must be received by the bureau within 30 days from the date of service of the complaint to be valid. Such written request must be filed with Richard A. Ratliff, P.E., Chief, Bureau of Radiation Control (Director, Radiation Control Program), Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3189. Should no request for a public hearing be timely filed or if the fee is not paid, the certificates of registration will be revoked at the end of the 30-day period of notice. A copy of all relevant material is available for public inspection at the Bureau of Radiation Control, Texas Department of Health, Exchange Building, 8407 Wall Street, Austin, Texas, Monday-Friday, 8:00 a.m. to 5:00 p.m. (except holidays).

TRD-9815236
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: September 29, 1998

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Health and Human Services Commission

Public Hearing

The Texas Health and Human Services Commission (HHSC), the Texas Department of Human Services, the Texas Department of Health and the Texas Department of Mental Health and Mental Retardation will conduct a public hearing to receive public comment on the options under consideration for Phase II of the developing Children's Health Insurance Program (CHIP) pursuant to Title XXI of the Social Security Act.

Information gathered in this hearing process will be considered in developing the Title XXI state plan. Final policy decisions on Phase II will be made by the Legislature and Governor.

Background on Phase II options will be available October 19, 1998 at HHSC, 4900 North Lamar, Fourth Floor, Austin, Texas 78751 (hard copy); and via the Internet at "www.hhsc.state.tx.us".

The hearing will be held on Thursday, October 29, 1998, beginning at 4:00 p.m., Central Time, in the Capitol Auditorium, State Capitol Extension, East 15th Street and Congress Avenue, Austin, Texas. Written comments may be submitted to the Health and Human Services Commission until 5:00 p.m., Central Time, of the day of the hearing. Please address written comments to the attention of Willia Bailey at 4900 North Lamar, Fourth Floor, Austin, Texas, 78751.

Persons with disabilities who wish to attend the hearing and require auxiliary aids or services should contact Willia Bailey (512) 424-6568 by October 27, 1998, so that appropriate arrangements can be made.

TRD-9815311
Marina S. Henderson
Executive Deputy Commissioner
Health and Human Services Commission
Filed: September 30, 1998

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Public Notices

The Health and Human Services Commission State Medicaid Office has received approval from the Health Care Financing Administration to amend the Title XIX Medical Assistance Plan by Transmittal Number 97-10, Amendment Number 534.

The amendment revises the plan to change the method in which hospitals are reimbursed for direct graduate medical education (GME) costs. The amendment is effective September 1, 1997.

If additional information is needed, please contact Rick Peters, Texas Department of Health, at 512/794-6870.

TRD-9815234
Marina S. Henderson
Executive Deputy Commissioner
Health and Human Services Commission
Filed: September 29, 1998

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The Health and Human Services Commission State Medicaid Office has received approval from the Health Care Financing Administration to amend the Title XIX Medical Assistance Plan by Transmittal Number 98-08, Amendment Number 547.

The amendment removes the coverage of diagnostic services for persons with potential for mental retardation. The amendment is effective May 1, 1998.

If additional information is needed, please contact Deborah Hankey, Texas Department of Mental Health Mental Retardation, at 512/206-5743.

TRD-9815235
Marina S. Henderson
Executive Deputy Commissioner
Health and Human Services Commission
Filed: September 29, 1998

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Texas Department of Insurance

Insurer Services

The following applications have been filed with the Texas Department of Insurance and are under consideration:

Application to change the name of CHRYSLER LIFE INSURANCE COMPANY to FORETHOUGHT LIFE ASSURANCE COMPANY, a foreign life company. The home office is located in Batesville, IN.

Application for admission to Texas for WILLIAMSBURG NATIONAL INSURANCE COMPANY, a foreign property and casualty company. The home office is located in Cerritos, CA.

Application to change the name of VANGUARD UNDERWRITERS INSURANCE COMPANY to WINTERTHUR INTERNATIONAL AMERICA UNDERWRITERS INSURANCE COMPANY, a foreign property and casualty company. The home office is located in Tulsa, OK.

Any objections must be filed within 20 days after this notice was filed with the Texas Department of Insurance, addressed to the attention of Kathy Wilcox, 333 Guadalupe Street, M/C 305-2C, Austin, Texas 78701.

TRD-9815061
Bernice Ross
Deputy Chief Clerk
Texas Department of Insurance
Filed: September 24, 1998

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Notice of Open Meeting

The Commissioner of Insurance will hold an open meeting on Monday, October 26, 1998 at 9:00 a.m. in Room 100 of the William P. Hobby Jr. State Office Building, 333 Guadalupe Street, Austin, Texas. The open meeting will be to consider the oral comments from the parties on the proposal for decision in Docket No. 454-97-2106.G to establish benchmark rates for private passenger and commercial automobile insurance pursuant to Articles 5.101 and 1.33B(c), Texas Insurance Code. Also the Commissioner will consider such other matters as may properly be brought before the Commissioner.

TRD-9815238
Bernice Ross
Deputy Chief Counsel
Texas Department of Insurance
Filed: September 29, 1998

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Notices of Public Hearings

A public hearing originally scheduled before the Commissioner of Insurance for August 18, 1998 at 9:00 a.m. under Docket No. 2369, has been rescheduled to October 26, 1998 at 1:30 p.m. in Room 100 of the Texas Department of Insurance Building, 333 Guadalupe Street in Austin, Texas. This hearing is held to consider the adoption of new 28 TAC section 5.4604, concerning the appointment of Texas licensed professional engineers as qualified windstorm inspectors.

The proposed new section to 5.4604 and the statutory authority for the proposed new section was published in the June 26, 1998 issue of the *Texas Register* (23 TexReg 6691).

TRD-9815095
Bernice Ross
Deputy Chief Clerk
Texas Department of Insurance
Filed: September 25, 1998

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The Commissioner of Insurance will hold a public hearing under Docket No. 2384, on October 22, 1998, at 9:00 a.m. in Room 100 of the William P. Hobby Jr. State Office Building, 333 Guadalupe St. Austin, Texas. This hearing is concerning 28 TAC section 9.20 relating to amendments and adoption of procedural rules in the Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas.

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 8636).

TRD-9815096
Bernice Ross
Deputy Chief Clerk
Texas Department of Insurance
Filed: September 25, 1998

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Third Party Administrator Applications

The following third party administrator (TPA) application have been filed with the Texas Department of Insurance and are under consideration.

Application for admission to Texas of Moody Worldwide, Inc., a foreign third party administrator. The home office is Reno, Nevada.

Any objections must be filed within 20 days after this notice was filed with the Secretary of State, addressed to the attention of Charles M. Waits, MC 107-5A, 333 Guadalupe, Austin, Texas 78714-9104.

TRD-9815094
Bernice Ross
Deputy Chief Clerk
Texas Department of Insurance
Filed: September 25, 1998

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The following third party administrator (TPA) applications have been filed with the Texas Department of Insurance and are under consideration.

Application for incorporation in Texas of Texas Healthcare Foundation, L.C., a domestic third party administrator. The home office is Lewisville, Texas.

Application for incorporation in Texas of Tarrant Health Services, P.L.L.C., a domestic third party administrator. The home office is Fort Worth, Texas.

Any objections must be filed within 20 days after this notice was filed with the Secretary of State, addressed to the attention of Charles M. Waits, MC 107-5A, 333 Guadalupe, Austin, Texas 78714-9104.

TRD-9815314
Bernice Ross
Deputy Chief Clerk
Texas Department of Insurance
Filed: September 30, 1998

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Texas Natural Resource Conservation Commission

Enforcement Orders, Week Ending September 30, 1998

An agreed order was entered regarding ARTURO ARREDONDO DBA ART'S CONOCO, Docket No. 96-1598-PST-E; Facility No. 55665; Enforcement ID No. 5260 on September 15, 1998 assessing $25,400 in administrative penalties with $21,400 deferred.

Information concerning any aspect of this order may be obtained by contacting Hodgson Eckel, Staff Attorney at (512)239-2195 or Seyed Miri, Enforcement Coordinator at (512)239-6793, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An order was entered regarding KURT DAVIS, Docket No. 96-1739-OSI-E; SOAH Docket No. 582-98-0126 on September 14, 1998 assessing $12,657 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Guy Henry, Staff Attorney at (512)239-6259, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding GARLAND PAUL BOURG, SR. & SUE ANN BOURG DOING BUSINESS AS CIRCLE G DAIRY AND BOURG DAIRY, Docket No. 96-1972-AGR-E; TNRCC ID No. 03327; Enforcement ID No. 9548 on September 15, 1998 assessing $28,880 in administrative penalties with $28,880 deferred.

Information concerning any aspect of this order may be obtained by contacting Mary R. Risner, Staff Attorney at (512)239-6224 or Claudia A. Chaffin, Enforcement Coordinator at (512)239-4717, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding FRANCISCO OROZCO DBA GUANAJUATO AUTO SALES, Docket No. 98-0180-AIR-E; Account No. DB-4659-C; Enforcement ID No. 12081 on September 15, 1998 assessing $1,875 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Lawrence King, Enforcement Coordinator at (512)239-1405, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding TEXAS PLASTICOTE, A SUBSIDIARY OF PIPELINE SEAL & INSULATOR, INCORPORATED, Docket No. 98-0253-AIR-E; Account No. HX-1472-R; Enforcement ID No. 12344 on September 15, 1998 assessing $3,000 in administrative penalties with $600 deferred.

Information concerning any aspect of this order may be obtained by contacting Sheila Smith, Enforcement Coordinator at (512)239-1670, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding DSI TRANSPORTS, INCORPORATED, Docket No. 97-1074-AIR-E; Account No. JE-0013-X; Enforcement ID No. 12028 on September 15, 1998 assessing $4,500 in administrative penalties with $900 deferred.

Information concerning any aspect of this order may be obtained by contacting Booker Harrison, Staff Attorney at (512)239-4113 or Lawrence King, Enforcement Coordinator at (512)239-1405, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding AMOCO PIPELINE COMPANY, Docket No. 98-0135-AIR-E; Account No. HX-1680-I; Enforcement ID No. 12139 on September 15, 1998 assessing $15,000 in administrative penalties with $3,000 deferred.

Information concerning any aspect of this order may be obtained by contacting Miriam Hall, Enforcement Coordinator at (512)239-1044, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding MARSHALL KLINE DOING BUSINESS AS TURN KEY TRAILERS, Docket No. 97-1146-AIR-E; Account No. CP-0357-J; Enforcement ID No. 11905 on September 15, 1998 assessing $4,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Bill Jang, Staff Attorney at (512)239-2269 or Kevin Cauble, Enforcement Coordinator at (512)239-1874, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding ED BULLION, Docket No. 97-1167-MSW-E; TNRCC Unauthorized Site No. 455100020; Enforcement ID No. 12062 on September 15, 1998 assessing $6,250 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Ali Abazari, Staff Attorney at (512)239-5915 or Timothy Haase, Enforcement Coordinator at (512)239-6007, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding ETHYL CORPORATION, Docket No. 95-0462-IHW-E; TNRCC ID No. 30465; Enforcement ID No. 1126 on September 15, 1998 assessing $22,080 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Lisa Uselton-Dyar, Staff Attorney at (512)239-5692 or Anne Nyffenegger, Enforcement Coordinator at (512)239-2554, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding R.C. MCBRYDE OIL COMPANY, Docket No. 97-0909-PST-E; Facility ID No. 000162; Enforcement ID No. 11888 on September 15, 1998 assessing $10,400 in administrative penalties with $2,080 deferred.

Information concerning any aspect of this order may be obtained by contacting Randy Norwood, Enforcement Coordinator at (512)239-1879, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding CHEVRON USA PRODUCTS COMPANY, Docket No. 98-0279-PST-E; PST Facility ID No. 0050102; Enforcement ID No. 12363 on September 15, 1998 assessing $3,125 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Jason Ybarra, Enforcement Coordinator at (713)767-3615, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-9815317

Eugenia K. Brumm, Ph.D.

Chief Clerk

Texas Natural Resource Conservation Commission

Filed: September 30, 1998

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Notice of Opportunity to Comment on Default Orders of Administrative Enforcement Actions

The Texas Natural Resource Conservation Commission (TNRCC or commission) Staff is providing an opportunity for written public comment on the listed Default Orders. The TNRCC Staff proposes 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 **November 7, 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 November 7, 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: Andrew Corporation; DOCKET NUMBER: 98-0004-AIR-E; TNRCC ID NUMBER: DF-0100-V; LOCATION: Denton, Denton County, Texas; TYPE OF FACILITY: miscellaneous metal coatings plant; RULES VIOLATED: 30 TAC §115.421(a)(9)(A)(i) by using a clear coat with a volatile organic compound content greater than 4.3 pounds per gallon, as documented during inspections conducted on February 6, 1997, and June 4, 1997; 30 TAC §116.115(a) by failing to maintain records of actual hours of operation and the quantity and type of each coating and solvent consumed during the specified averaging period, as documented during inspections conducted on February 6, 1997, and June 4, 1997; PENALTY: $8,100; STAFF ATTORNEY: William Puplampu, Litigation Division, MC 175, (512) 239-0677; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499, (817) 469-6750.

(2) COMPANY: Dennis Schouten dba Dennis Schouten Dairy; DOCKET NUMBER: 97-0900-AGR-E; ENFORCEMENT ID NUMBER: 11715; LOCATION: Huckabay, Erath County, Texas; TYPE OF FACILITY: concentrated feeding operation; RULES VIOLATED: 30 TAC §321.33(d)(1) by failing to obtain a TNRCC permit prior to exceeding 250 milking head of dairy cattle; 30 TAC §321.42 by failing to register the Facility with the TNRCC; 30 TAC §321.35(a) and Texas Water Code, §26.121(a) by discharging waste and wastewater from the old wastewater lagoon into the unnamed creek without authorization; PENALTY: $5,720; STAFF ATTORNEY: William Puplampu, Litigation Division, MC 175, (512) 239-0677; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas , 76010-6499, (817) 469-6750.

(3) COMPANY: Stan Threlkeld; DOCKET NUMBER: 97-0312-PST-E; ENFORCEMENT ID NUMBER: 11715; LOCATION: Arlington, Tarrant County, Texas; TYPE OF FACILITY: convenience store; RULES VIOLATED: 30 TAC §334.54(d)(1)(B) by failing to upgrade or permanently remove from service underground storage tanks which had been temporarily removed from service for longer than a year; 30 TAC §334.21 by failing to pay outstanding underground storage tank fees; PENALTY: $4,000; STAFF ATTORNEY: William Puplampu, Litigation Division, MC 175, (512) 239-0677; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlingon, Texas, 76020- 6499, (817) 469-6750.

TRD-9815305
Paul C. Sarahan
Director, Litigation Division
Texas Natural Resource Conservation Commission
Filed: September 30, 1998

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Notices of Opportunity to Comment on Settlement Agreements of Administrative Enforcement Actions

The Texas Natural Resource Conservation Commission (TNRCC or commission) Staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) pursuant to Texas Water Code (the Code), §7.075, which requires that the TNRCC may not approve these AOs unless the public has been provided an opportunity to submit written comments. Section 7.075 requires that notice of the proposed orders and of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **November 8, 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 November 8, 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: Adnan Enterprises, Inc.; DOCKET NUMBER: 98-0404-PST-E; IDENTIFIER: Petroleum Storage Tank Facility Identification Number 54554; LOCATION: Galveston, Galveston County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.242(3)(J), by failing to repair or replace inoperative Stage I dry breaks; and 30 TAC §115.246(5), by failing to maintain a record of Stage II

testing conducted at the facility; PENALTY: $880; ENFORCEMENT COORDINATOR: Julia McMasters, (512) 239-5839; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(2) COMPANY: Appleby Water Supply Corporation; DOCKET NUMBER: 98-0428-PWS-E; IDENTIFIER: Public Water Supply Number 1740005; LOCATION: Nacogdoches, Nacogdoches County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.44(d) and §290.46(u), by failing to maintain a minimum pressure of 35 pounds per square inch (psi) at all points within the distribution network and by failing to maintain a minimum pressure of 20 psi under combined fire and drinking water flow conditions; PENALTY: $1,400; ENFORCEMENT COORDINATOR: Sandy Van Cleave, (512) 239-0667; REGIONAL OFFICE: 3870 Eastex Freeway, Suite 110, Beaumont, Texas 77703-1892, (409) 898-3838.

(3) COMPANY: Diamond Shamrock, Corp.; DOCKET NUMBER: 98-0246-EAQ-E; IDENTIFIER: Enforcement Identification Number 12309; LOCATION: Georgetown, Williamson County, Texas; TYPE OF FACILITY: convenience store; RULE VIOLATED: 30 TAC §313.4, by failing to implement maintenance and corrective action on a permanent storm water structure; and 30 TAC Chapter 335 and the THSC, §;341.041, 361.135, 361.136, 361.604, and 361.606, by failing to pay hazardous waste facility program fees, public health service fees, and voluntary cleanup program fees; PENALTY: $1,125; ENFORCEMENT COORDINATOR: Laurie Eaves, (512) 239-4495; REGIONAL OFFICE: 1921 Cedar Bend, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(4) COMPANY: Glasscock County Coop; DOCKET NUMBER: 98-0660-PWS-E; IDENTIFIER: Public Water Supply Number 0870003; LOCATION: Garden City, Glasscock County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.105, by exceeding the maximum contaminant level for total coliform; and 30 TAC §290.106(b)(5), by failing to collect and submit the appropriate number of repeat water samples for bacteriological analysis; PENALTY: $863; ENFORCEMENT COORDINATOR: Sandy Van Cleave, (512) 239-0667; REGIONAL OFFICE: 3300 North A Street, Building 4, Suite 107, Midland, Texas 79705-5404, (915) 570-1359.

(5) COMPANY: Luce Bayou Public Utility District; DOCKET NUMBER: 97-1176-MWD-E; IDENTIFIER: Permit Number 11167-001; LOCATION: Huffman, Harris County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: Permit Number 11167-001 and the Code, §26.121, by failing to comply with the ammonia nitrogen daily average concentration permit limit; and 30 TAC §305.503, by failing to pay outstanding waste treatment inspection fees; PENALTY: $600; ENFORCEMENT COORDINATOR: Pam Campbell, (512) 239-4493; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(6) COMPANY: North Texas Cement Company; DOCKET NUMBER: 98-0844-AIR-E; IDENTIFIER: Account Number ED-0034-O; LOCATION: Midlothian, Ellis County, Texas; TYPE OF FACILITY: portland cement manufacturing plant; RULE VIOLATED: 30 TAC §116.115(a) and the Act, §382.085(b), by failing to equip the cold solvent cleaner with a cover which is closed whenever parts are not being handled in the cleaner; PENALTY: $6,250; ENFORCEMENT COORDINATOR: Michael De La Cruz, (817) 469-6750; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499, (817) 469-6750.

(7) COMPANY: Chet Andrews dba Oak Hill Mobile Home Park; DOCKET NUMBER: 98-0262-MWD-E; IDENTIFIER: Enforcement Identification Number 12225; LOCATION: Weatherford, Parker County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.42, §285.3(d), and the Code, §26.121, by failing to obtain a TNRCC water quality permit and by allowing an unauthorized discharge of partially treated wastewater; and the THSC, §341.041, by failing to pay a public health service fee; PENALTY: $8,750; ENFORCEMENT COORDINATOR: Karen Berryman, (512) 239-2172; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499, (817) 469-6750.

(8) COMPANY: Buddy Burnett dba Ponderosa Mobile Home Complex; DOCKET NUMBER: 98-0492-PWS-E; IDENTIFIER: Public Water Supply Number 1910044; LOCATION: Amarillo, Randall County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.106(a)(1) and §341.033(d), by failing to submit monthly water samples for bacteriological analysis; 30 TAC §290.103(5), by failing to provide public notification for failure to collect bacteriological samples; and the THSC, §341.041, by failing to pay a public health service fee; PENALTY: $2,344; ENFORCEMENT COORDINATOR: Subhash Jain, (512) 239-5867; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(9) COMPANY: Mr. John Wallace and Mr. Dave Barter dba R & W Industries; DOCKET NUMBER: 98-0335-AIR-E; IDENTIFIER: Account Number BM-0239-U; LOCATION: Bryan, Brazos County, Texas; TYPE OF FACILITY: dry abrasive cleaning and surface coating plant; RULE VIOLATED: 30 TAC §116.110(a) and the THSC, §382.0518(a) and §382.085(b), by constructing and operating a dry abrasive cleaning and surface coating operation without first obtaining a permit or qualifying for a standard exemption; PENALTY: $1,440; ENFORCEMENT COORDINATOR: Suzanne Walrath, (512) 239-2134; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(10) COMPANY: Subsea Ventures, Incorporated; DOCKET NUMBER: 98-0315-AIR-E; IDENTIFIER: Account Number HG-9639-L; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: custom fabrication of underwater drilling equipment plant; RULE VIOLATED: 30 TAC §116.110(a) and the Act, §382.0518(a) and §382.085(b), by conducting a dry abrasive blasting operation without first obtaining a permit or satisfying the conditions of a permit exemption; and 30 TAC §111.147(1)(A) and the Act, §382.085(b), by allowing in-plant roads to be used without taking precautions to control dust emissions; PENALTY: $3,200; ENFORCEMENT COORDINATOR: Sheila Smith, (512) 239-1670; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(11) COMPANY: Supreme Beef Packers, Inc.; DOCKET NUMBER: 97-0939-MWD-E; IDENTIFIER: Enforcement Identification Number 11475; LOCATION: Ladonia, Fannin County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: The Code, §26.121, by failing to prevent unauthorized discharges from the animal and waste confinement areas; PENALTY: $11,760; ENFORCEMENT COORDINATOR: Brian Lehmkuhle, (512) 239-4482; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499, (817) 469-6750.

(12) COMPANY: Phillip Whitley; DOCKET NUMBER: 97-0693-OSI-E; IDENTIFIER: Enforcement Identification Number 11988; LOCATION: Conroe, Montgomery County, Texas; TYPE OF FACILITY: on-site sewage system; RULE VIOLATED: The THSC, §366.004 and §366.071, by installing an on-site sewage facility without having first secured a certificate of registration; PENALTY: $1,000; ENFORCEMENT COORDINATOR: Brian Lehmkuhle,

(512) 239-4482; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

TRD-9815232
Paul Sarahan
Director, Legal-Litigation Division
Texas Natural Resource Conservation Commission
Filed: September 29, 1998

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The Texas Natural Resource Conservation Commission (TNRCC or commission) Staff is providing an opportunity for written public comment on the listed Agreed Orders (AO)s pursuant to the Texas Water Code, §7.075. Section 7.705 requires that before the TNRCC may approve the AOs, the TNRCC shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the opportunity to comment must be published in the *Texas Register* not later than the 30th day before the date on which the public comment period closes, which in this case is **November 7, 1998**. Section 7.075 also requires that the TNRCC promptly consider any written comments received and that the TNRCC may withdraw or hold approval of an AOs if a comment discloses facts or considerations that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the TNRCC's Orders and permits issued pursuant to the TNRCC's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy each of the proposed AOs is available for public inspection at both the TNRCC's Central Office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable Regional Office listed as follows. Written comments about the AOs should be sent to the attorney designated for each AO at the TNRCC's Central Office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on November 7, 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 AOs and/or the comment procedure at the listed phone number; however, §7.075 provides that comments on the AOs should be submitted to the TNRCC in **writing**.

(1) COMPANY: City of Kilgore; DOCKET NUMBER: 97-0817-MWD-E; TNRCC ID NUMBER: 10201-001; LOCATION: Kilgore, Gregg County, Texas; TYPE OF FACILITY: wastewater treatment facility; RULES VIOLATED: Texas Water Code, §26.121(a) and TNRCC Permit Number 10201-001, by exceeding daily average Total Suspended Solids limit of 15 milligrams per liter; PENALTY: $3,520; STAFF ATTORNEY: Guy Henry, Litigation Division, MC 175, (512) 239-6259; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(2) COMPANY: Mark Kilgore; DOCKET NUMBER: 98-0284-PST-E; ENFORCEMENT ID NUMBER: 12307; LOCATION: Bonham, Fannin County, Texas; TYPE OF FACILITY: underground storage tank installation, removal, and repair service; RULES VIOLATED: 30 TAC §334.401(a) and §334.414(d) by failing to obtain a valid certificate of registration as a underground storage tank contractor and by failure to be or to have an on-site supervisor who is licensed by the commission, prior to engaging in the removal of the underground storage tank at the Facility; PENALTY: $2,500; STAFF ATTORNEY: Bill Jang, Litigation Division, MC 175, (512) 239-2269; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010, (817) 469-6750.

(3) COMPANY: McKinney Smelting, Incorporated; DOCKET NUMBER: 97-0364-IHW-E ACCOUNT NUMBER: F0074; LOCATION: McKinney, Collin County, Texas; TYPE OF FACILITY: scrap metal recycling facility; RULES VIOLATED: 30 TAC §335.4 and the Texas Water Code, §26.121 by discharging, handling, and disposing of industrial solid waste in such a manner as to cause the discharge or imminent threat of discharge of industrial solid waste into or adjacent to waters in the state without TNRCC authorization; PENALTY: $110,400; STAFF ATTORNEY: Cecily Small Gooch, Litigation Division, R-4, (817) 469-6750; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499, (817) 469-6750.

TRD-9815306
Paul C. Sarahan
Director, Litigation Division
Texas Natural Resource Conservation Commission
Filed: September 30, 1998

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Notice of Receipt of Application for a Texas Weather Modification License and Declaration of Administrative Completeness

The following applicant seeks to obtain a Texas weather-modification license for Fiscal Year 1999, under Texas Water Code Chapter 18 (Texas Weather Modification Act of 1967) and the Rules of the Texas Natural Resource Conservation Commission (TNRCC), 30 TAC Chapter 289.

Application No. E832846 submitted by SOUTH TEXAS WEATHER MODIFICATION ASSOCIATION, P. O. Box 155, Jourdanton, Texas 78026. The application was received on July 1, 1998. A summary of the information contained in the application includes the names of the meteorologists who are to be in control and in charge of weather-modification operations. The personnel listed on the license application includes Dr. William L. Woodley and Todd R. Flanagan.

Issuance of a license, or renewal of an existing license, merely certifies that the person(s) or organization holding the license is (are) competent to conduct weather modification activities, and is contingent upon the applicant paying the license fee and demonstrating competence in the field of meteorology which is reasonably necessary to engage in weather modification and control operations. A permit is required before the licensee can actually begin conducting weather modification and control activities.

The Commission's Weather Modification Advisory Committee, at its July 16, 1998 meeting in Austin, Texas, examined the license application and recommended that the license be issued by the Commission. A technical review by agency staff has been done, and the staff also recommends that the license be issued.

The Executive Director may approve this application unless a written hearing request is filed in the Chief Clerk's Office of the TNRCC within 10 days of this *Texas Register* posting.

Individual members of the public who wish to inquire about the information contained in this notice, or to inquire about other agency permit applications or permitting processes, should call the TNRCC Office of Public Assistance, Toll Free, at 1-800-687-4040.

TRD-9815318
Eugenia K. Brumm, Ph.D.
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: September 30, 1998

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Provisionally-Issued Temporary Permits to Appropriate State Water

Listed below are permits issued during the period of September 29, 1998.

Application No. TA-8017 by Driver Pipeline Company for diversion of 5 acre-feet in a 6 month period for industrial (hydrostatic testing) use. Water may be diverted from Oyster Creek, tributary of the Gulf of Mexico, at the Houston Pipeline Right-Of-Way on FARM-TO-MARKET ROAD 521, approximately 3 miles North of State Highway 35 and 2 miles South of FARM-TO-MARKET ROAD 523, Brazoria County, Texas.

Application No. TA-8019 by Exxon Corporation for diversion of 3 acre-feet in a 1-year period for mining (oil & gas well drilling) use. Water may be diverted from the Laguna Larga, Nueces-Rio Grande Coastal Basin, approximately 17 miles south of Corpus Christi, Nueces County, Texas near State Highway 286.

Application No. TA-8020 by Wicker Construction, Inc. for diversion of 10 acre-feet in a 1 year period for industrial (hydrostatic testing) use. Water may be diverted from Tiawichi Creek, tributary of Cherokee Bayou, tributary of the Sabine River, Sabine River Basin, approximately 9 miles north of Henderson, Rusk County, Texas at the crossing of FARM-TO-MARKET ROAD 2276 and Tiawichi Creek.

Application No. TA-8021 by A.K. Gillis & Sons, Inc. For diversion of 2 acre-feet in a 6 month period for industrial (roadway construction) use. Water may be diverted from the South Sulphur River, tributary of the Sulphur River, Sulphur River Basin, approximately 14 mile Northwest of Sulphur Springs, Hopkins County, Texas at the crossing of FARM-TO-MARKET ROAD 71 and the South Sulphur River.

Application No. TA-8022 by CCE, Inc. for diversion of 1 acre-foot in a 1-year period for industrial (roadway construction) use. Water may be diverted from the Sabine River, Sabine River Basin, approximately 7 miles northeast of Carthage, Panola County, Texas at the crossing of U.S. Highway 79 and the Sabine River.

The Executive Director of the TNRCC has reviewed each application for the permits listed and determined that sufficient water is available at the proposed point of diversion to satisfy the requirements of the application as well as all existing water rights. Any person or persons who own water rights or who are lawful users of water on a stream affected by the temporary permits listed above and who believe that the diversion of water under the temporary permit will impair their rights may file a complaint with the TNRCC. The complaint can be filed at any point after the application has been filed with the TNRCC and the time the permit expires. The Executive Director shall make an immediate investigation to determine whether there is a reasonable basis for such a complaint. If a preliminary investigation determines that diversion under the temporary permit will cause injury to the complainant the commission shall notify the holder that the permit shall be canceled without notice and hearing. No further diversions may be made pending a full hearing as provided in Section 295.174. Complaints should be addressed to Water Rights Permitting Section, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711, Telephone (512) 239-4433. Information concerning these applications may be obtained by contacting the Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711, Telephone (512) 239-3300.

TRD-9815316

Eugenia K. Brumm, Ph.D.

Chief Clerk

Texas Natural Resource Conservation Commission

Filed: September 30, 1998

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Public Hearing Notice (Rule Log Number-97146–297–WT)

Notice is hereby given that under the requirements of the Texas Government Code, Subchapter B, Chapter 2001, and the Texas Health and Safety Code, 382.017, the Texas Natural Resource Conservation Commission (TNRCC or commission) will conduct a public hearing to receive testimony concerning 30 TAC Chapters 50, 288, 293, 294, 295, and 297.

The proposed changes to Chapters 50, 288, 293, 294, 295, and 297 seek to clarify the meaning and use of provisions contained in these chapters as they are used in applicable commission actions relative to executive director authorization to issue emergency and temporary transfers and appropriations of water, water conservation plans, drought contingency plans, surface water rights, and groundwater management based on changes made to the Texas Water Code by SB 1 and criteria contained in the agency's Regulatory Guidance Document for water rights applications.

A public hearing on the proposal will be held October 29, 1998, at 10:00 a.m. in Room 201-S of TNRCC Building E, 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.

Written comments on the proposal should reference Rule Log No. 97146-297-WT and may be submitted to Lutrecia Oshoko, Texas Natural Resource Conservation Commission, Office of Policy and Regulatory Development, MC-205, P.O. Box 13087, Austin, Texas 78711-3087, (512)239-4640, or faxed to (512) 239-5687. Written comments must be received by 5:00 p.m. November 9, 1998. For further information or questions concerning this proposal, please contact John Warden, Water Quantity Division at (512) 239-6967.

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-9815299

Margaret Hoffman

Director, Environmental Law Division

Texas Natural Resource Conservation Commission

Filed: September 30, 1998

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North Texas Tollway Authority

Request for Qualifications-Systems Integration Consultant

The North Texas Tollway Authority (NTTA) is tendering a Request for Qualifications (RFQ) for a systems integrator to plan, design and implement improvements to the NTTA's existing and planned electronic toll collection systems.

The NTTA will act as it own prime contractor with a systems integrator to act as subcontractor/consultant to the NTTA. The selected systems integrator will be required to first develop a project plan for approval by the NTTA. The phase I project plan will

include: (1) the systems integrator's evaluation of the NTTA's performance and operational requirements, (2) reuse and modification of the NTTA's existing toll solution, (3) use of available, off-the-shelf, toll industry components and (4) identification of all areas of necessary custom development. The project plan must also include details of how the systems integrator will execute the integration, and implementation phases of the project and must include project and performance tracking methods, cost and schedule with specific milestones. The NTTA reserves the right to procure all system components directly from vendors. The systems integrator will not be eligible to bid on any potential RFP's that the system integrator develops.

If the NTTA approves the systems integrator's phase I project plan, the systems integrator may receive notice-to-proceed to execute the approved project plan in phases; phase II, systems integration and phase III, installation, testing and acceptance. Throughout the program, the systems integrator will conduct all planning, design, implementation and installation activities on NTTA property in NTTA provided workspace. In addition the systems integrator will use NTTA provided computers, software, and network for all aspects of plan development, design and implementation. At all times throughout the program the NTTA will retain full ownership of the project's work-in-progress.

The successful systems integrator will have experience in all areas of toll collection technology and associated operations, such as, toll software applications, computers, controllers and peripherals, telecommunications and fiber optics, toll collection devices, vehicle classification and video enforcement systems, traffic, reconciliation, and management reporting, and electronic toll account management and clearing house operations. In addition, an in-depth knowledge of current technology as it may be applied to electronic toll collection and traffic management (ETTM) systems is required.

The format of the response should include: (1) prospect's background, including a statement of ability to obtain bonding and insurance; (2) list of similar projects in past five years, including participation level; (3) key personnel to be assigned to this project; (4) description of how prospect perceives project may develop, (5) special skills prospect may bring to the process and (6) how project would be managed. Response should not exceed ten pages and should not include hardware or software specifications. No unsolicited material should be sent to NTTA; however, NTTA reserves the right to ask for clarification or further information if needed.

Evaluations will be based on the written proposals with particular weight being given to the description of how the prospect perceives the project may develop and how the project would be managed. NTTA may ask for a second phase evaluation through interviews with representatives of respondents.

Responses to this RFQ must be received by 4:00 p.m. October 26, 1998, at the North Texas Tollway Authority, P.O. Box 190369, 3015 Raleigh Street, Dallas, Texas, 75219.

TRD-9815242
Jerry Hiebert
Executive Director
North Texas Tollway Authority
Filed: September 29, 1998

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Texas Parks and Wildlife Department

Seagrass Conservation Plan for Texas

The Seagrass Conservation Plan for Texas (SCPT), sponsored and developed by Texas Parks and Wildlife (TPW), Texas Natural Resource Conservation Commission (TNRCC), and the Texas General Land Office (TGLO), is available for public review on the Internet at http://www.tpwd.state.tx.us under the CONSERVATION category. This resource planning document outlines a coordinated process to achieve seagrass conservation goals and objectives identified in planning meetings and presented at The Symposium on Texas Seagrasses held in 1996. The plan summarizes the status and trends of seagrasses in Texas, reviews factors that impact this coastal habitat, and develops recommendations on research, management or policy, and public education issues related to seagrass conservation. A printed draft copy can be obtained for the cost of reproduction and postage (approximately $9.00) by calling 512-912-7012. Comments or questions can be directed to Warren Pulich (512-912-7014) at TPW in Austin or Tom Calnan (512-463-5100) at TGLO in Austin.

TRD-9815117
Bill Harvey, Ph.D.
Regulatory Coordinator
Texas Parks and Wildlife Department
Filed: September 25, 1998

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Public Utility Commission of Texas

Notice of Application for Amendment to Service Provider Certificate of Operating Authority

On September 21, 1998, Texas HomeTel, 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 60145. Applicant intends to expand its geographic area to include the entire state of Texas.

The Application: Application of Texas HomeTel, Inc., for an Amendment to its Service Provider Certificate of Operating Authority, Docket Number 19878.

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 October 14, 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 19878.

TRD-9815282
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: September 29, 1998

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Notice of Application for Approval of Joint Stipulation and Agreement Regarding a Proposed Decrease in Wholesale Rates and Other Revisions

Notice is given to the public of the filing with the Public Utility Commission of Texas on September 18, 1998, of an application for approval of a joint stipulation and agreement regarding a proposed decrease in wholesale rates, removal from rates of an equity enhancement rider, minor changes to rate design, and a refund of overcollected revenues. A summary of the application follows.

Docket Title and Number: Application of Tex-La Electric Cooperative of Texas, Inc., for Approval of Joint Stipulation and Agreement, Docket No. 19875, before the Public Utility Commission of Texas.

Applicant seeks commission approval of a proposal to (1) lower the wholesale power cost to its member distribution cooperatives by targeting a Debt Service Coverage (DSC) of 1.10x or higher, resulting in a DSC of between 1.14x and 1.25x in the subsequent five years; (2) remove the equity enhancement rider from member rates; and (3) change its rate design to create a two- part demand rate. Applicant estimates that the proposed revisions will result in an overall decrease in its members' rates of $4.6 million or approximately 9.3 percent on a 1997 test year basis. Applicant additionally seeks approval to refund overcollected revenues to its members not later than December 31, 1998.

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 November 2, 1998. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-9815283
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: September 29, 1998

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Notice of Application for Sale, Transfer, or Merger

Notice is given to the public of the filing with the Public Utility Commission of Texas an application for sale, transfer, or merger on September 9, 1998, pursuant to the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.101 (Vernon 1998).

Docket Style and Number: Application for Sale, Transfer, or Merger of West Texas Utilities Company. Docket Control Number 19836.

The Application: West Texas Utilities seeks approval of the acquisition of the Hearne Southwest Substation from the City of Hearne, in accordance with Public Utility Regulatory Act §14.101. West Texas Utilities asserts that approval of this application will not result in a rate increase for its customers.

Persons who wish to intervene in the proceeding or comment upon the action sought should contact, not later than October 30, 1998, the Public Utility Commission of Texas, PO Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Consumer Protection at (512) 936- 7120. Hearing- and speech-impaired individuals with text telephones (TTY) may contact the Commission at (512) 936-7136.

TRD-9815063
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: September 24, 1998

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Notices of Applications 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 September 18, 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 Digital Teleport, Inc., for a Service Provider Certificate of Operating Authority, Docket Number 19872 before the Public Utility Commission of Texas.

Applicant intends to provide basic local switched services, interexchange switched services, interLATA, and interstate private line services, as well as a full range of telecommunications services for business and residential subscribers within its serving areas.

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 October 14, 1998. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-9815281
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: September 29, 1998

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Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on September 23, 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 DPI-Teleconnect, Inc., for a Service Provider Certificate of Operating Authority, Docket Number 19887 before the Public Utility Commission of Texas.

Applicant intends to provide, on a resell basis, monthly recurring, flat-rate basic local exchange and local exchange service including extended area service, custom calling services and any other services that are available on a resell 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 October 14, 1998. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-9815280
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: September 29, 1998

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Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on September 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 Telstar Telecom Company, L.L.C., for a Service Provider Certificate of Operating Authority, Docket Number 19896 before the Public Utility Commission of Texas.

Applicant intends to provide prepaid local exchange service, call waiting, call forwarding, Caller ID, and non-published telephone number service.

Applicant's requested SPCOA geographic area includes the geographic areas currently served by Southwestern Bell Telephone Company and GTE Southwest, Inc., within 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 October 14, 1998. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-9815278
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: September 29, 1998

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Notice of Application Pursuant to P.U.C. Substantive Rule §23.94

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) an application on July 21, 1998, pursuant to P.U.C. Substantive Rule §23.94 for approval of a rate change.

Tariff Title and Number: Application of West Plains Telecommunications, Inc. for Approval of a Rate Change Pursuant to P.U.C. Substantive Rule §23.94. Tariff Control Number 19635.

The Application: West Plains Telecommunications, Inc. (West Plains) seeks approval to implement a minor rate change to its Residence Monthly Local Exchange Access Line Rates and Business Monthly Local Exchange Access Line Rates. The estimated annual revenue impact to West Plains is an increase of $95,841.36 for the first year or 3.7% of the total regulated intrastate gross annual revenues.

Subscribers of West Plains have a right to petition the commission for review of this proposed increase by filing a protest with the commission. The protest must be signed by a minimum of 5%, or 210 affected local service customers, and must be received by the commission no later than October 19, 1998.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, by mail at P.O. Box 13326, Austin, Texas, 78711-3326, or call the Public Utility Commission Office of Customer Protection at (512) 936-7120 on or before October 19, 1998. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-9815279
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: September 29, 1998

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Notices 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 an application pursuant to P.U.C. Substantive Rule §23.27 for a new PLEXAR-Custom service for 3M in Austin, Texas.

Tariff Title and Number: Southwestern Bell Telephone Company (SWBT) Notice of Intent to File a New PLEXAR-Custom Service for 3M in Austin, Texas, Pursuant to P.U.C. Substantive Rule §23.27. Tariff Control Number 19893.

The Application: Southwestern Bell Telephone Company is requesting approval for a new PLEXAR-Custom service for 3M in Austin, Texas. PLEXAR-Custom service is a central office- based PBX-type serving arrangement designed to meet the specific needs of customers who have communication system requirements of 75 or more station lines. The designated exchange for this service is the Austin exchange, and the geographic market for this specific PLEXAR-Custom service is the Austin LATA.

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-9815287
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: September 29, 1998

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Notice is given to the public of the intent to file with the Public Utility Commission of Texas an application pursuant to P.U.C. Substantive Rule §23.27 for a new PLEXAR-Custom service for Taylor County in Abilene, Texas.

Tariff Title and Number: Southwestern Bell Telephone Company's (SWBT) Notice of Intent to File a New PLEXAR-Custom Service for Taylor County in Abilene, Texas, Pursuant to P.U.C. Substantive Rule §23.27. Tariff Control Number 19912.

The Application: Southwestern Bell Telephone Company is requesting approval for a new PLEXAR-Custom service for Taylor County in Abilene, Texas. PLEXAR-Custom service is a central office-based PBX-type serving arrangement designed to meet the specific needs of customers who have communication system requirements of 75 or more station lines. The designated exchange for this service is the Abilene exchange, and the geographic market for this specific PLEXAR-Custom service is the Abilene LATA.

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-9815319
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: September 30, 1998

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Public Notices of Interconnection Agreement

On September 1, 1998, Trans National Telecommunications, Inc. and GTE Southwest, Inc., 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 19816. 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 standards 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 19816. 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 October 19, 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 19816.

TRD-9815310
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: September 30, 1998

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On September 23, 1998, Southwestern Bell Telephone Company and KMC Telecom II, Inc., collectively referred to as applicants, filed a joint application for approval of 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 19888. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing 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 19888. 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 October 26, 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 19888.

TRD-9815277
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: September 29, 1998

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San Antonio-Bexar County Metropolitan Planning Organization

Requests for Proposals

The San Antonio-Bexar County Metropolitan Planning Organization (MPO) is seeking proposals from qualified firms to conduct a School Zone Flashing Beacon Effectiveness Study in the Antonio metropolitan area. The purpose of the study is to determine the effectiveness of the school zone flashing beacons through data collection on vehicle operating speeds.

A copy of the Request for Proposals (RFP) may be requested by calling Ricardo Gomez, Transportation Planner, at (210) 227-8651. Anyone wishing to submit a proposal must do so by 12:00 p.m. CST, October 30, 1998, at the MPO office:

South Texas Building

603 Navarro, Suite 904

San Antonio, Texas 78205

The contract award will be made by the MPO's Transportation Steering Committee based on the recommendation of the study's consultant selection committee. The School Zone Flashing Beacon Effectiveness Study Selection Committee will review the proposals based on the evaluation criteria listed in the RFP.

Funding for this study, in the amount of $40,000, is contingent upon the availability of Federal transportation planning funds.

TRD-9815300
Charlotte A. Roszelle
Grants Coordinator
San Antonio-Bexar County Metropolitan Planning Organization
Filed: September 30, 1998

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The San Antonio-Bexar County Metropolitan Planning Organization (MPO) is seeking proposals from qualified firms to conduct a Transportation and Land Use Project for the San Antonio metropolitan area. The purpose of the study is to develop an integrated transportation and land use manual, specific to the MPO Study area, for use by the local agencies, that will provide guidance in the design of specific transportation facilities as well as site, subdivision and neighborhood plans, in order to encourage efficient land use and discourage continued urban sprawl.

A copy of the Request for Proposals (RFP) may be requested by calling Jeanne Geiger, Senior Transportation Planner, at (210) 227-8651. Anyone wishing to submit a proposal must do so by 12:00 p.m. CST, October 30, 1998, at the MPO office:

South Texas Building

603 Navarro, Suite 904

San Antonio, Texas 78205

The contract award will be made by the MPO's Transportation Steering Committee based on the recommendation of the study's consultant selection committee. The Transportation and Land Use Project Selection Committee will review the proposals based on the evaluation criteria listed in the RFP.

Funding for this study, in the amount of $166,425, is contingent upon the availability of Federal transportation planning funds.

TRD-9815301
Charlotte A. Roszelle
Grants Coordinator
San Antonio-Bexar County Metropolitan Planning Organization
Filed: September 30, 1998

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Texas Turnpike Authority Division of the Texas Department of Transportation

Notices of Intent

Pursuant to Title 43, Texas Administrative Code, §§52.1 - 52.8, concerning Environmental Review and Public Involvement, the Texas Turnpike Authority Division (TTA) of the Texas Department of Transportation is issuing this notice to advise the public that an Environmental Impact Statement (EIS) will be prepared for a proposed new location highway/tollway project in Travis and Caldwell Counties, Texas.

The TTA, in cooperation with the Federal Highway Administration (FHWA) will prepare an EIS on a proposal to construct the central segment, Segment B, of State Highway 130. State Highway 130 - Segment B is proposed to extend from US 290 east of Austin in Travis County to the intersection of Farm-to-Market Road 1185 at US 183 north of Lockhart in Caldwell County.

As currently envisioned, in its entirety State Highway 130 will extend from IH 35 at State Highway 195 north of Georgetown in Williamson County, Texas, to IH 10 near Seguin in Guadalupe County, Texas. State Highway 130 will be located generally parallel to and east of Interstate Highway 35 and the urban areas of Austin, San Marcos, and New Braunfels. The total length of the proposed facility is approximately 143.5 kilometers (89 miles). The proposed State Highway 130 facility is being developed in three segments with each segment having logical termini and independent utility. FHWA and TTA will prepare an environmental impact statement for each of the three independent segments.

The length of Segment B, which is the subject of this Notice of Intent (NOI), varies depending on the selected alternative, from approximately 44.7 kilometers (27.8 miles) to 48.8 kilometers (30.3 miles). The proposed action is intended to relieve congestion on Interstate 35 by providing an alternative route for those who commute between Austin and surrounding areas as well as drivers desiring to bypass the central business area of Austin and other cities along the heavily traveled Interstate 35 corridor. The proposed action will also provide improved access and increased mobility to urbanized areas in the proposed corridor; help support planned business and residential growth in various areas throughout the project corridor; and provide needed freeway access from surrounding areas to the proposed Austin Bergstrom International Airport.

As currently envisioned the proposed Segment B facility will be a controlled access toll road; thus, in conjunction with the EIS 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 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 stated purpose and need for the proposed project. Any impacts owing to the toll road designation will be discussed in the environmental impact statement.

The draft EIS for Segment B will address a build alternative including multiple alternative alignments. Alternatives to the proposed action, which will also be discussed in the EIS, will include (1) taking no action, or the "no build" alternative, and (2) improving existing roadways in the project area. The build alternatives include multiple alternative alignments along new location and along existing highway rights-of-way within the Segment B project limits.

Impacts caused by the construction and operation of Segment B of State Highway 130 will vary according to the alternative alignment utilized. Generally, impacts would include the following: transportation impacts (construction detours, construction traffic, and mobility improvement); air and noise impacts from construction and operation of the roadway; water quality impacts from construction activities and roadway stormwater runoff; impacts to waters of the United States, including wetlands, from right-of-way encroachment; conversation of dedicated parkland; and impacts to residences and businesses.

Letters describing the proposed action and soliciting comments have been sent to appropriate Federal, State, and local agencies, and to private organizations and citizens who have previously expressed interest in the proposal. Public meetings for the Segment B project were held on April 15, 1996, at Del Valle High School in Del Valle, Texas; on April 16, 1996, at Barbara Jordan Elementary School in Austin, Texas; on June 11, 1996, at Plum Creek Elementary School in Lockhart, Texas; and on June 26, 1997, at Barbara Jordan Elementary School in Austin, Texas. At these meetings, public comments on the proposed action and alternatives were requested.

In continuation of the scoping process for Segment B of State Highway 130, an additional public meeting will be held on November 5, 1998. The public meeting will be held at Barbara Jordan Elementary School, 6711 Johnny Morris Road, Austin, Texas. From 6:00 to 7:00 p.m., displays showing the preliminary alternative corridors will be available for review. During this period, staff of the TTA will be available to answer questions. Beginning at 7:00 p.m. a formal presentation of the project will be made and will be followed by a public comment period. All interested persons are encouraged to attend the public meeting.

A public hearing will be held for the Segment B project subsequent to 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 proposed Segment B of State Highway 130 are addressed and all significant issues identified, comments and suggestions are invited from all parties.

Agency Contact: Comments or questions concerning this proposed action and the EIS should be directed to Stacey Benningfield, Environmental Manager, Texas Turnpike Authority Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701, (512) 936-0983.

TRD-9815302

James W. Griffin, P.E.

Interim Director

Texas Turnpike Authority Division of the Texas Department of Transportation

Filed: September 30, 1998

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Pursuant to Title 43, Texas Administrative Code, §§52.1 - 52.8, concerning Environmental Review and Public Involvement, the Texas Turnpike Authority Division (TTA) of the Texas Department of Transportation is issuing this notice to advise the public that an Environmental Impact Statement (EIS) and Major Investment Study (MIS) will be prepared for a proposed new location highway/tollway project in Willliamson and Travis Counties, Texas.

The TTA, in cooperation with the Federal Highway Administration (FHWA), will prepare a joint EIS/MIS for a proposed project to relieve traffic congestion in northern Travis and southern Williamson Counties, Texas.

The proposed action is to extend Loop 1 north from its current terminus at Farm-to-Market Road 734 (Parmer Lane). The proposed Loop 1 north extension would generally follow Farm-to-Market Road 1325 or one of three corridors on undeveloped land to the west of existing Farm-to-Market Road 1325. Ultimately, all alternatives intersect with the proposed State Highway 45.

The length of the proposed Loop 1 extension varies depending on the selected alternative, from approximately 4.5 kilometers (2.7 miles) to 8.9 kilometers (5.5 miles).

Improvements to be considered in this project include constructing a roadway on new or existing locations and/or improving alternative transportation modes in the community. Ongoing regional high-occupancy vehicle (HOV) studies as well as the combination of a fixed guideway facility (light rail) and/or commuter rail facility will be considered for integration with the proposed Loop 1 project. Ultimate facility design is anticipated to be a four to six lane roadway. Frontage roads, overpasses and direct connection ramps will be constructed at varying locations, depending on the final alignment and design.

The MIS portion of the study will analyze the various mobility alternatives in the Loop 1 corridor as described previously. Information on the costs, benefits and impacts of the alternatives will lead to decisions by FHWA, TTA, the Texas Department of Transportation and the Austin Transportation Study (the metropolitan planning organization for the Austin-area) on the design concept and scope of the investment. Major considerations in the EIS will include an analysis of the costs of the right-of-way, the numbers and types of relocations necessary, engineering constraints and limitations due to topography, and potential environmental impacts involving land use, socioeconomic conditions, water resources, air quality, noise, traffic, ecological/cultural resources and hazardous material sites. At the present stage of the planning process, no preferred alternative has been selected. In-depth studies will be conducted before and after a preferred alternative is chosen to avoid and/or minimize impacts to human, cultural and ecological resources. These studies will be coordinated through appropriate local, state and federal agencies.

As currently envisioned the proposed Loop 1 extension will be a controlled access toll road; thus, in conjunction with the EIS 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 and financing it, in whole or 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 stated purpose and need for the proposed

project. Any impacts owing to the toll road designation will be discussed in the environmental impact statement.

The draft EIS for the Loop 1 north extension will address a build alternative including multiple alternative alignments. Alternatives to the proposed action, which will also be discussed in the EIS, will include (1) taking no action, or the "no build" alternative, and (2) improving existing roadways in the project area.

Impacts caused by the construction and operation of the proposed Loop 1 extension will vary according to the alternative alignment utilized. Generally, impacts would include the following: transportation impacts (construction detours, construction traffic, and mobility improvement); air and noise impacts from construction and operation of the roadway; water quality impacts from construction activities and roadway stormwater runoff; impacts to waters of the United States, including wetlands, from right-of-way encroachment; and impacts to residences and businesses.

Letters describing the proposed action and soliciting comments have been sent to appropriate Federal, State, and local agencies, and to private organizations and citizens who have previously expressed interest in the proposal. A public meeting for the Loop 1 extension project was held on December 2, 1997, at Summitt Elementary School in Austin, Texas. At the meeting, public comments on the proposed action and alternatives were requested.

In continuation of the scoping process for the proposed Loop 1 extension, an additional public meeting has been scheduled. The purpose of the meeting is to receive comments on the proposed project. The meeting will be held on Tuesday, October 27, 1998, at Summitt Elementary School, 12207 Brigadoon Lane, Austin, Texas. From 6:00 to 7:00 p.m., displays showing the preliminary alternative corridors will be available for review. During this period, staff of the TTA will be available to answer questions. A formal presentation of the project will be made at 7:00 p.m. and will be followed by a public comment period. All interested persons are encouraged to attend the public meeting.

A public hearing will be held for the Loop 1 north extension project subsequent to 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 the proposed Loop 1 project are addressed and all significant issues identified, comments and suggestions are invited from all parties.

Agency Contact: Comments or questions concerning this proposed action and the EIS/MIS should be directed to Stacey Benningfield, Environmental Manager, Texas Turnpike Authority Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701, (512) 936-0983.

TRD-9815303

James W. Griffin, P.E.

Interim Director

Texas Turnpike Authority Division of the Texas Department of Transportation

Filed: September 30, 1998

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Public Notice (RFQ Bond Counsel)

The following request for qualifications for providing professional bond counseling services is filed under the provisions of the Texas Government Code, Chapter 2254.

The Texas Turnpike Authority (the "TTA"), a Division of the Texas Department of Transportation, an agency of the State of Texas, is soliciting statements of interest and qualifications from professional legal services firms having bond counseling expertise to provide bond counseling services for the TTA. Firms responding must demonstrate a history of providing expert bond counseling services and advice to governmental agencies who issue revenue and general obligation bonds. Such bond counseling services can occur over the next ten years, subject to appropriations by the Texas Legislature.

Proposed fees or budgets shall not be submitted with any initial response or other communication of a firm. A bond counsel qualification packet will be available October 1, 1998, and will be issued to each firm filing a written notice that it desires to respond. Final firm responses must be received in the offices of the TTA before 4:45 p.m. CDST October 30, 1998 to be eligible for consideration.

When a firm responds by filing its qualifications, it shall include a summary of the affirmative action program of the firm. It is the policy of the TTA to encourage the participation of Historically Underutilized Businesses ("HUBs"), minorities, and women in all facets of it activities. To this end, the extent to which HUBs, minorities, and women participate in the ownership, management and professional work force of a firm will be considered by the TTA in the selection of a firm to serve as bond counsel. Respondents shall submit a current profile of their firm with their responses to this RFQ.

Each firm will be evaluated on its experience in providing bond counseling services of the type routinely required by the TTA and other state's turnpike agencies, the expertise of personnel who will be assigned to TTA, the respondents' office locations(s), size of the respondents' firms, and the reputation of the respondent in the financial/underwriting/ investment banking/legal professions.

Qualifications filed will be reviewed by board/staff selection committee(s) to identify those most qualified and experienced respondents who may best serve the TTA on specific assignments. The final selection of bond counsel, if any, will be made following completion of the review of responses and negotiation of a satisfactory fee.

Questions concerning this assignment shall be directed to James W. Griffin, Interim Division Director, Texas Turnpike Authority, (512) 936-0903.

TRD-9815067

James W. Griffin

Interim Director

Texas Turnpike Authority Division of the Texas Department of Transportation

Filed: September 24, 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:

City of Corsicana, 200 North 12th Street, Corsicana, Texas, 75110, received July 2, 1998, application for financial assistance in the amount of $10,865,000 from the Drinking Water State Revolving Fund.

Brookeland Fresh Water Supply District, P.O. Box 95, Brookeland, Texas, 75931, received June 1, 1998, application for financial

assistance in the amount of $1,945,000 from the Texas Water Development Fund II.

Kirkmont Municipal Utility District, 10102 Blackhawk Blvd., Houston, Texas, 77089, received September 1, 1998, application for financial assistance in the amount of $575,000 from the Texas Water Development Fund or Texas Water Development Fund II.

Jasper County Water Control & Improvement District No. 1, P.O. Box 1207, Buna, Texas, 77612, received August 31, 1998, application for financial assistance in the amount of $825,000 from the Texas Water Development Fund II.

Moore Water Supply Corporation, P.O. Box 126, Moore, Texas, 78057, received August 3, 1998, application for grant/loan assistance in the amount of $1,660,000 from the Economically Distressed Areas Program.

Possum Kingdom Water Supply Corporation, HC 74, Box 535, Graham, Texas, 76450, received March 26, 1998, application for financial assistance in the amount of $ 4,700,000 from the Drinking Water State Revolving Fund.

City of Eagle Pass, P.O. Box 4019, Eagle Pass, Texas, 78853-4019, received September 29, 1998, application for additional grant assistance in the amount of $18,000 from the Research and Planning Fund.

Panhandle Regional Planning Commission, P.O. Box 9257, Amarillo, Texas, 79105, received August 1, 1998, application for grant assistance in the amount of $20,000 from the Research and Planning Fund.

Red River Authority of Texas, 900 8th Street, Suite 520, Wichita Falls, Texas, 76301, received Just 31, 1998, application for grant assistance in the amount of $20,000 from the Research and Planning Fund.

North Texas Municipal Water District, P.O. Box 2408, Wylie, Texas, 75098-2408, received July 29, 1998, application for grant assistance in the amount of $20,000 from the Research and Planning Fund.

Northeast Texas Municipal Water District, Highway 250 South, P.O. Box 955, Hughes Springs, Texas, received August 1, 1998, application for grant assistance in the amount of $20,000 from the Research and Planning Fund.

Rio Grande Council of Governments, 1100 North Stanton, Suite 610, El Paso, Texas, 79902, received August 24, 1998, application for grant assistance in the amount of $20,000 from the Research and Planning Fund.

Colorado River Municipal Water District, P.O. Box 869, Big Spring, Texas, 79721-0869, received August 1, 1998, application for grant assistance in the amount of $19,600 from the Research and Planning Fund.

Brazos River Authority, P. O. Box 7555, Waco, Texas, 76714-7555, received July 31, 1998, application for grant assistance in the amount of $20,000 from the Research and Planning Fund.

San Jacinto River Authority, P.O. Box 329, Conroe, Texas, 77305-0329, received July 31, 1998, application for grant assistance in the amount of $20,000 from the Research and Planning Fund.

Deep East Texas Council of Governments, 274 East Lamar Street, Jasper, Texas, 75951, received August 1, 1998, application for grant assistance in the amount of $20,000 from the Research and Planning Fund.

Upper Guadalupe River Authority, 125 Lehmann Drive, Suite 100, Kerrville, Texas, 78028, received August 1, 1998, application for grant assistance in the amount of $20,000 from the Research and Planning Fund.

Lower Colorado River Authority, P.O. Box 220, Austin, Texas, 78767, received August 1, 1998, application for grant assistance in the amount of $20,000 from the Research and Planning Fund.

San Antonio River Authority, 100 East Guenther Street, P.O. Box 830027, San Antonio, Texas, 78283, received August 1, 1998, application for grant assistance in the amount of $20,000 from the Research and Planning Fund.

Lower Rio Grande Valley Development Council, 311 North 15th Street, McAllen, Texas, 78504, received July 31, 1998, application for grant assistance in the amount of $20,000 from the Research and Planning Fund.

Nueces River Authority, 6300 Ocean Drive, NRC 3100, Corpus Christi, Texas, 78412, received August 1, 1998, application for grant assistance in the amount of $17,000 from the Research and Planning Fund.

High Plains Underground Water Conservation District No. 1, 2930 Avenue Q, Lubbock, Texas, 79405, received August 1, 1998, application for grant assistance in the amount of $20,000 from the Research and Planning Fund.

Lavaca-Navidad River Authority, P. O. Box 429, Edna, Texas, 77957, received May 22 1998, application for grant assistance in the amount of $20,000 from the Research and Planning Fund.

Additional information concerning this matter may be obtained from Craig D. Pedersen, Executive Administrator, P.O. Box 13231, Austin, Texas, 78711.

TRD-9815327
Gail L. Allan
Director of Project-Related Legal Services
Texas Water Development Board
Filed: September 30, 1998

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Texas Youth Commission

Notice of Consultant Contract Award for the Project TEAMS Program

Under the provisions of the Texas Government Code, Chapter 2254, the Texas Youth Commission (TYC) publishes this notice of a contract award for outside human resource consultant services for the Project TEAMS program.

The consultant will assist the agency in the integration of resocialization and education programs; evaluate and support the portfolio implementation system; design and conduct train-the-trainer sessions; conduct presentations at TYC conferences and administrative meetings; develop print ready documents (Teacher/Student Guides for Project TEAMS); evaluate TEAMS implementation process; and provide summative reports based upon onsite consultations.

The request for consultant proposal was published in the August 7, 1998, *Texas Register* (23 TexReg 8305).

The consultant proposal contract was awarded to Pat Jacoby of Authentic Learning, 307 Stirrup Drive, Dripping Springs, Texas 78620, 512/264-3050.

The total value of the contract is $21,000. The contract period begins on September 24, 1998, and will continue until June 10, 1999.

For additional information, contact Ms. Billie Flippen, Director of Curriculum and Instruction, at Texas Youth Commission, P.O. Box 4260, Austin, Texas 78765 or 512/424-6163.

TRD-9815036

Steve Robinson
Executive Director
Texas Youth Commission
Filed: September 24, 1998

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